PART VI
NATURAL JUSTICE

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NATURAL JUSTICE AND LEGAL JUSTICE

Procedural justice

By developing the principles of natural justice the courts have devised a kind of code of fair administrative procedure. Just as they can control the substance of what public authorities do by means of the rules relating to reasonableness, improper purposes, and so forth, so through the principles of natural justice they can control the procedure by which they do it. It may seem less obvious that they are entitled to take this further step, thereby imposing a particular procedural technique on government departments and statutory authorities generally. Yet in doing so they have provided doctrines which are an essential part of any system of administrative justice. Natural justice plays much the same part in British law as does 'due process of law' in the Constitution of the United States. In particular, it has a very wide general application in the numerous areas of discretionary administrative power. For however wide the powers of the state and however extensive the discretion they confer, it is always possible to require them to be exercised in a manner that is procedurally fair.

Procedure is not a matter of secondary importance. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable. The legislation which controls the use of land, for example, contains a large element of expropriation without compensation, which is for the most part accepted without public complaint. But if there is the least suggestion that a planning appeal has been handled unfairly, public complaint is loud and widespread. A judge of the United States Supreme Court has said: 'Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied'.[1] One of his colleagues said: 'The history of liberty has largely been the history of the observance of procedural safeguards.'[2] The work of British judges in devising procedural safeguards is the theme of this Part of the book, as also of the following Part on remedies. Article 6(1) of the European Convention on Human Rights,[3] which has legal effect under the Human Rights Act 1998, now supplements the common law of procedural justice in many administrative cases, even though the article was

[1] *Shaughnessy* v. *United States*, 345 US 206 (1953) (Jackson J).

[2] *McNabb* v. *United States*, 318 US 332 (1943) (Frankfurter J).

[3] When applicable, this article provides for 'a fair and public hearing ... by an independent and impartial tribunal established by law'. The full text is given above, p. 188.

originally, it seems, limited to the judicial determination of private law matters.[4] However, the judges have developed, and continue to develop, techniques that ensure that the Convention is flexibly applied in a way that is sensitive to the administrative context.[5]

Lawyers are a procedurally minded race, and it is natural that administrators should be tempted to regard procedural restrictions, invented by lawyers, as an obstacle to efficiency. It is true that the rules of natural justice restrict the freedom of administrative action and that their observance costs a certain amount of time and money. But time and money are likely to be well spent if they reduce friction in the machinery of government; and it is because they are essentially rules for upholding fairness and so reducing grievances that the rules of natural justice can be said to promote efficiency rather than impede it. Provided that the courts do not let them run riot, and keep them in touch with the standards which good administration demands in any case, they should be regarded as a protection not only to citizens but also to officials. Moreover, a decision which is made without bias, and with proper consideration of the views of those affected by it, will not only be more acceptable; it will also be of better quality. Justice and efficiency go hand in hand, so long at least as the law does not impose excessive refinements.

Administrative justice and natural justice

In its broadest sense natural justice may mean simply 'the natural sense of what is right and wrong'[6] and even in its technical sense it is now often equated with 'fairness'.[7] It has been said that 'that romantic word "natural"' adds nothing 'except perhaps a hint of nostalgia';[8] and that 'justice is far from being a "natural" concept—the closer one goes to a state of nature, the less justice does one find'.[9]

But in administrative law natural justice is a well-defined concept which comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause; and that a man's defence must always be fairly heard.[10] In courts of law and in statutory tribunals it can be taken for granted that these rules must be observed. But so universal are they, so 'natural', that they are not confined to judicial power. They apply equally to administrative power, and sometimes also to powers created by contract. It is in their application to ordinary administrative

[4] See below, p. 445. It also applies to 'the determination . . . of any criminal charge'.
[5] Discussed in detail, ibid.
[6] *Voinet* v. *Barrett* (1885) 55 LJQB 39 at 41 (Lord Esher MR). Lord Mansfield spoke of 'natural justice and equity' in *Moses* v. *Macferlan* (1760) 2 Burr. 1005 at 1012.
[7] Below, p. 389.
[8] *Norwest Holst Ltd.* v. *Secretary of State for Trade* [1978] Ch. 221 at 226 (Ormrod LJ).
[9] *McInnes* v. *Onslow-Fane* [1978] 1 WLR 1520 at 1530 (Megarry V-C).
[10] See Marshall, *Natural Justice*; Jackson, *Natural Justice* (2nd edn.); Flick, *Natural Justice* (2nd edn.). The two rules do not seem to have been bracketed together before the decision of the House of Lords in *Spackman* v. *Plumstead District Board of Works* (below).

power that public authorities are prone to overlook them, for example where a police authority is dismissing a chief constable or a minister is confirming a housing scheme. Natural justice is one of the most active departments of administrative law.

There are both broad and narrow aspects to consider. The narrow aspect is that the rules of natural justice are merely a branch of the principle of ultra vires, and should really find their home in the preceding chapter. Violation of natural justice is then to be classified as one of the varieties of wrong procedure, or abuse of power, which transgress the implied conditions which Parliament is presumed to have intended. Just as a power to act 'as he thinks fit' does not allow a public authority to act unreasonably or in bad faith, so it does not allow disregard of the elementary doctrines of fair procedure. As Lord Selborne once said:[11]

> There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

Quoting these words, the Privy Council has said that 'it has long been settled law' that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority.[12] Likewise Lord Russell has said:[13]

> it is to be implied, unless the contrary appears, that Parliament does not authorise by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures, compliance with those principles.

Thus violation of natural justice makes the decision void, as in any other case of ultra vires. This effect is discussed more fully below.[14] For the moment it is enough to note that the rules of natural justice thus operate as implied mandatory requirements, non-observance of which invalidates the exercise of the power.

In its wider aspect the subject contains the very kernel of the problem of administrative justice: how far ought both judicial and administrative power to rest on common principles? How far is it right for the courts of law to try to impart their own standards of justice to the administration? When special powers to take action or to decide disputes are vested in administrative bodies with the very object of avoiding the forms of legal process, is there yet a residuum of legal procedure which ought never to be shaken off? The judges have long been conscious of this problem, and it has prompted them to some of their more notable achievements. Rules of common law, which became in effect presumptions to be used in the interpretation of statutes, developed and refined the rules of natural justice over a

[11] *Spackman* v. *Plumstead District Board of Works* (1885) 10 App. Cas. 229 at 240.

[12] *A.-G.* v. *Ryan* [1980] AC 718. Even the order of a superior court may be set aside for violation of natural justice: *Isaacs* v. *Robertson* [1985] AC 97, for which see above, p. 306.

[13] *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 WLR 1255 at 1263. And see *Ridge* v. *Baldwin* [1964] AC 40 at 80 ('a decision given without regard to the principles of natural justice is void' (Lord Reid)).

[14] Below, pp. 494, 474.

period of centuries. Since the decisions to which the rules apply are very various, they have to be flexibly applied and their precise content depends on the circumstances. But their general applicability to governmental action is today beyond doubt.

Post-war vicissitudes

After the Second World War natural justice suffered a setback, and the whole subject threatened to become unsettled, in a manner which is all too characteristic of case-law. This was closely connected with a parallel confusion over the remedy of certiorari.

A turning-point came in 1963 with the decision of the House of Lords in *Ridge* v. *Baldwin*.[15] This marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis. A spate of litigation followed in its wake, and many new questions were elucidated. The process is likely to continue, as the courts build up their code of administrative procedure and explore the implications of what they call 'fair play in action'.[16] In particular, the right to a fair hearing is capable of elaboration in many details. The citizen's right to have his case properly heard, before he suffers in some way under the official rod, can cover a whole series of procedural steps, from the initial objection to the final decision.

The litigation since 1963 has helped to make public authorities aware of the law's requirements, thereby improving administrative standards. In the courts the rules have been clarified and their enforcement has become more consistent. The legal conception of procedural justice, has now a secure bridgehead in the territory of administration. Judges are no longer deterred by the disparaging remarks of some of their predecessors, such as 'the expression (natural justice) is sadly lacking in precision'[17] and 'that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation'.[18] Such comments are out of line with the current of authority which has flowed for several hundred years. In *Ridge* v. *Baldwin* Lord Reid made an apt reply:[19]

> In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition

[15] [1964] AC 40.

[16] See below, p. 492.

[17] *R.* v. *Local Government Board ex p. Arlidge* [1914] 1 KB 160 at 199 (Hamilton LJ). And see *Maclean* v. *Workers' Union* [1929] 1 Ch. 602 at 604 (Maugham J).

[18] *Local Government Board* v. *Arlidge* [1915] AC 120 at 138 (Lord Shaw), followed by derogatory comments on natural justice.

[19] [1964] AC 40 at 64.

. . . and natural justice as it has been interpreted in the courts is much more definite than that.

Another indication that natural justice is a sufficiently precise concept is that the expression has been used without further definition in Acts of Parliament.[20]

Natural justice in the common law

The rules requiring impartial adjudicators and fair hearings can be traced back to medieval precedents, and, indeed, they were not unknown in the ancient world. In their medieval guise they were regarded as part of the immutable order of things, so that in theory even the power of the legislature could not alter them. This theory lingered into the seventeenth and faintly even into the eighteenth century. It reached its high-water mark in *Dr Bonham's* case (1610), where Chief Justice Coke went so far as to say that the court could declare an Act of Parliament void if it made a man judge in his own cause, or was otherwise 'against common right and reason'.[21] This was one of his grounds for disallowing the claim of the College of Physicians to fine and imprison Dr Bonham, a doctor of physics of Cambridge University, for practising in the City of London without the licence of the College of Physicians. The statute under which the College acted provided that fines should go half to the king and half to the College, so that the College had a financial interest in its own judgment and was judge in its own cause.

No modern judge could repeat this exploit, for to hold an Act of Parliament void is to blaspheme against the doctrine of parliamentary sovereignty.[22] As we shall see, there are plenty of cases under modern statutes where authorities are in a sense (sometimes even a financial sense) judges in their own affairs. Coke's opinion was by no means clear law even in his own time although it was approved by at least one contemporary Chief Justice.[23] Natural justice, natural law, the law of God and 'common right and reason' were all aspects of the old concept of fundamental and unalterable law. They no longer represent any kind of limit to the power of statute.[24] Natural justice has had to look for a new foothold, and has found it as a mode not of destroying enacted law but of fulfilling it. Its basis now is in the rules of interpretation. The courts presume that Parliament, when it grants powers, intends

[20] Foreign Compensation Act 1969, s. 3(10), noted below, p. 721; Trade Union and Labour Relations Act 1974, s. 6(13), since repealed.

[21] 8 Co. Rep. 113b at 118a.

[22] See the discussion of sovereignty, above, p. 26.

[23] Hobart CJ in *Day* v. *Savadge* (1614) Hobart 85, who said '. . . even an Act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself, for jura naturae sunt immutabilia and they are leges legum'. And see *City of London* v. *Wood* [1701] 12 Mod. 669 (Holt CJ approving Coke's opinion).

[24] In 1871 Willes J described the above-quoted remark of Hobart CJ as 'a warning rather than an authority to be followed': *Lee* v. *Bude & Torrington Junction Rly* (1871) LR 6 CP 576 at 582.

them to be exercised in a right and proper way. 'Where wide powers of decision-making are conferred by statute', Lord Browne-Wilkinson has observed, 'it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice'.[25] Since Parliament seldom makes provision to the contrary,[26] this allows considerable scope for the courts to devise a set of canons of fair administrative procedure, suitable to the needs of the time and the context in which the issue arises.

The courts also apply similar doctrines in the private sphere, in the interpretation of contracts. Members of trade unions or clubs, for example, cannot normally be expelled without being given a hearing, for their contracts of membership are held to include a duty to act fairly: by accepting them as members and receiving their subscriptions the trade union or club impliedly undertakes to treat them fairly and in accordance with the rules.[27] The same may apply to members of universities, including students. Such cases, strictly speaking, fall outside administrative law, since they are not concerned with governmental authorities, and the question at issue is not one of ultra vires but one of breach of contract. Nevertheless the principles of fair procedure may be similar to those applied in administrative law and the decisions may be helpful by analogy.

The courts are not always willing to be confined by rigid categories, and in some cases they have held that there is a duty of procedural fairness even where there is neither statute not contract upon which to base it. The Court of Appeal has held that the Panel on Take-overs and Mergers, part of the Stock Exchange's system of self-regulation which has no statutory or contractual basis, is subject to judicial review, and must observe the principles of natural justice, because it operates in the public sphere and exercises immense power de facto.[28] This and other such cases are discussed later.[29] The High Court of Australia has held that the owner of a racecourse who admits the public has a 'moral duty' not to eject any individual arbitrarily and without hearing him fairly, and that if he does so his act is 'ultra vires and void'.[30] The courts have in the past asserted common law powers to

[25] *R.* v. *Home Secretary ex p. Pierson* [1998] AC 539 at 550. See also Lord Steyn at 505 and Lord Mustill in *R.* v. *Home Secretary ex p. Doody* [1994] AC 531 at 560 (Parliament presumed to intend power to be exercised in a manner that is fair in all the circumstances).

[26] Except in special cases, e.g. *Cheetham* v. *Manchester Cpn.* [1875] LR 10 CP 249 (demolition of dangerous buildings); *R.* v. *Herrod ex p. Leeds City District Council* [1976] QB 540 (refusal of gaming permits); *R.* v. *Dudley JJ ex p. Payne* [1979] 1 WLR 891 (offender sentenced without notice of the date of hearing). And see the Anti-Terrorism, Crime and Security Act 2001 permitting indefinite detention of foreigners reasonably suspected of terrorism, but without full procedural protection.

[27] See below, p. 478.

[28] *R.* v. *Panel on Take-overs and Mergers ex p. Datafin Plc* [1987] QB 815 (not a natural justice case).

[29] See below, p. 631.

[30] *Forbes* v. *New South Wales Trotting Club* (1979) 25 ALR 1. Contrast *Heatley* v. *Tasmanian Racing and Gaming Commission* (1977) 14 ALR 519 at 538, holding that an owner's rights of property may be exercised without regard to natural justice.

regulate some kinds of monopolies; and these decisions are perhaps to be seen as analogous to those powers.[31]

Where an administrative act or decision is vitiated by a breach of natural justice, the court may award any appropriate remedies. The remedy will frequently be certiorari to quash, on the footing that the vitiated decision is void and a nullity.[32] For this same reason a declaratory judgment is equally effective, as in *Ridge* v. *Baldwin*.[33] Occasionally, where injury is done, there will be grounds for an action for damages.[34]

Traditionally natural justice has been confined to the two rules now to be discussed: that a man may not be judge in his own cause; and that a man's defence must always be fairly heard. It has not, as yet, included a general requirement that reasons should be given for decisions. On the other hand there are isolated judicial statements that natural justice requires decisions to be based on some evidence of probative value.[35] The courts are now so conscious of natural justice that they may well extend its scope in both these directions.

The European Convention and natural justice in administrative proceedings

The European Convention does not refer specifically to administrative proceedings. Article 6(1),[36] however, provides for 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. But it only applies to the 'determination' of an individual's 'civil rights and obligations or of any criminal charge against him' and the jurisprudence of the Court of Human Rights shows that there is no 'determination' of an individual's 'civil rights and obligations'[37]—which was originally intended to mean broadly *private law*

[31] See below, p. 646.
[32] See below, p. 606.
[33] [1964] AC 40.
[34] See below, p. 773.
[35] As to reasons see below, p. 522; as to 'no evidence' see above p. 276.
[36] For the full text, see above p. 188. For discussion see [2003] *PL* 753 (P. P. Craig).
[37] The Court, in accordance with its usual approach, gives both 'civil rights and obligations' and 'criminal charge' 'an autonomous Convention meaning' independent of the national legal system involved. It has been held by the Court that Art. 6(1) 'does not in itself guarantee any particular content for rights and obligations' (*James* v. *UK* (1986) 8 EHRR 81, para. 81). The suggestion in *Osman* v. *UK* (2000) 29 EHRR 245; [1999] 1 FLR 193 (wide immunity accorded to police for negligence in investigation and suppression of crime, held a breach of Art. 6(1)) that there is a substantive facet to Art. 6(1) has not since found favour: *Barrett* v. *Enfield LBC* [1999] 3 WLR 79 at 85 (Lord Brown-Wilkinson) and *DP and JC* v. *United Kingdom* (2003) 36 EHRR 14 (Art. 6(1) only applicable to disputes over rights arguably 'recognised under domestic law' (para. 123)). This was confirmed in *Mathews* v. *Ministry of Defence* [2003] UKHL 4; [2003] 1 AC 1163, so a substantive bar to a serviceman recovering damages from the MOD, in the particular circumstances, did not engage Art. 6(1). The Article only protected the right of access to the courts where the right in question was at least arguably recognised in domestic law and the restriction on access was procedural.

rights[38]—in many administrative proceedings. Moreover, disciplinary proceedings where the liberty of the accused is not at risk do not involve a 'criminal charge'[39] and if they do not deprive the accused of the liberty to practise a profession they do not, it seems, determine his rights.[40] A fixed penalty scheme to penalise carriers who bring clandestine entrants into the UK has been held to be criminal, since the objective of the scheme was to deter dishonesty and carelessness.[41] That Article 6(1) is primarily applicable to judicial proceedings may further be seen by the requirement that 'Judgment shall be pronounced publicly'.

Thus Article 6(1) does not impose a general duty upon administrative bodies to provide a fair and impartial hearing to those affected by their decisions. The circumstances of each case must be investigated to see whether Article 6(1) is engaged. The following are all matters to which Article 6(1) has been held by the Court or the Commission to be inapplicable on the ground that there is no determination of the applicant's civil rights and obligations: immigration and deportation,[42] entitlement to tax benefits,[43] the payment of discretionary grants,[44] public employment,[45] the procedures adopted by official investigations (such as a

[38] *Lecompte, Van Leuvèn and De Meyere* v. *Belgium* (1981) 4 EHRR 533 (and many other decisions). The Court and Commission have not defined with clarity the boundary between public and private law but have proceeded inductively on a case by case basis. See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (London, 1995), 175–7 for discussion. See the discussion in *Runa Begum* v. *Tower Hamlets LBC* [2003] 2 AC 430 (HL), esp paras. 30–44 (Lord Hoffmann) and paras. 84–94 (Lord Millett) noting 'the unsettled state of the jurisprudence of the Strasbourg court'.

[39] Thus a disciplinary matter affecting liberty may concern a 'criminal charge' even though it is considered administrative in the relevant legal system: *Engel* v. *Netherlands* A 22 (1976); *X* v. *UK* (military discipline) and *Campbell and Fell* v. *UK* A 80 (1984) (prison discipline). Furthermore tax penalties are 'criminal' (*Bendenoun* v. *France* A 284 (1994); cf. *Schouten and Meldrum* v. *Netherlands* A304 (1994). Article 6(1) is applicable to road traffic offences even where the national law does not consider them criminal: *Ozturk* v. *FRG* A 73 (1984).

[40] *App. No. 8247/78* v. *Belgium* 20 D & R 40; *App. No. 1189/85* v. *Belgium* (1989) 11 EHRR 76.

[41] *International Transport Roth GmbH* v. *Home Secretary* [2002] 3 WLR 344 (CA) (per Simon Brown LJ and Jonathan Parker LJ; contra Laws LJ). Once recognised as criminal the further protections (including the presumption of innocence) contained in Art. 6(2) & (3) are engaged.

[42] *X, Y, Z, V and W* v. *UK* No. 3325/67, 10 YB 528 (1967) (entry); *Agee* v. *UK* No. 7729/76, 7 DR 164 (deportation).

[43] *App. No. 8903/80* v. *Austria* (1981) 21 D & R 246. But proceedings for the recovery of overpaid tax are within Art. 6(1): *National and Provincial Building Society* v. *UK* (1997) 25 EHRR 127 (including judicial review of regulations designed to prevent such recovery). And see *Editions Periscope* v. *France* (1992) 14 EHRR 597.

[44] *App. No. 6776/74* v. *Switzerland* (1976) 2 D & R 123 and *B* v. *Netherlands* No. 11098/84, 43 DR 198 (1985) (criminal injuries compensation). Contra *Rolf Gustafson* v. *Sweden* (1997) 25 EHRR 623.

[45] *App. No. 8496/79* v. *United Kingdom* (1981) 21 D & R 168; *Maillard* v. *France* (1999) 27 EHRR 232. Private employment (*Konig* v. *Germany* (1978) 2 EHRR 170; *Lecompte, Van Leuven and De Meyere* v. *Belgium* (1981) 4 EHRR 533) and some exceptional cases of public employment (*Preikhas* v. *Germany* App. 6504/74 (1978) 12 D & R 5) are included.

DTI inquiry)[46] and the revocation of a licence by the Parole Board.[47] This is not a complete list.[48]

On the other hand, there are cases where administrative proceedings are considered to be 'decisive' of civil rights even where that is not their purpose. For instance, where a contract for the sale of land was conditional upon the grant of permission by an administrative tribunal to use the land for non-agricultural purposes, Article 6(1) was held to apply to the proceedings of that tribunal.[49] For similar reasons Article 6(1) generally applies to matters directly regulating property rights and commercial activity through the grant of licences (or similar devices).[50] Most claims for welfare benefits fall within Article 6(1).[51] The fair administration of justice, as protected by Article 6(1), is considered of such importance that the Court has said that it is not to be restrictively interpreted;[52] and extension of the reach of Article 6(1) may be expected.

Article 6(1) is thus potentially relevant in many cases and a close analysis of the relevant domestic law in the light of the decisions of the Court will often be required. Where Article 6(1) is engaged domestic courts and tribunals will take into account the authoritative interpretations laid down by the Court.[53] There have been influential warnings against 'undermining the imperative of legal certainty

[46] *Fayed* v. *UK* A 294 (1994); (1994) 18 EHRR 393 (investigation did not determine rights).

[47] *R. (Smith)* v. *Parole Board (No. 2)* [2003] EWCA Civ. 1269; [2004] 1 WLR 421.

[48] See the full accounts in [1984] *PL* 89 (Boyle); (1998) 1 European Public Law 347 (Bradley); Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (London, 1995), 164–241; Janis, Kay and Bradley, *European Human Rights Law: Text and Materials* 2nd edn. (Oxford, 2000), 402–54 and Grosz, Beatson and Duffy, *Human Rights—the 1998 Act and the European Convention* (2000), 227–29.

[49] *Ringeisen* v. *Austria* A 13 (1971). The administrative decision must be directly decisive; a remote connection is insufficient: *Lecompte, Van Leuven and De Meyere* case (above). Planning appeals do engage Art. 6(1) since they affect the value (and enjoyment) of land (*Ortenburg* v. *Austria* (1995) 19 EHRR 524 (appeal against grant of planning permission)).

[50] *Hakansson and Sturesson* v. *Sweden* A 171 (1990); *Bentham* v. *Netherlands* (1986) 8 EHRR 1: *Tre Traktorer Aktiebolag* v. *Sweden* (1989) 13 EHRR 309.

[51] *Feldbrugge* v. *Netherlands* (1986) 8 EHRR 425 (sickness benefit claim associated with private contract of employment and contributory) made plain that Art. 6(1) was applicable to claims for benefits analogous to insurance claims. *Salesi* v. *Italy* (1993) 26 EHRR 1122 (claim for wholly state-funded non-contributory disability pension) upheld the applicability of the Article, even where there was no private law analogy, to individual, economic claims to rights flowing from specific statutory rules. See to like effect *Mennitto* v. *Italy* (2000) 34 EHRR 1122. In *Runa Begum* v. *Tower Hamlets LBC* [2003] UKHL 5; [2003] 430 (HL) (noted (2003) 62 CLJ 244 (Forsyth)) this was extended to benefits in kind which required the exercise of discretion by the administrative authority after the specific statutory criteria for the benefit had been fulfilled. (The benefit in kind was accommodation due to the homeless Runa Begum by the local council under Part VII of the Housing Act 1996.) Although not part of the *ratio decidendi* this was the view favoured by Lord Hoffmann (para. 55) adopting the approach of Hale LJ in *Adam* v. *Newham LBC* [2001] EWCA Cir. 1916; [2002] 1 WLR 2120. Purely discretionary grants may yet escape Art. 6(1).

[52] *Delcourt* v. *Belgium* (1973) 1 EHRR 355. And in *Runa Begum* (above) Lord Millet said it was 'desirable' that the protection of Art. 6(1) was extended to claims for welfare benefits.

[53] Human Rights Act 1998, s. 2(1).

by excessive debates over how many angels can dance on the head of the Article 6 pin'.[54] But some uncertainty is inherent in the extension of Article 6(1) to administrative proceedings.

The curative effect of access to a court of 'full jurisdiction'

Even where Article 6(1) does apply, the European Court has not insisted that the public authority or other primary decision-maker should comply with every aspect of it. What the Court does insist upon is that the applicant should be able to bring the dispute before a court of 'full jurisdiction'. If this is possible, the procedure as a whole is compliant and the defect at first instance is cured. Thus the crisp question often arises whether the application for judicial review (or other judicial remedy) is sufficient to remedy any falling short of the standards of Article 6(1) by the original decision-maker.[55] The jurisprudence of the Court is not entirely consistent.[56] The tendency however appears to be to accept that judicial review does provide sufficient access to a court of full jurisdiction, provided that the procedure as a whole complies with Article 6(1).[57]

The House of Lords, in particular, has stressed that the curative principle is to be flexibly applied in a way that is sensitive to the context in which it arises. 'Full jurisdiction' Lord Hoffmann has said means 'full jurisdiction to deal with the case as the nature of the decision requires'.[58] Moreover, Lord Bingham has pointed to the relationship between the reach of the Article 6(1) and the intensity of the judicial scrutiny required to cure non-compliance at first instance: '. . . the narrower the interpretation given to "civil rights", the greater the need to insist upon review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation given to "civil rights", the more flexible must be the approach to the requirement of independent and impartial review if the emasculation (by over judicialisation) of administrative welfare schemes is to be avoided.'[59] Thus the more administrative and less judicial the decision-making process set up by Parliament may be the less intensive will be the judicial scrutiny of the decision to

[54] *R. (Beeson's Personal Representatives)* v. *Secretary of State for Health* [2002] EWCA 1812, para. 15 (Laws LJ), approved by Lord Hoffmann (*Runa Begum*, above, para. 58).

[55] See [2003] *JR* 90 (R. Clayton and V. Sachdeva). Similar issues may arise in considering whether a right of appeal to a court of law from a tribunal decision suffices for compliance with Article 6(1). See below, p. 449.

[56] Grosz, Beatson and Duffy (as above), 125–6, demonstrate a tension between the views of the Commission and the Court on this issue. The Court's more generous view of judicial review will, however, doubtless be determinative in the future.

[57] *JED* v. *UK* (unrep., 2 February 1999). For cases not requiring reconsideration of the merits see *Kaplan* v. *UK* (1994) 76A DR 90; *ISKON* v. *UK* (1994) 76A DR 90.

[58] *R. (Alconbury Developments Ltd)* v. *Secretary of State for the Environment* [2001] UKHL 23; [2001] 2 WLR 1389, para. 87 approved by Lord Bingham in *Runa Begum* (as above), para. 5.

[59] *Runa Begum* (as above), para. 5.

secure compliance. The fact that 'the legality of virtually all government decisions' may be subjected to judicial scrutiny allows English law to 'view with equanimity the extension of the scope of Article 6'. This allows the courts to have proper regard 'to democratic accountability, efficient administration and the sovereignty of Parliament' in setting the measure of procedural justice in any particular case.[60]

As foreshadowed above, however, the common law imposes a far-reaching and sophisticated duty of procedural fairness upon those who decide administrative matters. Although there are bound to be some difficult cases,[61] the incorporation of the Convention should not entail many fundamental changes of practice. None the less, the uncertainty in Convention law discussed above ensures that, even if the decision is eventually reached that either Article 6(1) is inapplicable or that there has been compliance with it, there is ample scope for administrative action to be challenged on the ground of non-compliance. Since the Bills of Rights of some other countries specifically provide that the individual has the right to procedural justice in administrative proceedings[62] the uncertain reach of Article 6(1) may be considered a flaw in the Convention.[63]

[60] The quotations come from Lord Hoffmann's speech in *Runa Begum* (para. 35).

[61] Primarily over the requirement of a determination 'by an independent and impartial tribunal'.

[62] For instance, Art. 33 of the Constitution of South Africa 1996: 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

[63] No agreement was reached in the late 1980s on a text of a Protocol to the Convention dealing with administrative proceedings. See Grosz, Beatson and Duffy (as above), 120.

13

THE RULE AGAINST BIAS

JUDICIAL AND ADMINISTRATIVE IMPARTIALITY

'No man a judge in his own cause'

Nemo judex in re sua. A judge is disqualified from determining any case in which he may be, or may fairly be suspected to be, biased.[1] So important is this rule that Coke supposed, as we have seen, that it should prevail even over an Act of Parliament; and he reported a case where the Court of Chancery resolved that the equity judge in Chester was incompetent to judge a case in which he himself was a party.[2] But the classic example of an offence against this rule in the regular courts of law is that of Lord Chancellor Cottenham in 1852, who in a Chancery suit had affirmed a number of decrees made by the Vice-Chancellor in favour of a canal company in which Lord Cottenham was a shareholder to the extent of several thousand pounds. Lord Cottenham's decrees were set aside by the House of Lords on account of his pecuniary interest;[3] but the House then itself dealt with the appeal on its merits, and affirmed the decrees of the Vice-Chancellor.[4] It was not shown that Lord Cottenham's decision was in any way affected by his interests as a shareholder; in fact it was clearly not affected at all, for Lord Campbell said:[5]

> No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim, that no man is to be a judge in his own cause, should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest . . . And it will have a most salutary influence on [inferior] tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in

[1] See generally [2000] *PL* 45 (D. G. T. Williams).

[2] *Egerton* v. *Lord Derby* (1613) 12 Co. Rep. 114. In *Bridgman* v. *Holt* (1693) Shower PC 111, a King's Bench case involving the rights of Holt CJKB, he sat with his counsel and not as judge: see at 111. See also [1974] *CLJ* 80 (D. E. C. Yale). See *R.* v. *Bow Street Magistrate ex p. Pinochet Ugarte* (No. 2) [2000] 1 AC 119 (HL), discussed below, p. 456, for a modern example.

[3] *Dimes* v. *Grand Junction Canal* (1852) 3 HLC 759. Non-pecuniary interest is sufficient where the judge is one of the parties.

[4] See 3 HLC 794.

[5] 3 HLC at 793.

their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.

A modern case, where the offending interest was of a non-pecuniary kind, has become equally well known, since it is the source of the quotation, overworked but nonetheless true, that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[6] A solicitor was acting for a client who was suing a motorist for damage caused in a road accident. The solicitor was also acting clerk to the justices before whom the same motorist was convicted of dangerous driving and he retired with them when they were considering their decision. The fact that the clerk's firm was acting against the interests of the convicted motorist in other proceedings was held to invalidate the conviction, even though it was proved that the justices had not in fact consulted the clerk and that he had scrupulously refrained from saying anything prejudicial.[7] Lord Hewart CJ expressed the essence of the rule:

> The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

Similarly where a prosecution for selling vegetables under weight to a local authority school was heard before a magistrate who was a member of the authority's education committee, the conviction was quashed.[8]

A line must nevertheless be drawn between genuine and fanciful cases. A justice of the peace is not disqualified, merely because he subscribes to a society for preventing cruelty to animals, from hearing a prosecution instituted by the society.[9] Where a county council had prosecuted a trader under the Food and Drugs Act, it was held no objection that the justices' clerk was a member of the council, upon proof that he was not a member of the council's Health Committee, which had in fact directed the prosecution.[10] The Court of Appeal protested against the tendency to impeach judicial decisions 'upon the flimsiest pretexts of bias', and against 'the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done'. Similarly, a deputy High

[6] *Ex p. McCarthy*, below at 259. To like effect see Atkin LJ in *Shrager* v. *Basil Dighton Ltd.* [1924] 1 KB 274 at 284. Lord Bingham MR's remark that: '[This] famous aphorism . . . is no longer, it seems, good law . . .': (*R.* v. *Inner West London Coroner ex p. Dallaglio* [1994] 4 All ER 139 at 162) is mistaken. See the discussion below, pp. 455, 465.

[7] *R.* v. *Sussex Justices ex p. McCarthy* [1924] 1 KB 256.

[8] *R.* v. *Altrincham Justices ex p. Pennington* [1975] QB 549.

[9] *R.* v. *Deal Justices* (1881) 45 LT 439. Cf. *R.* v. *Burton ex p. Young* [1897] 2 QB 468 and contrast *R.* v. *Huggins* [1895] 1 QB 563.

[10] *R.* v. *Camborne Justices ex p. Pearce* [1955] 1 QB 41. Cf. *R.* v. *Minister of Agriculture and Fisheries ex p. Graham* [1955] 2 QB 140.

Court judge was not disqualified because the solicitors' firm of which he was a partner was, without his knowledge, involved in related litigation.[11] Neither was a judge disqualified in a case where one party's solicitors where already acting for the judge in relation to his will.[12] And a judge who was the director of a property company, which was the landlord of one of the parties, was not disqualified.[13] The judge did not know of this link but even if he had known there could in the circumstances 'not be a real danger of bias. The interest was so minimal, that no reasonable and fair-minded person sitting in court would have considered there was a real as opposed to a fanciful danger of a fair trial not being possible.'[14] On the other hand, where the judge had expressed himself vigorously but properly in law journal articles on the legal issues that subsequently arose before him he had crossed 'the ill defined line' and the Court of Appeal concluded that there was a real danger that 'a lay observer with knowledge of the facts' would not have excluded the possibility of unconscious bias.[15] Judicial criticism of the law must in the future be expressed in measured and restrained language.

In this case the Court of Appeal, speaking with the special authority of the Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor together, laid down that, while everything will depend upon the facts and the nature of the issue to be decided, objections could not be based on religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, ordinarily, would the judge's educational, social, employment or service background, nor his political associations, professional associations (e.g. membership of an Inn of Court), membership of social, sporting or charitable bodies (including Masonic associations), prior judicial decisions or views expressed in textbooks, lectures or articles, nor the fact that he had in the past received instructions from a party (or the parties' legal representatives) be relevant. But a history of personal friendship or animosity between the judge and a member of the public associated with the case (e.g. as party or witness) may disqualify the judge.[16]

[11] *Locabail (UK) Ltd.* v. *Bayfield Properties Ltd* [2000] 2 WLR 870 (CA).

[12] *Taylor* v. *Lawrence (Appeal: Jurisdiction to reopen)* [2002] EWCA Civ. 90; [2003] QB 528 (no 'significant injustice' justifying reopening of appeal).

[13] *R.* v. *Bristol Betting and Gaming Licensing Committee ex p. O'Callaghan* (heard with the *Locabail* case). See similarly *R.* v. *Mulvihill* [1990] 1 WLR 438 (bank robber's appeal on the ground that judge held shares in the bank robbed failed since no one could reasonably suspect unfairness).

[14] At 906.

[15] *Timmins* v. *Gormely* (heard with the *Locabail* case). The phrase 'ill defined line' comes from *Vakauta* v. *Kelly* (1989) 167 CLR 568 at 571. Similarly, a senior Scottish judge who had published a newspaper article which painted a vivid but negative picture of the Convention's impact on the law, created a 'legitimate apprehension' in defendants that he would not act impartially in the protection of their Convention rights, and his decision was set aside (*Hockstra* v. *Lord Advocate* [2001] 1 AC 216 (PC)).

[16] *Locabail (UK) Ltd* v. *Bayfield Properties Ltd* above. The principles laid down in this case are limited to judicial decision-makers (para. 3).

Bias and Article 6(1)

When Article 6(1) of the European Convention on Human Rights applies[17] it entitles those affected to the determination of their 'civil rights and obligations' or of any 'criminal charge' against them 'by an independent and impartial tribunal established by law'. As explained above,[18] many administrative proceedings will be found to determine 'civil rights and obligations' and so the protection of the common law will be overlaid with that of the Convention. In the Human Rights Court's jurisprudence, the concept of impartiality is tested both subjectively—was there in fact bias?[19]—and objectively—were there guarantees in place to exclude any legitimate doubt as to the impartiality of the tribunal?[20] There is a clear relationship between the objective test of bias and the home-grown principle that justice must be seen to be done. Indeed, the importance of the appearance of impartiality has often been stressed by the court which has stated that what 'is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused'.[21] The common law and the European Convention both view impartiality as fundamental characteristics of fair procedure and in principle there should be little conflict between them. And, the House of Lords has made 'a modest adjustment' to the common law to ensure that there is congruence between the two systems of protection.[22]

In one important respect, however, the Convention appears in conflict with the common law on bias. Many administrative decision-makers—for instance, ministers, civil servants and local government employees—do not have the judicial independence or impartiality required for compliance with Article 6(1). They lack security of tenure, they are often open to influences from their employer and, as administrative decision-makers, will often be influenced by policy in a way that is inappropriate for judicial officials. Compliance with Convention standards of independence and impartiality appears to require far-reaching and inconvenient reforms in administrative decision-making.

As explained above,[23] however, the European Court has not insisted that administrative decision-makers should comply with every aspect of Article 6(1). Non-compliance can be cured by access to a court of 'full jurisdiction'. This has provided the means, particularly in regard to independence and impartiality,

[17] See above p. 445 for an account of when it applies. Most of the bias cases concern criminal trials (which fall directly within Art. 6(1)) thus the Convention is frequently referred to in that area.

[18] Above, p. 445.

[19] This is, of course, only established very rarely.

[20] *Piersack* v. *Belgium* A53 (1982) and *Hauschildt* v. *Denmark* A 154 (1989).

[21] *Fey* v. *Austria* A 255-A para. 30 (1993).

[22] Below, pp. 466–7.

[23] Below, p. 448.

whereby the application of Article 6(1) is reconciled, without grave disruption, to existing administrative practice and law. Thus the decision of an insufficiently independent local housing officer that a homeless person's refusal of certain accommodation was unreasonable was upheld by the House of Lords.[24] The lack of independence was cured by a right of appeal to a fully independent court 'on any point of law'. This was so notwithstanding that there might be factual disputes that did not fall within the scope of the right of appeal.[25] Similarly, the decision of an insufficiently independent minister determining a planning appeal was upheld by the House of Lords even though the appeal to a fully independent court 'on any point of law' could not address the policy questions that lay at the heart of the decision.[26] There are several other decisions to the same effect.[27] If the procedure overall is considered fair by the reviewing court it may be expected that compliance will be found. By this roundabout route the European Court has resolved the problems which it might have done more directly by distinguishing between the

[24] *Runa Begum* (as above). The right of appeal under section 204 the Housing Act 1996 was 'on any point of law arising from the decision' of the housing officer. In *Nipa Begum* v. *Tower Hamlets LBC* [2000]1 WLR 306 (CA) 'point of law' was held to include the full range of issues that could be raised in judicial review. Cf. *R. (Bewry)* v. *Norwich City Council* [2001] EWHC Admin. 657; [2002] HRLR 2 (insufficient independence of housing benefit review board not cured by judicial review).

[25] The factual findings were 'only staging posts on the way to the broader judgment which the authority has to make' (Lord Bingham, para. 9(2)). Furthermore, there were safeguards, laid down in statutory instruments, to ensure the fairness of the decision-making process (see para. 9(3)). And a finding of fact supported by no evidence would amount to an error of law. Furthermore, an appeal to the High Court on 'a point of law' from the decision of an inspector in a planning matter has been held to comply notwithstanding the limited jurisdiction of the High Court to review questions of fact in such cases or to question the merits of the original decision: *Bryan* v. *UK* (1996) 21 EHHR 342 (but the inspector's finding and inferences were not challenged). See below, pp. 989–90 for description of the inspector's role. Contrast the pre *Runa Begum* cases of *R. (Friends Provident Life Office)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin. 820; [2002]1 WLR 1450 (where there is a dispute of fact in a dispute over planning permission public inquiry by independent inspector may be required for compliance with Art. 6(1); but 'no absolute rule of law' to this effect) and *R. (Kathro)* v. *Rhondda Cynon Taff County BC* [2001] EWHC Admin. 527; [2002] Env LR 15 (where there is a dispute of fact, judicial review may not cure lack of impartiality and independence of planning authority (considering application for planning permission on land which it owns)). The recognition that material errors of fact are errors of law (which was not considered in these cases) may strengthen the curative effective of judicial review where there is a dispute of fact. See above, p. 278.

[26] *Alconbury* (as above). The absence of judicial review of the planning merits of the decision was inherent in the administrative rather than the judicial process set up by Parliament. See below, p. 371.

[27] *R. (Adlard)* v. *Secretary of State for the Environment* [2002] EWCA Civ. 735; [2002] 1 WLR 2515 (CA) (refusal of oral hearing to objectors to planning application subject to judicial review and thus no breach of Article 6(1)); *Preiss* v. *General Dental Council* [2001] The Times, 14 August (the disciplinary arrangements of the General Dental Council where insufficiently independent but once coupled with the right of appeal to the Privy Council were found compliant); and *Porter* v. *Magill* [2001] UKHL 67, [2002] 2 WLR 37 (any breach of Art. 6(1) in role of district auditor as investigator, prosecutor and judge in deciding to surcharge local councillors remedied by right of appeal to court).

procedural part of the quasi-judicial decision, which is inherently susceptible to judicial review and the 'policy part' which subject to unreasonableness, etc is not.

The European Court of Human Rights has signalled that where the procedure overall remains unfair, there will be no curative effect.[28] This will be of particular significance in cases of necessity.[29]

English law has not come up to Convention standards of impartiality and independence in other cases, but this has generally been because statutory provisions have been found wanting.[30] In Scotland it has been held that temporary Sheriffs, appointed with no security of tenure and subject to annual renewal by the Lord Advocate,[31] were not 'independent' as required by Article 6(1).[32]

Administrative decisions

Most decided cases on bias concern decisions of courts of law. The question now is how far the same rules can be applied to administrative decisions.

It was natural for the rule against bias to be applied generally to the functions of justices of the peace, whether judicial or administrative, and in this way the rule was readily adapted to administrative action. Thus in the eighteenth and nineteenth centuries, during the time when local government was mostly in the hands of the justices, many of their decisions were invalidated for bias in such matters as highway administration, poor law administration and liquor licensing. In 1705 the Court of Queen's Bench quashed a highway order because of the participation of a justice who was also the surveyor of the highway whose conduct was in question, and Holt CJ treated the case as analogous to one before a court of law.[33] Many similar decisions followed.[34]

But, just as in the case of strictly judicial functions, a line had to be drawn so as

[28] See *Kingsley* v. *The United Kingdom (Application No. 35605/97)* [2001] The Times, 9 January, discussed below, p. 461.

[29] Below, p. 459.

[30] Courts martial procedure, for instance, until reform by the Armed Forces Act 1996 placed the decision to prosecute as well as the appointment of the court and the prosecuting and defending officers in the hands of the convening officer who could vary the verdict. See *Findlay* v. *United Kingdom* (1997) 24 EHRR 221. The reformed procedure is generally compliant: *Morris* v. *United Kingdom* (2002) 34 EHRR 1253 (procedure generally compliant but considering that junior officers on court compromised independence); *R.* v. *Spear* [2002] 3 WLR 437 (HL) (trial of civil offence by courts martial not in itself incompatible; upholding presence of junior officers (ECHR not fully informed)). Naval courts-martial were reformed by Remedial Order. See above, p. 180.

[31] In accordance with the Sheriff Courts (Scotland) Act 1971, s. 11.

[32] *Starrs* v. *Procurator Fiscal Linlithgow*, The Times, 17 November 1999. And *Singh* v *Home Secretary* The Times, 21 January 2004 (part-time immigration adjudicator not independent).

[33] *Foxham Tithing Case* (1705) 2 Salk. 607.

[34] e.g. *Great Charte* v. *Kennington* (1730) 2 Str. 1173; *R.* v. *Cheltenham Commissioners* (1841) 1 QB 467; and the curious case of *R.* v. *Great Yarmouth Justices ex p. Palmer* (1882) 8 QBD 525.

not to disturb decisions where the interest in question was too slight to be appreciated. In a much-cited case[35] the court refused to quash a certificate of justices to the effect that a reservoir was duly completed, on which depended the Bradford corporation's right to appropriate the water of certain streams. Two of the justices were trustees of a hospital and a friendly society which had invested in the corporation's bonds, and it was argued that the appropriated water was an asset which would improve the security of the bonds, and so dispose the justices to grant the certificate. The court held that any direct pecuniary interest, however small, would have disqualified them, for instance if they themselves had been liable for costs; and likewise if they would be likely to have a bias 'from kindred or any other cause'. But, since there was no pecuniary interest or real likelihood of bias, the certificate must stand.

Accordingly it became the rule that any direct pecuniary interest, however small, was a disqualification,[36] and this rule was applied rigorously.[37] Indeed, in a prominent case, the House of Lords has affirmed that the principle of automatic disqualification in fact extends beyond pecuniary and proprietary interests.[38] It applies equally where the judge is himself a party or has a relevant interest in the subject matter of the litigation, even if he has no financial interest in its outcome. The case concerned an appeal before the House of Lords in which the Crown Prosecution Service sought to overturn the quashing by the Divisional Court of extradition warrants made against a former head of state. Amnesty International were given leave to intervene in the proceedings before the House of Lords. Unknown to the representatives of the former head of state at the time, one of the law lords was in fact an (unpaid) director and chairperson of Amnesty International Charity Ltd, a company under the control of Amnesty International which was formed to carry out the charitable parts of Amnesty International's activities. The law lord, who did not disclose his links with AI, had no financial interest in the outcome and was not a party to the proceedings, but the 'substance of the matter is that AI . . . and AICL are all various parts of an entity or movement working in different fields towards the same goals'.[39] This was enough automatically to disqualify the law lord; and the matter was reheard before a differently constituted Appeal Committee. The circumstances of this case were most unusual; it is difficult to see what other non-pecuniary interests will suffice other than the obvious one where the judge is a party. But the case serves to underline the reach,

[35] *R.* v. *Rand* (1866) LR 1 QB 230.

[36] *R.* v. *Rand*, above; *R.* v. *Meyer* (1875) 1 QBD 173; *R.* v. *Farrant* (1887) 20 QBD 58; *R.* v. *Barnsley Licensing Justices ex p. Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167.

[37] See, e.g., *R.* v. *Cambridge Recorder* (1857) 8 E & B 637. In *R.* v. *Farrant* (above) it was held that a magistrate who made a bet on the result of the case would be disqualified for pecuniary interest.

[38] *R.* v. *Bow Street Magistrate ex p. Pinochet Ugarte* (No. 2), above.

[39] At 135 (Lord Browne-Wilkinson).

even into the House of Lords, of the rule against bias; and it has, moreover, focused attention on questions of judicial propriety.

Further administrative examples

Twentieth-century judges have generally enforced the rule against bias in administrative proceedings no less strictly than their predecessors,[40] as exemplified by the following cases.

The mere presence of a non-member while a tribunal is deliberating is enough to invalidate the proceedings. Thus the proceedings of a Watch Committee, hearing an appeal by a police sergeant against his dismissal by his chief constable, were fatally flawed by the presence of the chief constable, whose mind was made up and who was in effect the respondent, during the committee's deliberations.[41] For similar reasons the court quashed the decision of a disciplinary committee which had consulted privately with the chief fire officer who had reported a fireman for indiscipline.[42] But the tribunal's clerk may sometimes attend.[43]

Where there has been previous involvement in the case by a person who should be unbiased then the appearance of bias may be created or the decision may be predetermined. The Kent police authority erred, when proceeding to retire a chief inspector compulsorily on the ground of mental health, by informing him that they would refer to the doctor who had examined him the previous year and had reported adversely. The Court of Appeal held that the doctor had a duty to act fairly and heed the rules of natural justice; and he could not do so if he had committed himself to an opinion on the case in advance of the inquiry.[44] The rule against bias can apply at any stage of a statutory proceeding, e.g. to the making of a

[40] The proposition that different rules governed administrative proceedings to those that governed judicial proceedings was crisply rejected in *R.* v. *Secretary of State for the Environment ex p. Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 at 325 (Sedley J). Cf. *Eves* v. *Hambros Bank (Jersey) Ltd* [1996] 1 WLR 251 (Jurat, who had been director of bank, entitled to sit as judge in proceedings, to which defaulting mortgagor not party, confirming bank's tenancy over mortgaged property).

[41] *Cooper* v. *Wilson* [1937] 2 KB 309 (but in fact it was held that the sergeant had succeeded in resigning before his dismissal). Contrast *Kilduff* v. *Wilson* [1939] 1 All ER 429. And see *R.* v. *Hendon Rural District Council ex p. Chorley* [1933] 2 KB 696 establishing the same point in a planning context. Cf. *Samuel Smith Old Brewery (Tadcaster)* v. *City of Edinburgh Council* 2001 SLJ 977 (convenor of development control committee declared interest and vacated chair, but remained present in place allocated to non-member councillors; decision upheld).

[42] *R.* v. *Leicestershire Fire Authority ex p. Thompson* (1978) 77 LGR 373.

[43] *Barrs* v. *British Wool Marketing Board* 1957 SLT 153 and *McDonnell, Petitioner* 1987 SLT 486 (allowing attendance) but contrast *ex parte McCarthy* (above) and *R.* v. *Birmingham Magistrates' Court ex p. Ahmed* [1994] COD 461 (disallowing attendance in a judicial context). A justices' clerk may question a fine defaulter about his means but must do so impartially: *R.* v. *Corby JJ ex p. Mort*, The Times, 13 March 1998.

[44] *R.* v. *Kent Police Authority ex p. Godden* [1971] 2 QB 662.

report as a preliminary step before the making of a final order.[45] This is bias by predetermination.[46]

But prior involvement does not always disqualify. This is generally not because the prior involvement is trivial but because given the nature of the proceedings it would be impractical to disqualify. Company inspectors investigating a company have a policing function and cannot realistically be expected to be unbiased, since they are bound to be acting on suspicion; and it is therefore no objection that the same inspectors have previously investigated a similar company under the same management.[47] In a case which seems to go too far, the applicant, a foster parent, was de-registered by a fostering panel consisting of five people who had personal knowledge of and close involvement with the applicant's approach to child care. Although the Court of Appeal recognised that this might appear unfair it held that the expert panel were in the circumstances the best people to decide.[48]

Clear rules are more difficult to discern in other circumstances.[49] But one general issue has been of particular importance. Where an administrative decision is policy-based (such as the decision of a planning authority) rather than rule-based (such as the decision of an immigration appeal tribunal) it has sometimes been suggested that different and less onerous rules apply. In two cases local planning authorities had made contracts with developers for the exploitation of land which the authorities themselves owned, undertaking to do their best to procure planning permission, to be granted by themselves. In both cases it was shown that in granting permission both authorities had acted fairly and without bias in fact, and both courts held that it was irrelevant that a likelihood of bias might reasonably have been suspected—as on the facts was clearly so.[50] This was put in the questionable form that 'the reasonable man test has no application in the case of an administrative decision', as opposed to a decision 'of a judicial nature'.[51] Otherwise, it was pointed out, there might be 'an administrative impasse' in cases where the planning authority had quite properly become involved in some development.[52] Thus it

[45] But a mere investigation, e.g. by a Royal Commission, is not subject to the rule: *Re Copeland and McDonald* (1978) 88 DLR (3d) 724.

[46] As also where part of the decision is announced before the end of the hearing: *Ellis* v. *Minister of Defence* [1985] ICR 257. Similarly (in a judicial context) where half-way through the trial the chairman of the bench had typed up a statement to be used in sentencing: *R.* v. *Romney Justices ex p. Gale*, [1992] COD 323. But a warning by an immigration adjudicator to prison officers to 'stand by' half-way through an appeal was not enough: *R.* v. *Special Adjudicator ex p. Frank Arthur* [1994] Imm. AR 46.

[47] *R.* v. *Secretary of State for Trade ex p. Perestrello* [1981] QB 19.

[48] *R.* v. *Avon County Council ex p. Crabtree* [1996] 1 FLR 502.

[49] See the account above, p. 452.

[50] *R.* v. *Amber Valley DC ex p. Jackson* [1985] 1 WLR 298; *R.* v. *St Edmundsbury BC ex p. Investors in Industry Commercial Properties Ltd* [1985] 1 WLR 1168, following *R.* v. *Sevenoaks DC ex p. Terry* [1985] 3 All ER 226 in preference to *Steeples* v. *Derbyshire CC* [1985] 1 WLR 256 (reasonable man test applied: planning permission void).

[51] In the *St Edmundsbury* case (above) at 1193, 1194 (Stocker J).

[52] Quote from the *Sevenoaks* case (above), Glidewell J.

was held that such decisions were bad only if the council had 'acted in such a way that . . . when it came to consider . . . [the] application for planning permission, it *could not* exercise a proper discretion'.[53] But in a later case, where this argument was raised, the court in accordance with general principle held that the same approach to bias should be adopted to both administrative and judicial decisions.[54] Even so, the challenge failed notwithstanding links between an interested party and the planning authority.[55]

These decisions invite the comment that some of them might have been based more suitably on the rule of necessity, shortly to be explained.[56] When Parliament has empowered the same body both to undertake development and to grant planning permission, that body must perform both these functions as best it can despite the inevitable conflict between its roles as developer and as planner. This is the problem of indivisible authority discussed below. But this does not mean that the test of bias cannot apply to an administrative decision where it affects only particular members of a deciding body, who can be disqualified without making that body incompetent to act.

Where there is no dispute of fact, the procedure whereby a planning authority may grant planning permission in respect of land which it owns, has been held compliant with Article 6(1).[57]

Indivisible authorities: cases of necessity

In most of the cases so far mentioned the disqualified adjudicator could be dispensed with or replaced by someone to whom the objection did not apply. But there are many cases where no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity;[58] for otherwise there is no means of deciding and the machinery of justice or administration will break down.[59] The Article 6(1) requirement of an independent and impartial decision-maker is, as the Human Rights Court has made clear,[60] more absolute and less

[53] Glidewell J at 233 (emphasis added).

[54] *R.* v. *Secretary of State for the Environment ex p. Kirsktall Valley Campaign Ltd* [1996] 3 All ER 304 at 325 (Sedley J). Cf. *R.* v. *Hereford and Worcester CC ex p. Wellington Parish Council*, 94 LGR 159 (Harrison J).

[55] Local development corporation (the planning authority) granted permission to build supermarket on land owned by rugby club. This permission was vital to the club's relocation plans. Two members of the corporation were vice-presidents of the club and another a professional adviser but no 'real danger' of bias was found. A distinction was drawn between legitimate and illegitimate prior interests and the need to avoid predetermination.

[56] Below.

[57] *R. (Kathro)* v. *Rhondda Cynon Taff CBC* [2001] EWHC Admin. 527; [2002] Env. LR 15, discussed above p. 454.

[58] See [1982] *PL* 628 (R. R. S. Tracey).

[59] In *Great Charte* v. *Kennington* (1730) 2 Str. 1173 it was said that where there were no justices who were not ratepayers 'it might be allowed to prevent a failure of justice'.

[60] *Kingsley* v. *The United Kingdom* (2002) 35 EHRR 177, discussed below.

mindful of administrative convenience. Compliance with the Convention standard will thus sometimes pose difficulties.

These will be discussed below, but first an account of the common law necessity principle is required. Necessity made an appearance in *Dimes* v. *Grand Junction Canal*, already recounted.[61] Before the appeal could proceed from the Vice-Chancellor to the House of Lords, the Lord Chancellor had to sign an order for enrolment. But it was held that his shareholding in the company, which disqualified him from hearing the appeal, did not affect the enrolment, since no one but he had power to effect it. 'For this is a case of necessity, and where that occurs the objection of interest cannot prevail.'[62] Comparable situations have occurred in modern cases. In one, a county court registrar was sued unsuccessfully in his own court, and had to tax costs in his own favour.[63] In another, the government of Saskatchewan called upon the court to determine whether the salaries of judges were liable to income tax; and the Privy Council confirmed that the court was right to decide it, as a matter of necessity.[64]

In administrative cases the same exigency may easily arise. Where statute empowers a particular minister[65] or official to act, he will usually be the one and only person who can do so. There is then no way of escaping the responsibility, even if he is personally interested. Transfer of responsibility is, indeed, a recognised type of ultra vires.[66] In one case it was unsuccessfully argued that the only minister competent to confirm a compulsory purchase order for land for an airport had disqualified himself by showing bias and that the local authority could only apply for a local Act of Parliament.[67] The court will naturally not allow statutory machinery to be frustrated in this way. For similar reasons a governor of a colony may validly assent to an Act of indemnity for his own actions, since otherwise the Act could not be passed at all.[68] It is generally supposed, likewise, that a minister must act as best he can even in a case where he, for instance, himself owns property which will be benefited if he approves a development plan. Such cases of private and personal interest are conspicuous by their absence in the law reports. But there have been cases involving public funds. The Local Government Superannuation Act 1937 gave employees of local authorities statutory rights to pensions under certain conditions, but provided that any question concerning these rights should be decided first by the local authority, and then in case of dispute by the minister,

[61] Above, p. 450.

[62] (1852) 3 HLC at 787 citing authority as early as 1430.

[63] *Tolputt (H.) & Co. Ltd.* v. *Mole* [1911] 1 KB 836.

[64] *The Judges* v. *A.-G. for Saskatchewan* (1937) 53 TLR 464 (the Saskatchewan court's decision was adverse to the judges).

[65] But if he is 'the Secretary of State', another Secretary of State can act in his stead: above, p. 47; *London and Clydeside Estates Ltd.* v. *Secretary of State for Scotland* 1987 SLT 459 at 463.

[66] See above, p. 312.

[67] *Re Manchester (Ringway Airport) Compulsory Purchase Order* (1935) 153 LT 219 (no bias was found).

[68] *Phillips* v. *Eyre* (1870) LR 6 QB 1.

whose decision on questions of fact was to be final. The Court of Appeal held that there was no escape from these clear provisions.[69] But Scott LJ protested that

> Such an issue involves a question of character on which a wrong decision may ruin a man for life . . . This state of affairs is not consonant with British justice or the rule of law on which British democracy depends for its very existence.

Nevertheless no change was made when the next Local Government Superannuation Act was enacted in 1953.[70] There could hardly be a better example to show how remote from the modern world are the ideas expressed in Dr Bonham's case.[71]

Similarly in a New Zealand case the Privy Council held that a marketing board could not be prevented from making a zoning order allotting the milk produced by a certain district to a certain dairy company, even though the board had given the company a large loan and therefore had a pecuniary interest in its prosperity.[72] Both the power to make zoning orders and the power to make loans to dairy companies were expressly conferred by statute on the board and on no one else, so that 'although the board may find itself placed in an unenviable position', it was bound to exercise both powers if the statutory scheme was to be workable. The same doctrine should, perhaps, have been invoked in English cases where local authorities had to exercise different functions one of which could prejudice the other.[73]

Doubt has been cast on these principles by a case decided in the European Court of Human Rights.[74] What had happened was that the chairwoman of the Gaming Board had in a speech indicated that she and the Board did not regard the applicant as a fit and proper person to have conduct of a casino. The Gaming Board thereafter unsurprisingly found that the applicant was not a fit and proper person to hold a gaming licence. The Court of Appeal concluded, applying the then current test of 'real danger', that there was no real danger of bias and dismissed the application for judicial review. But the court also said that even if there was such a danger only the Gaming Board could make the decision and so the rule against bias gave way to necessity. Before the ECHR the applicant complained that the proceedings before the Gaming Board were unfair and that the review by the High Court could not adequately remedy the matter because of the restricted nature of judicial review. The ECHR held that because there was no remedy for the lack of the necessary impartiality before the English courts, English law was in breach of

[69] *Wilkinson* v. *Barking Cpn.* [1948] 1 KB 721.

[70] See s. 21. Under the Superannuation Act 1972, s. 11, a question of law can be referred to the High Court.

[71] Above, p. 443.

[72] *Jeffs* v. *New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551. See likewise *NZI Financial Cpn. Ltd.* v. *New Zealand Kiwifruit Authority* [1986] 1 NZLR 159 (statutory membership of export licensing authority); *Laws* v. *Australian Broadcasting Tribunal* (1990) 93 ALR 435 (tribunal must perform statutory function even if biased).

[73] See above, p. 459.

[74] *Kingsley* v. *United Kingdom* (2002) 35 EHRR 177. See [2002] *PL* 407 (I. Leigh).

Article 6. Had the English courts been able to quash the decision and remit it for decision to a different tribunal or had they been able to make the fresh decision themselves, the procedure would have been compliant.

As this case shows, where Article 6(1) is applicable, little reliance can be placed upon necessity in the future. This has the potential to cause administrative difficulty although generally the only remedy available will often be to seek a declaration of incompatibility.[75] The novel power under CPR 54.19(3) for a court to quash a flawed decision and 'take the decision itself' where no purpose would be served by remitting the matter to the decision-maker,[76] may sometimes enable judicial review to cure a lack of impartiality in the original decision-maker but its legality in this context is questionable.

Statutory dispensation

So strictly did the courts apply the rule against bias that Parliament attempted to mitigate it by granting exemption in particular cases. Difficulty arose especially in the case of justices of the peace, who often had other public functions which might disqualify them from adjudicating. An Act of 1742 allowed them to make orders in poor law cases despite the fact that they were themselves among the ratepayers who would benefit.[77] The Public Health Act 1875 allowed them to adjudicate under the Act notwithstanding membership of any local authority.[78] But the courts put a narrow interpretation upon all such provisions, holding that any departure from the universally acknowledged principle of natural justice required clear words of enactment.[79] The dispensation in the Public Health Act did not therefore prevent the court from quashing a conviction for selling bad meat where one of the justices had taken part in the meeting of the town council's committee which directed the prosecution. The Act was held to remove the disqualification which might be alleged on the ground of mere membership of a local authority, but not where the justice had actually acted in a manner inconsistent with judicial impartiality.[80] In liquor licensing a justice is exempted from disqualification on the ground that he was earlier concerned with the case on a licensing committee, so that he may sit on appeal from a refused application even though he took part, as a committee member, in refusing an earlier application.[81] But the rules which so provide were found

[75] See above, p. 179.
[76] Discussed below, p. 654.
[77] Justices Jurisdiction Act 1742.
[78] s. 258.
[79] *Mersey Docks Trustees* v. *Gibbs* (1866) LR 1 HL 93 at 110; *Frome United Breweries Co. Ltd.* v. *Bath Justices* [1926] AC 586.
[80] *R.* v. *Lee ex p. Shaw* (1882) 9 QBD 394; see similarly *R.* v. *Henley* [1892] 1 QB 504, distinguished in *R.* v. *Pwllheli Justices ex p. Soane* [1948] 2 All ER 815. And see the *Frome United Breweries* case, above.
[81] *R.* v. *Bristol Crown Court ex p. Cooper* [1990] 1 WLR 1031.

in another case to create a danger that the decision of the licensing committee (the first instance decision-maker) would be unconsciously favoured on appeal and so these rules were not in compliance with Article 6(1).[82]

Parliament may also adopt the somewhat contradictory policy of forbidding a person to act in cases where he has some disqualifying interest but of validating his action if he should do so. Thus the Local Government Act 1972 makes it a criminal offence for a member of a local authority to take part in or vote on any contract or other matter in which he has a pecuniary interest;[83] but the Act provides in general terms that the acts of anyone elected to office and acting in that office shall be valid and effectual notwithstanding disqualification.[84] The law of liquor licensing has a corresponding provision on which, once again, the courts have placed a restrictive construction. Licensing justices are subject to express statutory disqualifications, for example in cases concerning any premises in the profits of which they are interested or of which they are owners or occupiers. But the Act provides that no act done by a justice so disqualified shall be invalid by reason only of that disqualification.[85] By a subtle interpretation the courts confine this provision to what they call 'the technical disqualification created by the Act'.[86] They will uphold the order if it is shown merely that one or more of the justices fell within the disqualifying provisions; but they will quash it if, in addition, it is shown that there was a real likelihood of bias in the particular case.[87] This distinction may not be quite easy to explain by pure reason; but that very fact shows how the court is concerned to prevent serious inroads upon the principles of natural justice. If the protecting clause were allowed its full meaning, legal questions would be determined by judges who for fundamental reasons are incompetent to act. The Court of Appeal confirmed the doctrine in a case where a spirits licence was granted to a cooperative society. Six out of seven justices were members of the society and derived small dividends from it on their purchases, so that the grant of a licence would enable them to buy spirits at a significant discount. It was held that this was a mere technical disqualification under the terms of the Act and that since there was no real likelihood of bias the grant of the licence was valid.[88]

[82] *R. (Chief Constable of Lancashire)* v. *Crown Court at Preston* [2001] EWHC Admin. 928; [2002] 1 WLR 1332.

[83] s. 94. The Secretary of State has a dispensing power: s. 97.

[84] s. 82.

[85] Licensing Act 1964, s. 193(6); and see ss. (8). Earlier Acts contained similar provisions.

[86] *R.* v. *Tempest* (1902) 86 LT 585.

[87] Likelihood here evidently means probability: see below, p. 464.

[88] *R.* v. *Barnsley Licensing Justices ex p. Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167. Devlin LJ regarded this as 'a borderline case which comes very near the mark'.

Waiver of objection

The right to object to a disqualified adjudicator may be waived, and this may be so even where the disqualification is statutory.[89] The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisers know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged.[90] In the past this rule has been strictly applied, so much so that the practice was to refuse certiorari to quash the decision unless it was specifically shown in the affidavits that the applicant had no knowledge of the disqualifying facts at the time of the proceedings.[91] But in one case, where the litigant had appeared in person before the justices, certiorari was granted even though he knew the facts at the trial, since he did not know that he was entitled to raise his objection then, and there can be no waiver of rights of which the person entitled is unaware.[92]

The test of bias: 'real likelihood', 'real danger', 'reasonable suspicion' and 'real possibility'

Much confusion has been caused in the past by the concurrent use of differently formulated tests for disqualifying bias. Many judges have laid down and applied the 'real likelihood' formula, holding that the test for disqualification is whether the facts, as assessed by the court, give rise to a real likelihood of bias;[93] and this test has naturally been emphasised in cases where the allegation of bias was far-fetched.[94] Other judges have employed a 'reasonable suspicion' test, emphasising that justice must be seen to be done, and that no person should adjudicate in any way if it might reasonably be thought that he ought not to act because of some

[89] *Wakefield Local Board of Health* v. *West Riding and Grimsby Rly Co.* (1865) 1 QB 84.

[90] *R.* v. *Byles ex p. Hollidge* (1912) 77 JP 40: *R.* v. *Nailsworth Licensing Justices ex p. Bird* [1953] 1 WLR 1046; *Thomas* v. *University of Bradford* (No. 2) [1992] 1 All ER 964 (waiver of correct procedure); *R.* v. *Lilydale Magistrates Court ex p. Ciccone* [1973] VR 122; and see *R.* v. *Antrim Justices* [1895] 2 IR 603; *Tolputt (H.) & Co. Ltd.* v. *Mole* [1911] 1 KB 836; *Corrigan* v. *Irish Land Commission* [1977] IR 317; *Locabail (UK) Ltd* v. *Bayfield Properties Ltd.* [2000] 2 WLR 870 ('It is not open to [the litigant] to wait and see how her claims ... turned out before pursuing her complaint of bias ... [She] wanted to have the best of both worlds. The law will not allow her to do so' (Lord Woolf MR, Lord Bingham LCJ and Scott V-C)).

[91] *R.* v. *Williams ex p. Phillips* [1914] 1 KB 608; *R.* v. *Kent Justices* (1880) 44 JP 298.

[92] *R.* v. *Essex Justices ex p. Perkins* [1927] 2 KB 475.

[93] *R.* v. *Rand* (1866) LR 1 QB 230; *R.* v. *Sunderland Justices* (1901) 2 KB 357; *Frome United Breweries Co.* v. *Bath Justices* [1926] AC 586; *R.* v. *Camborne Justices ex p. Pearce* [1955] 1 QB 41; *Healey* v. *Rauhina* [1958] NZLR 945; *Hannam* v. *Bradford Corporation* [1970] 1 WLR 937.

[94] See *R.* v. *Camborne Justices*, above.

personal interest.[95] In one case it was even said that the rule for judges of all kinds was that they must be free from even unreasonable suspicion of bias.[96]

In many cases both tests led to the same result, since 'likelihood' was given the meaning of possibility rather than probability. For if there was no real possibility of bias, no reasonable person would suspect it. But other judicial statements, more naturally, equated 'likelihood' with 'probability',[97] so that the two tests became different, and courts confronted with them felt obliged to elect between them. In 1954 a Divisional Court, after reviewing authorities, decided firmly in favour of real likelihood.[98] But in 1968 the Court of Appeal decided equally firmly in favour of reasonable suspicion,[99] although Lord Denning MR interwove this with the other test.

This decision reasserted 'justice must be seen to be done' as the operative principle. But 'it left a legacy of some confusion'[1] in 'a somewhat confusing welter of authority'.[2]

In 1993 the House of Lords decisively affirmed the 'real likelihood' test in a criminal case,[3] though preferring to state it in terms of 'real danger',[4] so as to emphasise that 'the court is thinking in terms of possibility rather than probability of bias'. In laying down this criterion Lord Goff also said:

> The test, as so stated, gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose.

And later he added:

> I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as

[95] The numerous decisions include *R.* v. *Gaisford* [1892] 1 QB 381: *R.* v. *Sussex Justices ex p. McCarthy* [1924] 1 KB 256; *Cooper* v. *Wilson* [1937] 2 KB 309 at 324, 344; *Metropolitan Properties Co. (FGC) Ltd.* v. *Lannon* [1969] 1 QB 577.

[96] *Eckersley* v. *Mersey Docks and Harbour Board* [1894] 2 QB 667.

[97] *R.* v. *Barnsley Licensing Justices ex p. Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167 at 187 (Devlin LJ): *Metropolitan Properties (FGC) Ltd.* v. *Lannon* [1969] 1 QB 577 at 599 (Lord Denning MR).

[98] *R.* v. *Camborne Justices ex p. Pearce*, above. See similarly *R.* v. *Nailsworth Licensing Justices ex p. Bird* [1953] 1 WLR 1046.

[99] *Metropolitan Properties (FGC) Ltd.* v. *Lannon* [1969] 1 QB 577.

[1] *R.* v. *Gough* (below) (Lord Goff).

[2] *Hannam* v. *Bradford Cpn.* [1970] 1 WLR 937 (Widgery LJ).

[3] *R.* v. *Gough* [1993] AC 646 (juror recognised accused's brother as her next-door neighbour, but not until after the verdict: held, no real danger of bias). But where a juror knew vital witnesses and did not reveal this to the court, a real danger was found: *R.* v. *K.*, The Times, 14 April 1995. Similarly, where the spouse of a juror (a prison officer) knew the defendants while on remand awaiting trial: *R.* v. *Wilson and Strason* (1996) 8 Admin. LR 1.

[4] But the real danger test did not find favour in some commonwealth jurisdictions: *Moch* v. *Ned Travel (Pty) Ltd* 1996(3) SA1 (AD); *Webb* v. *R.* (1994) 181 CLR 41; *Doherty* v. *McGlennan* 1997 SLT 444. In *Roylance* v. *The General Medical Council* (No. 2) [2000] 1 AC 311, the Privy Council did not find it necessary to choose between the different tests.

these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.

This change of perspective—from the point of view of the reasonable observer to that of the court in possession of all the relevant evidence—led the Court of Appeal to conclude in one case[5] that 'by the time the legal challenge comes to be resolved, the court is no longer concerned strictly with the appearance of bias but rather with establishing that there was actual although unconscious bias'.[6] The case concerned the judicial review of the coroner's decision not to resume the inquests into the deaths caused by the sinking of the ship 'The Marchioness'. He had previously described the bereaved parents (the applicants) as 'unhinged' and 'mentally unwell'. '[If] despite the appearance of bias', Lord Bingham MR said, 'the court is able to examine all the relevant material and satisfy itself that there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand'.[7]

The change in perspective may be illustrated by a case in which a lay member of the Restrictive Practices Court applied for employment with a consultancy firm, not recalling that a director of that firm was a principal expert witness in a case before the court.[8] By the time set for hearing it was clear that there was no suitable employment for the lay member with that firm and that a full explanation including an undertaking not to seek employment with that firm in the future, had been given to the parties. While a judge who accepted the lay member's explanation might conclude there was 'no real danger' of bias, the fairminded observer, the Court of Appeal decided, might have concluded that the lay member's favourable estimation of the firm that led to the application for employment 'indicated a partiality to them which could not be undone' by the explanation.

Since the jurisprudence of the European Convention on Human Rights insists that the appearance of bias, even if there is no actual bias, is sufficient to taint a decision as a breach of Article 6(1)[9] the 'real danger' test, interpreted as in the first mentioned case, introduced a discrepancy between the Convention and the common law in ensuring impartial decision-making. In addition it disregarded the hallowed principle that justice must be seen to be done.

The House of Lords, in recognition of this discrepancy, has now made 'a modest

[5] *R.* v. *Inner West London Coroner ex p. Dallaglio* [1994] 4 All ER 139. For criticism see [1996] *Judicial Review* 102 (Rayment).

[6] Simon Brown LJ at 152. And if the decision-maker is shown not to know about the disqualifying interest no question of unconscious bias can arise: *Locabail (UK) Ltd* v. *Bayfield Properties Ltd* (above) para. 18 and *Auckland Casino Ltd* v. *Casino Control Authority* [1995] 1 NZLR 142 at 148.

[7] At 162. This is the context in which Lord Bingham MR remarked that Lord Hewart's famous dictum (above, p. 451) was not good law.

[8] *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 (CA) (judgment of Lord Phillips MR proposing the 'modest adjustment' discussed below, pp. 466–67).

[9] See above, p. 453.

adjustment' to the real danger test and ensured consistency between the Convention and the common law.[10] The case concerned a leading counsel, a Recorder, who had been appointed by the Lord Chancellor to serve as a part-time judge in the Employment Appeal Tribunal. He was briefed to appear before an EAT which included lay members who had previously sat with him in his role as judge. The test of bias laid down was 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.[11] Applying this test the House of Lords concluded that it was reasonably possible that that observer might consider that the Recorder's submissions would carry particular weight, perhaps subconsciously, with the lay members with whom he had sat in the past.[12]

This change in the test—and the shift in perspective—was firmly based in the necessity of ensuring public confidence in the administration of justice.[13] The House of Lords made clear though that the 'fair-minded and informed observer' would adopt a 'balanced approach'[14] and was 'neither complacent nor unduly sensitive or suspicious'.[15] Although aware of legal traditions that might enhance impartiality, he or she might be critical of them.[16]

This assessment of the response of the 'fair-minded and informed observer', although in essence a return to the old test of reasonable suspicion, will be difficult to predict. It is important that fanciful and unmeritorious allegation of bias are discouraged and that proper regard is had to the context in which the issue arises. The remark by Lord Bingham that 'the administration of justice requires higher standards today than was the case even a decade or two ago'[17] may be a harbinger of even more exacting standards.

[10] *Lawal* v. *Northern Spirit Ltd* [2003] UKHL 35 following a dictum in *Porter* v. *Magill* [2001] UKHL 67, [2002] 2 WLR 37 (HL) (discussed (2002) 61 CLJ 249 (R. Williams); (2002) 118 LQR 364 (J. Rowbottom)). The 'modest adjustment' was first proposed in *In re Medicaments and Related Classes of Goods* (No. 2) [2001] 1 WLR 700 (CA) (discussed, above, p. 466). And see *Nwabueze* v. *General Medical Council* [2000] 1 WLR 1760 (PC).

[11] The cited words come from Lord Phillips's judgment in *In re Medicaments and Related Classes of Goods* (No. 2) (para. 85) adopted by Lord Hope in *Porter* v. *Magill* (para. 103) and Lord Bingham in *Lawal* (para. 14).

[12] That this was a reasonable apprehension in such circumstances was shown by the specific rules that precluded part-time judges in Employment Tribunals from appearing before ETs containing lay members with whom they had previously sat.

[13] The Strasbourg jurisprudence (as well as the traditional common law) stressed this. See, for instance, *Belilos* v. *Switzerland* (1988) 10 EHRR 466, para. 67, and above, p. 453.

[14] Ibid.

[15] Lord Bingham in *Lawal* (ibid.) adopting a phrase of Kirby J in *Johnson* v. *Johnson* (2000) 200 CLR 488 (para. 53).

[16] Ibid.

[17] *Lawal*, para. 22.

CAUSES OF PREJUDICE

Intermingling of functions

A common problem is where an adjudicator has already been concerned with the case in some other capacity. This is particularly prone to arise in the case of magistrates, who may also be members of local authorities or of other administrative bodies. Difficult questions of degree frequently arise, since the court must try to avoid impeding the work of citizens who give their services in more than one capacity, while at the same time the principle of fair and unbiased decisions must at all costs be upheld.

One class is where the adjudicator has supported the application, complaint or prosecution which comes to be adjudicated.[18] A justice who has proposed a prosecution,[19] or has voted for it,[20] as a member of a local authority is naturally disqualified; but he may act, it seems, if he was merely present at a meeting which resolved to institute proceedings, provided that he took no active part,[21] despite the fact that he may well have been influenced by things said at the meeting. In some situations mere membership, without participation, may invalidate the adjudication. Thus where a local education authority had to decide whether to prohibit the dismissal of a schoolteacher whom the governors of the school had resolved to dismiss, the Court of Appeal found objectionable bias because three members of the local authority's sub-committee, which resolved not to prohibit the dismissal, were governors; yet those members had not attended the governors' meeting which resolved upon the dismissal.[22] It was observed that members of a body such as a board of governors might be thought to have a built-in tendency to support their colleagues, and ought not therefore to sit in judgment on their decisions.[23] In a contrasting case, where a student at a teacher training college was expelled for having a man living with her in her room, the Court of Appeal upheld the expulsion even though it was effected by the board of governors who had taken

[18] *R.* v. *Sunderland Justices* [1901] 2 KB 357 (councillors supporting road-widening scheme sat as justices and granted liquor licence for premises involved in the scheme); *R.* v. *Caernarvon Licensing Justices* [1948] WN 505. Contrast *R.* v. *Nailsworth Licensing Justices ex p. Bird* [1953] 1 WLR 1046. See also *R.* v. *Ely Justices ex p. Burgess*, [1992] COD 21 (justices travelled in car with prosecutor: conviction quashed).

[19] *R.* v. *Gaisford* [1892] 1 QB 381. See similarly *Re French and Law Society of Upper Canada* (No. 2) (1973) 41 DLR (3d) 23.

[20] *R.* v. *Milledge* (1879) 4 QBD 332; *R.* v. *Lee ex p. Shaw* (1882) 9 QBD 394; *R.* v. *Henley* [1892] 1 QB 504 (justice present; resolution unanimous).

[21] *R.* v. *Pwllheli Justices ex p. Soane* [1948] 2 All ER 815, distinguishing *R.* v. *Henley*, above. But in these cases there were statutory provisions.

[22] *Hannam* v. *Bradford Cpn.* [1970] 1 WLR 937.

[23] At 946 (Widgery LJ).

it upon themselves to refer the case to the disciplinary committee which recommended expulsion.[24] Yet the procedure was strongly criticised, and had the court been sympathetic to the plaintiff it could easily have found in her favour. In an unusual case a judge who as a Minister of the Crown had piloted through Parliament legislation relevant to the case before him, was found disqualified.[25]

Mere membership of a prosecuting body, however, raises questions of degree, and there may be a situation where a member who was inactive in the matter is not disqualified.[26] Thus a solicitor may sit as a magistrate on a prosecution brought by the Council of the Law Society,[27] and a member of a society for preventing cruelty to animals may adjudicate on a prosecution brought by the society;[28] and, *a fortiori*, past membership is unobjectionable.[29] A judge may refuse a paper application for permission to appeal, yet sit on that appeal when heard.[30] And a consultant may sit on a mental health review tribunal where he is employed by the NHS Trust responsible for the patient before the tribunal.[31]

Where functions are delegated or entrusted to committees or sub-committees, an overlap of membership may be objectionable on grounds of bias. This was plainly so where the London County Council used a committee for hearing applications for music and dancing licences and three members of the committee not only sat as members of the Council (though taking no part) when considering the committee's adverse recommendation, but also instructed lawyers to oppose the application before the Council.[32] The House of Lords followed this decision in a similar situation where justices referred a licence application to the compensation authority and instructed a lawyer to oppose it before that authority; three of the same justices not only sat but also voted as members of the compensation authority, and the decision of the authority was accordingly set aside.[33] But it was not irregular for invigilators to sit on the examinations board that decided whether a candidate had made improper use of notes.[34]

A particularly clear case of irregularity is where a person sits with an appellate

[24] *Ward* v. *Bradford Cpn.* (1971) 70 LGR 27, not citing *Hannam* v. *Bradford Cpn.*, above. Compare *Haddow* v. *Inner London Education Authority* [1979] ICR 202.

[25] *Davidson, Petitioner* 2002 SLJ 1231 (no distinction drawn between governmental and personal views; real possibility of bias found).

[26] As in *R.* v. *Camborne Justices ex p. Pearce* [1955] 1 QB 41; above, p. 465.

[27] *R.* v. *Burton ex p. Young* [1897] 2 QB 468. And see *Leeson* v. *General Medical Council* (1889) 43 Ch. D 336; *Re S. (A Barrister)* [1981] QB 683.

[28] *R.* v. *Deal Justices* (1881) 45 LT 439.

[29] *Allinson* v. *General Medical Council* [1894] 1 QB 750.

[30] *Senguptor* v. *Holmes* [2002] EWCA Civ. 1104; The Times, 19 August, 2002 (CA) (application for permission renewed orally before two different judges, and granted).

[31] *R. (PD)* v. *West Midlands and North West MHRT* [2003] EWHC 2469.

[32] *R.* v. *London County Council ex p. Akkersdyk* [1892] 1 QB 190.

[33] *Frome United Breweries Co. Ltd.* v. *Bath Justices* [1926] AC 586.

[34] *R.* v. *Manchester Metropolitan University ex p. Nolan* [1994] ELR 380.

body to hear an appeal against a decision of his own,[35] as did the chief constable in the Liverpool police case mentioned earlier.[36] Likewise a county valuation officer ought not to sit with an assessment committee while they deliberate on an objection to the valuation list.[37] Many rating cases have revealed other objectionable intermixtures of functions, for example where an employee of a town council, who took the minutes of its rating committee, acted also as a clerk to the assessment committee.[38]

It has been held that the fact that a magistrate has been subpoenaed as a witness is no ground for prohibiting him from sitting at the hearing of the same case.[39] But a witness frequently testifies on behalf of one party or another, and on general grounds also the functions of witness and judge would seem incompatible.

Other causes of prejudice

Objectionable bias may be found in a wide variety of situations and relationships. Any indication that an adjudicator has prejudged the case, or any indication that he might do so, will normally disqualify him—as it did where a magistrate prepared a statement of the sentence half-way through the trial.[40] A judge who in the absence of a prosecutor, took over the prosecution was also at fault[41] as was the magistrate who read a newspaper (law report) during the defendant's evidence.[42] Another case was where certain justices were directors and shareholders of a hotel which applied for a liquor licence; they sat with the licensing justices, who granted a licence, but before doing so they resigned their directorships and sold their shares. Even though they then had no pecuniary interest, their object from the start was to procure the grant of a licence, which was therefore quashed.[43] In another case a justice who joined in refusing a licence, and who belonged to a strict temper-

[35] Judges may however do this and often did so in earlier times: see *Hamlet* v. *General Municipal Boilermakers and Allied Trades Union* [1987] 1 WLR 449; *R.* v. *Lovegrove* [1951] 1 All ER 804.

[36] *Cooper* v. *Wilson* [1937] 2 KB 309; above, p. 457. See similarly *Taylor* v. *National Union of Seamen* [1967] 1 WLR 532 (trade union official who had dismissed plaintiff presided at appeal and presented case against him); *R.* v. *Barnsley Metropolitan Borough Council ex p. Hook* [1976] 1 WLR 1052 (revocation of market trader's licence: prosecuting officer sat with appeal committee). Contrast *R.* v. *Chief Constable of South Wales ex p. Thornhill*, The Times, 12 May 1986 (evidence of non-involvement accepted); *Hamlet* v. *GMBATU* (above) (rules of Union required membership of both initial and appeal bodies).

[37] *R.* v. *Assessment Committee for NE Surrey ex p. F. W. Woolworth & Co. Ltd.* [1933] 1 KB 776.

[38] *R.* v. *Salford Assessment Committee ex p. Ogden* [1937] 2 KB 1.

[39] *R.* v. *Farrant* (1887) 20 QBD 58.

[40] *R.* v. *Romsey Justices ex p. Gale*, [1992] COD 323.

[41] *R.* v. *Wood Green Crown Court ex p. Taylor*, The Times, 25 May 1995.

[42] *R.* v. *Marylebone Magistrates Court ex p. Joseph*, The Times, 7 May 1993.

[43] *R.* v. *Hain* (1896) 12 TLR 323. See similarly *Meadowvale Stud Farm Ltd.* v. *Stratford CC* [1979] 1 NZLR 342 (shareholders sat on county council).

ance sect, stated afterwards that he would have been a traitor to his position if he had voted in favour; and since this clearly indicated bias from the outset, the order of refusal was bad.[44] But a licensing justice is not disqualified by the mere fact that he is a teetotaller.[45] Nor, provided that a fair trial is given, does it matter that a justice showed from the bench that he held strong views on some relevant matter,[46] or that a member of a committee responsible for licensing sex shops had previously published his opinion that none should be allowed.[47] As was said in one licensing case, 'preconceived opinions—though it is unfortunate that a judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded'.[48]

Among other obvious cases of prejudice are personal friendship or hostility[49] and family or commercial relationship.[50] A justice was disqualified where he was a friend of the mother of one of the parties and that party had let it be known that the justice would be on her side;[51] but the court distinguished this sharply from cases of mere acquaintance or business contact. Bias was found where a member of an industrial tribunal was the mother-in-law of a professor who had sat on the internal appeal committee of a college which dismissed allegations of sex discrimination and unfair dismissal.[52] But a former professional adviser would normally be allowed to adjudicate in the case of a client,[53] and a builder is not disqualified from sitting on a planning committee merely because the applicant is a commercial rival.[54] A non-voting chairman of a university disciplinary committee who knew sensitive information about the student concerned was not disqualified.[55]

There can normally be no objection to a member of a tribunal sitting in an application by a party who has previously appeared before him on another application.[56]

[44] *R.* v. *Halifax Justices ex p. Robinson* (1912) 76 JP 233; cf. *Goodall* v. *Bilsland* (1909) SC 1152. In *M'Geehen* v. *Knox* (1913) SC 688 the facts were nearly as strong, yet the order stood.

[45] *R.* v. *Nailsworth Licensing Justices ex p. Bird* [1953] 1 WLR 1046.

[46] *Ex p. Wilder* (1902) 66 JP 761 (justice showed prejudice against motor cars). Cf. *Hookstra's* case, above p. 452.

[47] *R.* v. *Reading BC ex p. Quietlynn Ltd.* (1986) 85 LGR 387.

[48] *R.* v. *London County Council, re Empire Theatre* (1894) 71 LT 638. See *Whitford Residents Association* v. *Manukau City Cpn.* [1974] 2 NZLR 340; *R.* v. *Commonwealth Conciliation and Arbitration Commission ex p. Angliss Group* (1969) 122 CLR 546.

[49] As in *R.* v. *Handley* (1921) 61 DLR 656; cf. *White* v. *Kuzych* [1951] AC 585. The statement to the contrary in *Maclean* v. *Workers' Union* [1929] Ch. 602 goes too far.

[50] See *R.* v. *Rand* (1866) LR 1 QB 230 at 232–3.

[51] *Cottle* v. *Cottle* [1939] 2 All ER 535.

[52] *University College of Swansea* v. *Cornelius* [1988] ICR 735.

[53] *Re Polites, ex p. The Hoyts Cpn. Pty. Ltd.* (1991) 100 ALR 634.

[54] *R.* v. *Holderness BC ex p. James Roberts Developments Ltd.* (1992) 5 Admin. LR 470.

[55] *R.* v. *Board of Governors of Sheffield Hallam University ex p. Rowlett* [1994] COD 470. But the application was allowed on other grounds.

[56] *R.* v. *Oxford Regional Mental Health Review Tribunal ex p. Mackman*, The Times, 2 June 1986. Contrast *R.* v. *Downham Market Magistrates Court ex p. Nudd*, The Times, 14 April 1988.

Departmental or administrative bias

It is self-evident that ministerial or departmental policy cannot be regarded as disqualifying bias. One of the commonest administrative mechanisms is to give a minister power to make or confirm an order after hearing objections to it. The procedure for the hearing of objections is subject to the rules of natural justice in so far as they require a fair hearing and fair procedure generally. But the minister's decision cannot be impugned on the ground that he has advocated the scheme or that he is known to support it as a matter of policy. The whole object of putting the power into his hands is that he may exercise it according to government policy. Otherwise the situation might resemble the pathetic picture painted by the Committee on Ministers' Powers in their report of 1932,[57] where they suggested that a minister might be put in a dilemma where his impartiality would be in inverse ratio to his efficiency:

> An easy-going and cynical Minister, rather bored with his office and sceptical of the value of his Department, would find it far easier to apply a judicial mind to purely judicial problems connected with the Department's administration than a Minister whose head and heart were in his work . . . Parliament should be chary of imposing on Ministers the ungrateful task of giving judicial decisions in matters in which their very zeal for the public service can scarcely fail to bias them unconsciously.

As regards such 'purely judicial problems' Parliament does for the most part follow this advice, as is to be seen from the rapid multiplication in this century of independent statutory tribunals designed to take the determination of genuinely judicial cases out of ministers' hands. These, as will be seen, are nevertheless sometimes accused of departmental bias, perhaps because the clerk is an official of the ministry, or because they sit in ministry premises, or because their proceedings may have a tinge of departmental policy. The remedy for such complaints is not provided by the principles of natural justice but by the legislation on tribunals and inquiries, discussed in later chapters.

Attempts to represent government policy as objectionable on grounds of natural justice are usually complaints of predetermination, alleging that the effective decision was taken in advance, thus rendering the hearing futile and the result a foregone conclusion. In the case already mentioned, where the minister had confirmed a compulsory purchase order for the acquisition of land for an airport it was contended that the minister was disqualified because the Air Council, of which the minister was a member, had expressed a provisional view in favour of the scheme before objections were invited; but this was held to be perfectly proper and not prejudicial.[58] Where, before a planning application was due to come before a

[57] Cmd. 4060 (1932), 78.

[58] *Re Manchester (Ringway Airport) Compulsory Purchase Order* (1935) 153 LT 219; above, p. 460.

local authority, the members of a political party controlling the authority agreed to support the application, their political predisposition did not disqualify them, since it was 'almost inevitable, now that party politics play so large a part in local government, that the majority group on a council would decide on the party line'.[59] In a Scots case a Member of Parliament who had supported a constituent's objection to a proposed development later became Secretary of State and directed that an appeal by another would-be developer of the same land should be determined by himself and not by the reporter (inspector). This was held not to disqualify him in the circumstances.[60] In New Zealand members of a planning appeal board had sat in previous connected proceedings and expressed views on the best use of the land, but the court considered that such situations were inevitable where planning policy had to be administered and that they did not support allegations of bias.[61] The key to all these decisions is the fact that if Parliament gives the deciding power to a political body, no one can complain that it acts politically. The principles of natural justice still apply, but they must be adapted to the circumstances.[62]

A dramatic contest over a prior political commitment concerned the order for the new town at Stevenage.[63] Here the issue was whether the minister had truly complied with the statutory requirement that after the objections had been heard at an inquiry 'the minister shall consider the report' of the inspector.

The Minister of Town and Country Planning had determined that Stevenage should be the first of the new towns under the New Towns Act 1946. Strong objections were made and were fully heard by a ministry inspector at a public inquiry. The minister confirmed the designation order. But before considering the report he had addressed a public meeting in Stevenage where he met heckling and jeering and is reported to have said 'it is no good your jeering, it is going to be done'. The objectors argued that the minister had declared in advance that his mind was made up and that he would not consider the report impartially. But the House of Lords, reversing both courts below, held that the minister need only follow the statutory procedure and had no judicial or quasi-judicial duty. This might at the time have unsettled the 'basic English' of administrative law. But as the judges grew more sensitive to natural justice it soon became clear that its principles applied to the procedural part of such statutory procedures even though the final decision was one of policy, so that the minister had a quasi-judicial duty of the kind explained earlier.

[59] *R.* v. *Amber Valley DC ex p. Jackson* [1985] 1 WLR 298 (Woolf J).

[60] *London and Clydeside Estates Ltd.* v. *Secretary of State for Scotland* 1987 SLT 459 adopting the treatment of this topic in earlier editions of this book.

[61] *Turner* v. *Allison* [1971] NZLR 833. See also *Old St Boniface Residents' Association* v. *City of Winnipeg* (1990) 75 DLR (4th) 385. Contrast *Anderton* v. *Auckland CC* [1978] 1 NZLR 657.

[62] See *R.* v. *Amber Valley DC* (above).

[63] *Franklin* v. *Minister of Town and Country Planning* [1948] AC 87, discussed in '"Quasi-judicial" and its Background' (1949) 10 *CLJ* 216 (Wade).

EFFECTS OF PREJUDICE

Void or voidable?

In the case of Lord Cottenham's judgment, cited at the outset of this discussion,[64] the judges advised the House of Lords that the disqualifying interest made the judgment not void but voidable.[65] This has sometimes been repeated as if it were true of administrative cases involving bias, thus producing the concept of a voidable administrative act, already criticised. But Lord Cottenham's case had nothing to do with administrative powers. His judgment was given in the Court of Chancery, one of the superior courts of law, and it would naturally be valid unless and until reversed on appeal. It could therefore correctly be described as voidable as opposed to being void from the beginning.

But where an administrative act or decision is subject to judicial review, as opposed to appeal, the court can intervene on one ground only: ultra vires.[66] The court necessarily intervenes on the basis that the vitiated act is ultra vires, i.e. wholly unauthorised by law and thus void. There is no valid analogy with an appeal from a court of law. Judgments dealing with administrative decisions therefore proceed on the footing that the presence of bias means that the tribunal is improperly constituted, so that it has no power to determine the case; and accordingly its decision must be void and a nullity.[67] Thus the reviewing court's jurisdiction fits correctly into the framework of the ultra vires principle, whereas the notion of a voidable decision does not. A long line of judges of high authority have agreed with Lord Esher's observation that the participation of a disqualified person 'certainly rendered the decision wholly void'.[68]

[64] Above, p. 450.

[65] *Dimes* v. *Grand Junction Canal* (1852) 3 HLC 759 at 785. Parke B added a dictum about decisions of magistrates, but the authorities he cited did not support him: see (1968) 84 *LQR* at p. 108. In South Africa, however, a decision of a Supreme Court judge tainted by bias has been held a nullity: *Moch* v. *Ned Travel (Pty) Ltd* 1996 (3) SA 1 (A90).

[66] Formerly there was the ground of error on the face of the record: above, p. 268. See also the general discussion: above, p. 35.

[67] For fuller discussion see (1968) 84 *LQR* at p. 101. For other aspects of 'void or voidable' see above, p. 300.

[68] *Allinson* v. *General Medical Council* [1894] 1 QB 750. In agreement are *R.* v. *Cheltenham Commissioners* (1841) 1 QB 467 (decision 'invalid' despite no certiorari clause, therefore ultra vires); *R.* v. *Nat Bell Liquors Ltd.* [1922] 2 AC 128 at 160 ('without jurisdiction'); *Cooper* v. *Wilson* [1937] 2 KB 309 at 344 ('a nullity'); *R.* v. *Paddington etc. Rent Tribunal ex p. Kendal Hotels Ltd.* [1947] 1 All ER 148; *R.* v. *Paddington etc. Rent Tribunal ex p. Perry* [1956] 1 QB 229 at 237 ('no jurisdiction'); and see *Vassiliades* v. *Vassiliades* [1945] AIR 38 (Privy Council); *Ladies of the Sacred Heart of Jesus* v. *Armstrong's Point Association* (1961) 29 DLR (2d) 373; *Oscroft* v. *Benabo* [1967] 1 WLR 1087 at 1100; *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 at 171.

This analysis is corroborated by the nature of the remedies which the courts have granted. In a police discipline case, already mentioned, the Court of Appeal granted a declaration that the officer's dismissal was a nullity.[69] But a declaratory judgment is a useless remedy where the decision is merely voidable: merely to declare that a decision is voidable achieves nothing. But if it is void and a nullity, a declaration as to this is effective. Secondly there is the practice, traditional in liquor licensing cases, of sending cases back to the licensing authority by mandamus unaccompanied by certiorari:[70] this makes sense only on the footing that the initial decision was a nullity and can be ignored; yet it applies as much in cases of bias as in others.[71] Thirdly, the court will quash for bias even where there is a statutory 'no certiorari' clause;[72] but such a clause can be ignored only where the decision is ultra vires and void.[73]

The logic of the situation is in no way weakened by the fact that the right to object on the ground of bias can be waived in the manner already mentioned.[74] This has sometimes been supposed to show that bias must render the decision voidable only.[75] But this follows only if 'void' is given the absolute meaning criticised earlier and not the relative meaning which it ought to bear. Waiver is only one of many factors which may induce the court to refuse relief:[76] it may do so in its discretion for many reasons, however void the decision in question, and then the decision must be accepted as valid. Channell J once observed that the right to object on the ground of bias could be lost by waiver 'no matter whether the proceedings . . . are void or voidable'.[77] That question is merely irrelevant. Furthermore, there is no reason why the rule of law which says that a biased decision is void should not itself contain the qualification that it operates only if the right to object is not waived.[78]

[69] *Cooper* v. *Wilson* [1937] 2 KB 309; above, p. 457.
[70] See below, p. 624.
[71] *R.* v. *London County Council ex p. Akkersdyk* [1892] 1 QB 190.
[72] *R.* v. *Cheltenham Commissioners* (1841) 1 QB 467; *R.* v. *Hertfordshire Justices* (1845) 6 QB 753.
[73] See below, p. 715.
[74] Above, p. 464.
[75] See Rubinstein, *Jurisdiction and Illegality*, 221; (1926) 42 *LQR* 523 (D. M. Gordon).
[76] As explained above, p. 302. See (1968) 84 *LQR* at 109 (Wade).
[77] *R.* v. *Williams ex p. Phillips* [1914] 1 KB 608.
[78] See above, p. 239 (waiver and jurisdiction).

14

THE RIGHT TO A FAIR HEARING

AUDI ALTERAM PARTEM

'Hear the other side'

It is fundamental to fair procedure that both sides should be heard: *audi alteram partem*, 'hear the other side'. This is the more far-reaching of the principles of natural justice, since it can embrace almost every question of fair procedure, or due process, and its implications can be worked out in great detail. It is also broad enough to include the rule against bias, since a fair hearing must be an unbiased hearing; but in deference to the traditional dichotomy, that rule has already been treated separately.

The right to a fair hearing has been used by the courts as a base on which to build a kind of code of fair administrative procedure, comparable to 'due process of law' under the Constitution of the United States. As already mentioned, there has been an outburst of such activity since 1963, when the landmark decision of the House of Lords in *Ridge* v. *Baldwin* put an end to a period of judicial backsliding. Parliament also has made many provisions for tribunals and inquiries, and, particularly since 1957, for improving these statutory procedures. These, though dealt with in separate chapters, should be viewed together with the principles of natural justice as parts of a comprehensive design for ensuring that power is exercised considerately and fairly.

The courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. Even where an order or determination is unchallengeable as regards its substance, the court can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Thus the law makes its contribution to good administration.

Since the courts have been enforcing this rule for centuries, and since it is self-evidently desirable, it might be thought that no trained professional, whether judge or administrator, would be likely to overlook it. But the stream of cases that come before British and Commonwealth courts shows that overlooking it is one of the

most common legal errors to which human nature is prone. When a Lord Chief Justice,[1] an Archbishop of Canterbury[2] and a three-judge Court of Appeal[3] have strayed from the path of rectitude, it is not surprising that it is one of the more frequent mistakes of ordinary mortals. The courts themselves must take some of the blame, for they have wavered in their decisions, particularly in the period of about fifteen years which preceded *Ridge* v. *Baldwin*.

An ancient rule of wide application

According to one picturesque judicial dictum, the first hearing in human history was given in the Garden of Eden:[4]

> I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also.

This was in *Bentley*'s case, in which the University of Cambridge had deprived that recalcitrant scholar of his degrees on account of his misconduct in insulting the Vice-Chancellor's court; but he was reinstated on a mandamus from the Court of the King's Bench, on the ground that deprivation was unjustifiable and that, in any case, he should have received notice so that he could make his defence, as required by 'the laws of God and man'. This is a nice example of the old conception of natural justice as divine and eternal law.[5]

A century previously the same doctrine had made an appearance in an equally notorious case of contumacy, where a freeman of the borough of Plymouth had threatened and scandalised the mayor and was disfranchised. It was similarly held that the penalty was unjustified, in the absence of any special power of disfranchisement; and that even if there had been such a power, the removal would be

[1] *Abraham* v. *Jutsun* [1963] 1 WLR 658 (Divisional Court ordered solicitor to pay costs without hearing him in his defence; order set aside by Court of Appeal as made per incuriam). An attempt to convict Lord Macnaghten of a breach of the rule against bias was unsuccessful: *R.* v. *Antrim Justices* [1895] 2 IR 603. But Sir William Scott, the future Lord Stowell, excommunicated an ecclesiastical offender without a hearing and was liable in damages: *Beaurain* v. *Scott* (1813) 3 Camp. 388.

[2] *R.* v. *Archbishop of Canterbury* (1859) 1 E & E 545 (Archbishop dismissed curate's appeal on consideration of his written petition of appeal only; mandamus granted).

[3] *B.* v. *W.* [1979] 1 WLR 1041 (court acted on document not disclosed to appellant). In *Hadmor Productions Ltd.* v. *Hamilton* [1983] 1 AC 191 Lord Diplock accused Lord Denning MR of violating natural justice by relying upon a speech in a debate in the House of Lords without first informing counsel. But in *Mahon* v. *Air New Zealand* [1984] AC 808 at 838 he spoke tolerantly of such judicial lapses.

[4] *R.* v. *University of Cambridge* (1723) 1 Str. 557 (Fortescue J).

[5] See above, p. 443.

void because it was not shown that a hearing had first been given.[6] In this case also the remedy was a mandamus for restoration. Coke's report quotes from Seneca:[7]

quicunque aliquid statuerit parte inaudita altera, aequum licet statuerit, haud aequus fuerit.

This contains the same message as does the law about bias, that where natural justice is violated it is no justification that the decision was in fact correct.[8]

The early decisions mainly concerned restoration to offices.[9] In the first half of the nineteenth century natural justice began to affect ecclesiastical affairs. In one case a bishop had appointed a curate, at the vicar's expense, to perform the duties of the vicar whom the bishop considered to be negligent. The bishop did not call on the vicar to make any defence; and for this reason the court held the whole process to be void.[10] The exercise of a drastic power required that the vicar should be given the opportunity to answer the charges made against him. Bayley B said:

When the bishop proceeds on his own knowledge I am of the opinion also that it cannot possibly, and within the meaning of this Act, appear to the satisfaction of the bishop, and of his knowledge, unless he gives the party an opportunity of being heard, in answer to that which the bishop states on his own knowledge to be the foundation on which he proceeds.

It was already clear from decisions of this kind that the courts would apply the principle of natural justice to cases of an administrative character. They did so no less vigorously when the modern statutory authorities, equipped with new powers of many kinds, began to proliferate as the nineteenth century progressed. The same principle was extended beyond the sphere of administrative law, to such bodies as societies and clubs. It was held to be an implied term of each member's contract of membership that he could not be expelled without a fair hearing.[11] In a case where a member of a mutual insurance society was purportedly expelled for suspicious conduct, but without a hearing, it was held that the expulsion was absolutely void, so that he was still a member in law; and it was said:[12]

This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

[6] *Bagg's Case* (1615) 11 Co. Rep. 93b. The most celebrated of his misdeeds was that he 'turning the hinder part of his body in an inhuman and uncivil manner towards the aforesaid Thomas Fowens, scoffingly, contemptuously, and uncivilly, with a loud voice, said to the aforesaid Thomas Fowens, these words following, that is to say, "Come and kiss".'

[7] *Medea* 199–200, cited also in *Boswell's Case* (1606) 6 Co. Rep. 48b at 52a; *R.* v. *University of Cambridge* (1723) 1 Str. 557 at 561; *R.* v. *Archbishop of Canterbury* (1859) 1 E & E 545; Bl. Comm. ix. 283.

[8] Seneca's sentiment is exactly reproduced in *Earl* v. *Slater & Wheeler (Airlyne) Ltd.* [1973] 1 WLR 51 (dismissal without hearing held intrinsically unfair, even though fully justified).

[9] Examples are *Protector* v. *Colchester* (1655) Style 452; *Campion's Case* (1658) 2 Sid. 97.

[10] *Capel* v. *Child* (1832) 2 C & J 558. See also *Bonaker* v. *Evans* (1850) 16 QB 162; *R.* v. *North ex p. Oakey* [1927] 1 KB 491.

[11] *Dawkins* v. *Antrobus* (1881) 17 Ch. D. 615; *Fisher* v. *Keane* (1878) 11 Ch. D. 853. Cf. *Wright* v. *Jockey Club*, The Times, 16 June 1995 (no liability for loss caused by unfair hearing).

[12] *Wood* v. *Woad* (1874) LR 9 Ex. 190 (Kelly CB). And see *Byrne* v. *Kinematograph Renters Society Ltd.* [1958] 1 WLR 762.

Subsequently this doctrine found a fruitful field of application in protecting members and officers of trade unions from unfair expulsion or other penalties.[13] Here likewise the basis for natural justice was an implied term in the contract of membership. Denning LJ said of trade union committees:[14]

> These bodies, however, which exercise a monopoly in an important sphere of human activity, with the power of depriving a man of his livelihood, must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence: and any agreement or practice to the contrary would be invalid.

That the last ten words represent the law has since been decided definitely.[15]

How far the same rules apply in university disciplinary proceedings is discussed below.[16]

The right to a fair hearing and Article 6(1) of the Human Rights Convention

The enactment of the Human Rights Act 1998 and the incorporation of the European Convention on Human Rights and Fundamental Freedoms will bring a new dimension to this subject. As explained earlier,[17] the most germane article of the Convention, Article 6(1), applies to many but not all administrative proceedings. It only applies to administrative proceedings that determine the 'civil rights and obligations' of individuals. When it does apply it requires that there should be 'a fair and public hearing within a reasonable time'.[18] There clearly will be occasions on which the application of Article 6(1) will impose obligations upon decision-makers that go beyond those imposed by the common law. Thus, while the common law does not as yet impose a general duty to give reasons for a decision,[19] where Article 6(1) applies, the decision-maker must give a reasoned judgment so as to enable the individual affected to decide whether to appeal.[20] The requirements

[13] As, e.g., in *Burn* v. *National Amalgamated Labourers' Union* [1920] 2 Ch. 364; *Lee* v. *Showmen's Guild* [1952] QB 329; *Lawlor* v. *Union of Post Office Workers* [1965] Ch. 712; *Leary* v. *National Union of Vehicle Builders* [1971] Ch. 34; *Edwards* v. *SOGAT* [1971] Ch. 354; *Breen* v. *Amalgamated Engineering Union* [1971] 2 QB 175; *Stevenson* v. *United Road Transport Union* [1976] 3 All ER 29.

[14] *Abbott* v. *Sullivan* [1952] 1 KB 189 at 198.

[15] *Edwards* v. *SOGAT* (above); *Enderby Town Football Club* v. *Football Association* [1971] Ch. 591 at 606.

[16] p. 545.

[17] Above, p. 445.

[18] See above, p. 188, for the text of Art. 6(1).

[19] See below, p. 522.

[20] *Hadjianastassiou* v. *Greece* (1992) 16 EHRR 219 (in the context of a criminal case); *Garcia Ruiz* v. *Spain* (1999) 31 EHRR 589 and *Ruiz Jorija* v. *Spain* (1994) 19 EHRR 553. And see *English* v. *Reimbold and Strick* [2002] 1 WLR 2409 (CA), paras. 8–14 (judicial not administrative decision).

of a 'public hearing' and the public pronouncement of judgment[21] may also impose fresh obligations upon some administrative decision-makers.[22] It has already been noted that not all administrative decision-makers will satisfy the test of 'independence' required by Article 6(1).[23]

However, the vigour of the wide-ranging and sophisticated common law requirement of a fair hearing, shortly to be further described, should not be underestimated. Its protection of procedural due process will extend further into the administrative machine and will generally be as, or more, extensive than that afforded by Article 6(1). Although there will be occasions on which reliance will properly be placed upon Article 6(1) and the relevant decisions of the European Court, the common law will continue to dominate in this area.

ADMINISTRATIVE CASES

A classic example

The numerous new administrative authorities, both local and central, which came into being in the nineteenth and twentieth centuries opened up a large new territory for the principles of natural justice. The character of the authority was not what mattered: what mattered was the character of the power exercised. If it adversely affected legal rights or interests, it must be exercised fairly.

One case of 1863 is especially noteworthy, both because it stated the law in short judgments of great clarity, and also because it has played an important part in the recent revival of the right to be heard: *Cooper* v. *Wandsworth Board of Works*.[24] Under an Act of 1855 it was provided that no one might put up a building in London without giving seven days' notice to the local board of works; and that if any one did so, the board might have the building demolished. A builder nevertheless began to erect a house in Wandsworth without having given due notice and when his building had reached the second storey the board of works sent men late in the evening who demolished it. The board did exactly what the Act said they might do in exactly the circumstances in which the Act said they might do it. And their action was, of course, purely administrative. Nevertheless, the builder brought a successful action for damages for the injury to his building, merely on

[21] A previously unmentioned requirement of Art. 6(1).
[22] These will be noted as they arise.
[23] See above, pp. 447 and 453.
[24] (1863) 14 CB (NS) 180; approved in *Ridge* v. *Baldwin* [1964] AC 40; *Durayappah* v. *Fernando* [1967] 2 AC 337; *Wiseman* v. *Borneman* [1971] AC 297.

the ground that the board had no power to act without first asking him what he had to say for himself. Erle CJ said:

I think the board ought to have given notice to the plaintiff and to have allowed him to be heard. The default in sending notice to the board of the intention to build, is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually conformed . . . though by accident his notice may have miscarried . . . I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss.

Two of the other judgments in this case are important. Willes J said:

I am of the same opinion. I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that the rule is of universal application, and founded on the plainest principles of justice. Now, is the board in the present case such a tribunal? I apprehend it clearly is . . .

And Byles J also said:

It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions beginning with *Dr. Bentley's* case, and ending with some very recent cases, establish that, although there are no positive words in a statute, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

These last two quotations bring out clearly two especially important aspects: the universality of the principle, which make it applicable to almost the whole range of administrative powers; and the presumption that it will always apply, however silent about it the statute may be.

How wide its application was to be is illustrated by many later decisions. Whether the case concerned the cancellation of a Crown lease in Queensland,[25] the condemnation of a house in Manchester as unfit for human habitation,[26] the compulsory transfer of indentured labour in Trinidad,[27] or the refusal of a pension to a Canadian police officer obliged to resign,[28] the court uniformly insisted that

[25] *Smith* v. *R.* (1878) 3 App. Cas. 614 (power to cancel in case of non-residence or abandonment: held, 'a judicial function').

[26] *Hall* v. *Manchester Cpn.* (1915) 84 LJ Ch. 732.

[27] *De Verteuil* v. *Knaggs* [1918] AC 557.

[28] *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* [1906] AC 535.

the power could be validly exercised only after a fair hearing of the party adversely affected.

'Judicial' and 'quasi-judicial' acts

The above quotations show very clearly how the courts justified their interventions. They held that every judicial act is subject to the procedure required by natural justice; and they then denominated the great majority of administrative acts as 'judicial' for this purpose. Instead of saying, as was in fact the truth, that natural justice must be observed in both judicial and administrative acts, the courts stretched the meaning of 'judicial' in an unnatural way. Another graphic example is a statement by Willis J in a case which in essentials was the same as *Cooper* v. *Wandsworth Board of Works*:

> In condemning a man to have his house pulled down, a judicial act is as much implied as in fining him £5; and as the local board is the only tribunal that can make such an order its act must be a judicial act, and the party to be affected should have a notice given him . . . in the present case there is nothing in the Act of Parliament to limit the natural inference as to the nature of the act.[29]

Every administrative act was thus treated as 'judicial' if it adversely affected any person's rights or entailed a penalty.[30] Exactly the same abuse of language was adopted in requiring a 'duty to act judicially' as a condition of the availability of the remedies of certiorari and prohibition; and to this an unprofitable discussion must be devoted elsewhere.[31] When in time the courts came to forget the paradoxical sense which they had invented for 'judicial', they found themselves in difficulty. If every power affecting some person's rights is called 'judicial', there is virtually no meaning left for 'administrative'.

The term 'quasi-judicial' accordingly came into vogue, as an epithet for powers which, though administrative, were required to be exercised as if they were judicial, i.e. in accordance with natural justice.[32] This at least was less of a misnomer than 'judicial', and made it easier for the courts to continue the work of developing their system of fair administrative procedure. 'Quasi-judicial' was the subject of a classic discussion and definition by the Committee on Ministers' Powers,[33] who emphasised that a judicial decision consists of finding facts and applying law

[29] *Hopkins* v. *Smethwick Local Board of Health* (1890) 24 QBD 713. See similarly *Masters* v. *Pontypool Local Government Board* (1878) 9 Ch. D. 677. One of the many examples is *R.* v. *London County Council ex p. Commercial Gas Company* (1895) 11 TLR 337 (report of gas examiner held 'a judicial proceeding' and quashed for failure to grant hearing).

[30] See the discussion in *Barnard* v. *National Dock Labour Board* [1953] 2 QB 18 and *Vine* v. *National Dock Labour Board* [1957] AC 488, where the removal of a dock worker from the register was held to be a judicial act, though described also as quasi-judicial.

[31] Below, p. 606.

[32] An early example of its use is in *Mersey Docks Trustees* v. *Gibbs* (1866) LR 1 HL 93 at 110.

[33] Cmd. 4060 (1932), 73. See above, p. 42.

whereas a quasi-judicial decision consists of finding facts and applying administrative policy. The latter term was much used in the housing cases, related below.

Lord Loreburn's epitome

Of all the classical expositions of the general principle, the most frequently quoted has been from a speech of Lord Loreburn in the House of Lords in 1911. The House had to decide whether the Board of Education had properly determined a dispute between a body of school managers and the local education authority of Swansea, which had refused to pay teachers in church schools at the same rate as teachers in the authority's own schools. The House of Lords upheld the quashing of the Board's decision; for the Board had not dealt with the question which arose under the Act, which was whether they could legitimately discriminate between the two classes of schools.[34] But the Lord Chancellor, Lord Loreburn, spoke about the Board's duties in general terms:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view.

Although the case itself involved no breach of natural justice, Lord Loreburn's epitome of the general principle was so apt that it has been quoted with approval again and again.[35] Experience has shown that there are remarkably few true exceptions to this 'duty lying upon every one who decides anything', at any rate anything which may adversely affect legal rights or liberties. At the same time the passage acknowledges, though not with complete accuracy,[36] the practical limitations which the administrative character of a power may impose.

[34] *Board of Education* v. *Rice* [1911] AC 179.

[35] The central part is also reproduced almost verbatim by Lord Denning MR in *Re Pergamon Press* [1971] Ch. 388 at 399–400.

[36] In *General Medical Council* v. *Spackman* [1943] AC 627 at 638 Lord Atkin pointed out that the Evidence Act 1851 gave power to administer oaths, and that witnesses tendered ought to be examined in many cases. On these questions see below, pp. 518, 931 and 985.

STATUTORY HEARINGS

Statutory inquiries and hearings: the Arlidge *case*

The law took an important turn in 1914 in *Local Government Board* v. *Arlidge*.[37] A public inquiry had been held on an appeal to the Local Government Board by the owner of a house against which the Hampstead Borough Council had made a closing order on the ground that it was unfit for human habitation. The owner complained to the court that the Board had dismissed his appeal without a fair hearing because he was not allowed to appear before the officer who made the decision or to see the report of the inspector who held the inquiry. The argument that prevailed in the House of Lords was that by entrusting the power to a government department, Parliament must have intended that the department should act in its normal manner, and should therefore be able to take its decision without making public its papers and without having to conduct itself like a court of law.

In attempting to reconcile the procedure of a government department with the legal standard of a fair hearing the House of Lords stressed the limits that must be set to the judicialisation of administrative procedure. But they missed an important opportunity in setting their faces against the disclosure of the inspector's report. It took over forty years for this mistake to be corrected, when it finally came to be understood that the supposed analogy between the report and any other departmental papers was misconceived. Even now the law stands where the House of Lords left it in the *Arlidge* case,[38] and the necessary reforms have been made administratively, following the report of the Franks Committee of 1957, as explained elsewhere.[39] The *Arlidge* case was therefore a turning-point, in which the law failed to keep abreast of the standard of fairness required.

The Errington *case and the* lis *problem*

A line of other housing cases dealt with the same dilemma, and particularly with the question how far a government department could retain its normal administrative freedom while at the same time performing its quasi-judicial function of deciding a contested issue. For example, the ministry would frequently be in close touch with the local authority promoting the housing scheme: administratively

[37] [1915] AC 120.

[38] See *Denby (William) & Sons Ltd.* v. *Minister of Health* [1936] 1 KB 337; *Steele* v. *Minister of Housing and Local Government* (1956) 6 P & CR 386.

[39] Below, p. 924.

regarded, the central and local authorities ought to work in collaboration; but legally regarded, the ministry which was given the task of deciding disputes between local authorities and objectors to their schemes, ought to hold the scales evenly between the local authority and the objectors, and not favour one party at the expense of the other. The solution devised by the courts was that the minister's freedom is unfettered up to the point where the scheme is published and objection is lodged. From that point onwards there is an issue, a *lis*, between the local authority and the objectors, and the minister is no longer free to deal with one party without due consideration of the other.[40]

The leading case is the Court of Appeal's decision on the Jarrow clearance order, *Errington* v. *Minister of Health*.[41] A public inquiry had been held but after receiving the report the ministry made efforts to persuade the Jarrow Corporation to accept a less expensive scheme. The Corporation resisted and asked the minister to receive a deputation. The minister replied that in view of his quasi-judicial function he did not think he ought to receive a deputation representing one side only. But it was arranged that an official of the ministry and also the inspector who had held the inquiry should visit Jarrow and confer with the local authority on the site. After this meeting the Corporation submitted further evidence and argument to the ministry. In the end the minister confirmed the order. But the objectors impugned it, and with success, on the ground that these dealings between the Corporation and the ministry after the public inquiry had been closed were a breach of natural justice. For at that stage issue had been joined, and evidence had been heard, yet the ministry were giving a further hearing to one party behind the back of the other.

In accordance with the doctrine of the *lis*, complainants uniformly failed where they took exception only to events which had happened before their objections were lodged and the *lis* arose. The court refused to set aside orders on the ground that the ministry advised the local authority before they published their proposals,[42] or because the ministry encouraged them to suppose that their order would be likely to be confirmed.[43] Nor did natural justice require that the minister should disclose documents or advice available in his department before issue was joined, and on which his decision was based.[44] But the court uniformly

[40] See particularly *Marriott* v. *Minister of Health* (1935) 52 TLR 63; *Fredman* v. *Minister of Health* (1935) 154 LT 240; *Denby (William) & Sons Ltd.* v. *Minister of Health* [1936] 1 KB 337; *Errington* v. *Minister of Health* (below); *Steele*'s case, above.

[41] [1935] 1 KB 249. For later decisions to the same effect see below, p. 513. Contrast *Horn* v. *Minister of Health* [1937] 1 KB 164 and *Re Manchester (Ringway Airport) Compulsory Purchase Order* (1935) 153 LT 219, where no prejudicial communication was shown between the ministry and a party to the dispute.

[42] *Frost* v. *Minister of Health* [1935] 1 KB 286.

[43] *Offer* v. *Minister of Health* [1935] 1 KB 249.

[44] *Miller* v. *Minister of Health* [1946] KB 626; *Price* v. *Minister of Health* [1947] 1 All ER 47; *Summers* v. *Minister of Health* [1947] 1 All ER 184; *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All ER 395.

insisted on the observance of fair procedure once the quasi-judicial stage was reached.[45]

Although by inventing the principle of the *lis* the courts contrived to infuse a measure of natural justice into the statutory procedure at the point where it was most needed, the mixture of administrative and judicial responsibilities made it difficult for the ministry to fulfil their functions. As soon as an objection was lodged, they must either give up their normal dealings with the local authority, or else they must allow the objectors to intrude into the daily work of the department. What made the position seem artificial was the idea that the local authority was a party to the dispute, and that the minister was an independent judge. In fact, the two authorities were working—or should have been working—hand in glove, one at the local and one at the national level. Both were wielding administrative power, and there was no real difference in the nature of their activities.[46] If the scheme had been promoted by a local office of the ministry, instead of by the local corporation, any amount of subsequent consultation might have taken place and have been passed over as ordinary departmental work. The notion of the *lis*, therefore, was not the true key to the problem. Ultimately the key was found in the distinction between evidence of a general character, used by the minister to guide him on policy,[47] and evidence of the facts of the local situation investigated at the inquiry. But this more sophisticated solution was not reached in litigation over natural justice.[48] It was reached by reforms of administrative procedure made after the report of the Franks Committee on Tribunals and Inquiries (1957), and belongs to a later chapter.[49]

The government made a counter-move in the Planning Act of 1947 by obtaining from Parliament an express provision that the minister might, in the case of development plans, consult the local authority or anyone else at any stage without any obligation to allow further objections, or to hold any further hearing.[50] This applied only to development plans, and in all other cases the ruling in the *Jarrow* case is still respected.

[45] See *Stafford* v. *Minister of Health* [1946] KB 621; *R.* v. *Housing Appeal Tribunal* [1920] 3 KB 334 (tribunal empowered to dispense with hearing; local authority's statement not disclosed to appellant; decision quashed); *R.* v. *Secretary of State for Wales ex p. Green* (1969) 67 LGR 560 (objector led to suppose that inquiry would be held, so made summary objections only; minister's order quashed).

[46] This comment was approved by Lloyd LJ in *R.* v. *Secretary of State for the Environment ex p. Southwark LBC* (1987) 54 P & CR 226.

[47] See *Kent CC* v. *Secretary of State for the Environment* (1976) 33 P & CR 70 (minister free to consult another minister about policy).

[48] But see *Darlassis* v. *Minister of Education* (1954) 52 LGR 304, discussed below, p. 981. where remarks favour the more sophisticated solution.

[49] See below, p. 981.

[50] Town and Country Planning Act 1947, s. 10(3), replaced by Town and Country Planning Act 1990, s. 35(9) (structure plans).

THE RETREAT FROM NATURAL JUSTICE

The break with tradition

In the Stevenage case, as just related, the House of Lords had held that the deciding minister's function was 'purely administrative' and in no way judicial or quasi-judicial. Yet, as amply illustrated earlier,[51] it was essentially to administrative acts that the epithets 'judicial' and 'quasi-judicial' had been applied, in order to impose the legal standard of fair procedure on judicial and administrative conduct alike. Forgetting this tradition, and following the backward lead of the House of Lords, the courts began to hold that natural justice had no application to ordinary administrative action.

The first clear denial of the role of natural justice occurred in a case from Ceylon in which the Privy Council held that a textile trader could be deprived of his trading licence without any kind of hearing.[52] The charge against him was that his firm had falsified paying-in slips when banking coupons under the scheme of control. The Controller in fact arranged an inquiry at which the trader and his witnesses were heard. The Supreme Court of Ceylon, following familiar English authorities, held that the circumstances demanded a fair hearing, but that it had in fact been given. The Privy Council agreed that a fair hearing had been given—but, going out of their way to raise the question, they held that it had never been necessary.

The judgment, delivered by Lord Radcliffe, stated that there was no ground for holding that the Controller was acting judicially or quasi-judicially; that he was not determining a question but withdrawing a privilege; and that nothing in the regulations or in the conditions of his jurisdiction suggested that he need proceed by analogy to judicial rules.[53] It said that the power 'stands by itself on the bare words of the regulation'. It assumed that there was nothing to consider beyond the bare words, and that the right to a hearing could be determined as if the question had never before arisen in an English court.

Not long afterwards the Queen's Bench Division held that a London taxi-driver's licence could be revoked without a hearing by the Metropolitan Police Commissioner.[54] Here again, the licensing authority did not in fact act without

[51] Above, p. 482.

[52] *Nakkuda Ali* v. *Jayaratne* [1951] AC 66, criticised in (1951) 67 *LQR* 103 (Wade). As to wartime decisions, see *Ridge* v. *Baldwin* [1964] AC 40 at 73 (Lord Reid).

[53] In *David* v. *Abdul Cader* [1963] 1 WLR 834 at 839 Lord Radcliffe expressed a view more sympathetic to judicial control of licensing functions.

[54] *R.* v. *Metropolitan Police Commissioner ex p. Parker* [1953] 1 WLR 1150. Contrast *R.* v. *City of Melbourne ex p. Whyte* [1949] VLR 257 (cancellation of taxi-driver's licence requires observance of natural justice).

granting a hearing: the driver was allowed to appear before the licensing committee, but the committee would not allow him to call a witness to controvert the evidence of the police. He complained that the hearing given to him had not been full and fair. Lord Goddard CJ said that the Commissioner could summarily withdraw a licence without any sort of hearing or inquiry.

These two notorious decisions threatened to undo all the good work of earlier judges. They exposed English law to the reproach that, though a man must be heard before being expelled from his trade union or his club, he need not be heard before being deprived of his livelihood by a licensing authority.

Commonwealth and foreign decisions

The low ebb to which natural justice appeared to have been reduced in England by the decisions of the 1950s can be appreciated by making comparison with other countries. Commonwealth countries which accepted the Privy Council as their supreme judicial authority were naturally put into difficulties by *Nakkuda Ali* v. *Jayaratne* and confusion inevitably invaded judgments which attempted to identify 'judicial' acts and to determine the status of administrative functions.[55] But the true common law tradition was preserved in Commonwealth jurisdictions overseas more effectively than it was in England. *Nakkuda Ali's* case was sometimes ignored,[56] sometimes distinguished,[57] and sometimes interpreted so as to make little difference.[58] The rule that a hearing is required, in particular, before the revocation of a licence on which the holder's livelihood depends was also upheld, as an obvious principle of legal justice, in the United States[59] and in France[60] during the same period when it was being denied in England.

[55] e.g. *Copithorne* v. *Calgary Power Ltd.* (1958) 16 DLR (2d) 241 (compulsory purchase—no right to hearing), a Canadian '*Nakkuda Ali*'.

[56] As by the Supreme Court of Canada in *Alliance des Professeurs Catholiques de Montreal* v. *La Commission des Relations Ouvrières de la Province de Quebec* [1953] 4 DLR 161; by the High Court of Australia in *Delta Properties Pty Ltd.* v. *Brisbane City Council* (1955) 95 CLR 11; by the Supreme Court of South Africa in *R.* v. *Ngwevela* 1954 (1) SA 123; and by the High Court of Calcutta in *Dipa Pal* v. *University of Calcutta* AIR 1952 Cal 594.

[57] As by the Court of Appeal of New Zealand in *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd.* [1953] NZLR 366 and in *New Zealand Licensed Victuallers Association of Employers* v. *Price Tribunal* [1957] NZLR 167.

[58] See the judgment of Cooke J in the *New Zealand Dairy Board* case, above; *Low* v. *Earthquake and War Damage Commission* [1959] NZLR 1198.

[59] *Hecht* v. *Monaghan* 307 NY 461 (1954) (taxi-driver's licence).

[60] CE 5 May 1944, *Trompier-Gravier*, Rec. 133 (licence for news-stand). In French law the right appears to be confined to cases where there are allegations of personal deficiency or misconduct, and where the act is in the nature of a sanction as opposed to an act of policy, subject to exceptions: Vedel and Delvolvé, *Droit administratif*, 12th edn., i. 285; [1980] *PL* 288 (D. K. Allen). This restriction does not apply in England: see below, p. 499. See also *Transocean Marine Paint Association* v. *EC Commission* [1974] 2 CMLR 459 at 470 on the law of the EU and of European countries.

THE RIGHT TO BE HEARD REINSTATED

Ridge *v.* Baldwin

The tide turned once again in 1963,[61] when the House of Lords went back to the classic authorities in *Ridge* v. *Baldwin*,[62] a case which is an important landmark.

The chief constable of Brighton had been tried and acquitted on a criminal charge of conspiracy to obstruct the course of justice. Two other police officers were convicted, and the judge twice took opportunities to comment adversely on the chief constable's leadership of the force. Thereupon the Brighton Watch Committee, without giving any notice or offering any hearing to the chief constable, unanimously dismissed him from office. His solicitor then applied for a hearing and was allowed to appear before a later meeting. The Committee confirmed their previous decision, but by a vote of nine against three. The chief constable exercised his right of appeal to the Home Secretary, but his appeal was dismissed. Finally he turned to the courts of law, claiming a declaration that his dismissal was void since he had been given no notice of any charge against him and no opportunity of making his defence. This was refused by the High Court and by a unanimous Court of Appeal. But it was awarded by the House of Lords by a majority of four to one.

The initial dismissal was not only a breach of the principles of natural justice: it was contrary to the express provisions of the statutory regulations governing police discipline, which in cases of misconduct required notice of the charge and an opportunity for self-defence. They applied 'where a report or allegation is received', and much intellectual effort was therefore spent on the question whether this piece of loose draftsmanship meant that the safeguards in the regulations (which justice plainly demands in any case) applied only where there was a formal 'receiving' of the complaint. A more absurd point on which to decide an important case it would be hard to find. But great benefit flowed from it, since although the dismissal was held void on this ground by the majority of four, three of them felt impelled to consider what the situation might be if the regulations did not apply. Thus they came to the question of principle, and this became the dominant theme in their opinions.

A police authority was, as the law then stood, empowered to dismiss any constable 'whom they think negligent in the discharge of his duty, or otherwise unfit

[61] Favourable signs had appeared shortly beforehand: *Ceylon University* v. *Fernando* [1960] 1 WLR 223; *Kanda* v. *Government of Malaya* [1962] AC 322; *Hoggard* v. *Worsborough Urban District Council* [1962] 2 QB 93.

[62] [1964] AC 40. Academic comment on this beneficial decision was surprisingly unfavourable: (1964) 80 *LQR* 105 (A. L. Goodhart); [1964] *CLJ* 83 (A. W. Bradley). But Lord Reid, in a press interview given on his retirement after twenty-six years in the House of Lords, singled it out as the decision which he remembered with greatest satisfaction: The Times, 14 January 1975. It will surely now be accepted as worthy of that high honour.

for the same'.[63] Therefore in the authority's eyes the constable must be convicted of negligence or unfitness before they have power to deprive him of his office. This makes the case considerably stronger than many of the older natural justice cases, and it is certain that the judges who decided those cases would have held that no holder of a public office could be removed from it without notice of the charge and a fair hearing. For how could the committee convict for negligence or unfitness without hearing the defence? It was on this simple and general ground that the majority upheld the chief constable's rights. Lord Morris said:[64]

> My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case.

The hearing given to the chief constable's solicitor was held to be irrelevant, since even then no notice of any specific charge was given, and natural justice was again violated.

The 'judicial' fallacy repudiated

The leading speech of Lord Reid in *Ridge* v. *Baldwin* is of the greatest significance because of its extensive review of the authorities, which inevitably exposed the fallacies into which the decisions of the 1950s had lapsed. He attacked the problem at its root by demonstrating how the term 'judicial' had been misinterpreted as requiring some superadded characteristic over and above the characteristic that the power affected some person's rights. The mere fact that the power affects rights or interests is what makes it 'judicial', and so subject to the procedures required by natural justice.[65] In other words, a power which affects rights must be exercised 'judicially', i.e. fairly, and the fact that the power is administrative does not make it any the less 'judicial' for this purpose. Lord Hodson put this point very clearly:[66]

> . . . the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that were the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice.

Thus at last was verbal confusion cleared away and thus the House of Lords restored the classic doctrine of *Cooper* v. *Wandsworth Board of Works*, aptly celebrating the centenary of that case, and approving in particular the statements

[63] Municipal Corporations Act 1882, s. 191.
[64] [1964] AC at 114.
[65] See likewise *A.-G.* v. *Ryan* [1980] AC 718. This point is of great importance also for determining the scope of certiorari as a remedy: see below, p. 610.
[66] [1964] AC 130.

that the right to a hearing was 'of universal application' and that 'the justice of the common law will supply the omission of the legislature'.[67]

Lord Reid emphasised the universality of the right to a fair hearing: whether the cases concerned property or tenure of an office or membership of an institution, they were all governed by one principle. He also said:[68]

> We do not have a developed system of administrative law—perhaps because until fairly recently we did not need it . . . But I see nothing in that to justify our thinking that our old methods are any less applicable today than ever they were to the older types of case. And if there are any dicta in modern authorities which point in that direction then, in my judgment, they should not be followed.

This led to the conclusion that *Nakkuda Ali* v. *Jayaratne*, holding that a licensing authority did not need to act judicially in cancelling a licence, was based on 'a serious misapprehension of the older authorities and therefore cannot be regarded as authoritative'. In a later case Lord Denning MR pithily summed up the situation:[69]

> At one time it was said that the principles (sc. of natural justice) only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge* v. *Baldwin*. At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong. *R.* v. *Metropolitan Police Commissioner ex p. Parker* and *Nakkuda Ali* v. *Jayaratne* are no longer authority for any such proposition.

Even more concisely, the Privy Council said:[70]

> . . . the Minister was a person having legal authority to determine a question affecting the rights of individuals. This being so it is a necessary implication that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity.

And Lord Diplock said in the House of Lords that the right of a man to be given 'a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement'.[71]

[67] Above, p. 480. For further approval of *Cooper* v. *Wandsworth Board of Works* see *Wiseman* v. *Borneman* [1971] AC 297.

[68] [1964] AC at 72.

[69] *R.* v. *Gaming Board for Great Britain ex p. Benaim and Khaida* [1970] 2 QB 417 at 430. See also *Pagliara* v. *A.-G.* [1974] 1 NZLR 86; *Heatley* v. *Tasmanian Racing and Gaming Commission* (1977) 14 ALR 519 (statutory ban placed on race-goer from entering public racecourse: fair hearing required).

[70] *A.-G.* v. *Ryan* [1980] AC 718 (opinion delivered by Lord Diplock, holding that a minister in the Bahamas had failed to give a fair hearing to an applicant for registration as a citizen).

[71] *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 276.

'Acting fairly'

Although *Ridge* v. *Baldwin* sorted out the confusion caused by the artificial use of the word 'judicial' to describe functions which were in reality administrative, it did not eliminate this misnomer from the law. A means of doing so, however, appeared in a later line of cases which laid down that powers of a purely administrative character must be exercised 'fairly', meaning in accordance with natural justice—'which after all is only fair play in action'.[72] 'Natural justice is but fairness writ large and judicially.'[73] By this simple verbal short-cut the misuse of the term 'judicial' can be avoided altogether. At last we reach the result directly instead of by a devious path: administrative powers which affect rights must be exercised in accordance with natural justice.[74] As Lord Diplock put it:[75]

> Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions.

This development dates from a case of 1966 where an immigration officer at London Airport had refused to admit a boy from Pakistan on the ground that he appeared to be well over the age of 16, under which age he would have been allowed to enter with his father. Lord Parker CJ held that even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must nevertheless act fairly.[76] He added that he realised that he was overstepping the line which earlier cases had drawn, according significance to whether there was or was not a duty to act judicially or quasi-judicially. Salmon LJ likewise held that the immigration officer, acting in an administrative capacity, must act 'fairly in accordance with the ordinary principles of natural justice', although he thought that he had a quasi-judicial capacity since he had statutory power to 'make a decision affecting basic rights of others'. The court did not, however, intervene, since it found on the facts that the officer had acted fairly.

Although this decision was plainly founded on a misapprehension as to the state of the law,[77] it supplied such a simple and attractive basis for natural justice that it was followed with alacrity, and it was not long before its principle was adopted by

[72] A much-quoted remark of Harman LJ in *Ridge* v. *Baldwin* [1963] 1 QB 539 at 578.

[73] Lord Morris in *Furnell* v. *Whangarei High Schools Board* [1973] AC 660 at 679.

[74] On this development see (1975) 25 U Tor. LJ 280 (D. J. Mullan); (1978) 28 U Tor. LJ 215 (M. Loughlin); (1979) 96 SAfLJ 607 (L. G. Baxter).

[75] *R.* v. *Commission for Racial Equality ex p. Hillingdon LBC* [1982] AC 779.

[76] *Re H. K. (An Infant)* [1967] 2 QB 617. See similarly *R.* v. *Birmingham City Justice ex p. Chris Foreign Foods (Wholesalers) Ltd.* [1970] 1 WLR 1428.

[77] *Ridge* v. *Baldwin* was not cited and *Nakkuda Ali* v. *Jayaratne* was discussed and distinguished as if it were still good law. Judgment was not reserved.

the Court of Appeal.[78] Speaking of inspectors appointed by the Board of Trade to make a report on the affairs of a company, which might have grave consequences, Lord Denning MR said:[79]

> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial or quasi-judicial, but only administrative.

As this and other opinions show, the courts still find difficulty in ridding themselves of the idea that if the function is administrative it is therefore not quasi-judicial. They still shrink from reverting to the traditional doctrine, that an administrative power which may gravely affect a person's position must be exercised judicially, despite 'Lord Reid's momentous speech in *Ridge* v. *Baldwin*, since which emphasis upon the distinction between judicial and non-judicial decisions is no longer good law'.[80] The fallacy that 'quasi-judicial' and 'administrative' mean two basically different things appears to be almost ineradicable.

Notwithstanding the clear statements in the original decision that 'acting fairly' was required by the rules of natural justice, judges unable to accept the logic of *Ridge* v. *Baldwin* have attempted to differentiate them, suggesting that natural justice applies only to judicial or quasi-judicial functions and 'acting fairly' to administrative or executive functions—thus compounding the old fallacy with a new one.[81] But it is now clearly settled, as is indeed self-evident, that there is no difference between natural justice and 'acting fairly', but that they are alternative names for a single but flexible doctrine whose content may vary according to the nature of the power and the circumstances of the case.[82] In the words of Lord Denning MR, 'the rules of natural justice—or of fairness—are not cut and dried. They vary infinitely'.[83] Attempts to represent natural justice and 'acting fairly' as two different things are a sure sign of failure to understand that *administrative* powers are subject to the principles of natural justice as explained throughout this

[78] *R.* v. *Gaming Board for Great Britain ex p. Benaim and Khaida* [1970] 2 QB 417 at 430: *Re Pergamon Press* [1971] Ch. 388 at 399. See also *R.* v. *Kent Police Authority ex p. Godden* [1971] 2 QB 662; *R.* v. *Liverpool Corporation ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299; *Maxwell* v. *Department of Trade and Industry* [1974] QB 523; *R.* v. *Race Relations Board ex p. Selvarajan* [1975] 1 WLR 1686; *Fraser* v. *Mudge* [1975] 1 WLR 1132.

[79] *Re Pergamon Press* (above).

[80] Stephen J in *Salemi* v. *Minister for Immigration* (No. 2) (1977) 14 ALR 1 at 30.

[81] As in *Pearlberg* v. *Varty* [1972] 1 WLR 534 at 547; *Bates* v. *Lord Hailsham* [1972] 1 WLR 1373, mostly corrected in *McInnes* v. *Onslow-Fane* [1978] 1 WLR 1520 at 1530. By exploiting this supposed distinction the Supreme Court of Canada, having precluded itself from applying 'natural justice' to administrative action, accepted the duty to 'act fairly': *Re Nicholson and Haldimand-Norfolk Police Commissioners* (1979) 88 DLR (3d) 671. See also *Flexman* v. *Franklin CC* [1979] 2 NZLR 690.

[82] e.g. *Re Pergamon Press Ltd.* [1971] Ch. 388 at 399; *R.* v. *Home Secretary ex p. Hosenball* [1977] 1 WLR 766 at 784; *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 275 (Lord Diplock); *Lloyd* v. *McMahon* [1987] AC 625 at 702 (Lord Bridge); *Salemi* v. *Minister for Immigration* (No. 2) (1977) 14 ALR 1.

[83] *R.* v. *Home Secretary ex p. Santillo* [1981] QB 778.

chapter. Lord Scarman neatly combined both points in observing that the courts have extended 'the requirement of natural justice, namely the duty to act fairly, so that it is required of a purely administrative act'.[84]

The 'acting fairly' doctrine has at least proved useful as a device for evading some of the previous confusion. The courts now have two strings to their bow. An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially, in accordance with the classic authorities and *Ridge* v. *Baldwin*; or it may simply be held that, 'in our modern approach',[85] it automatically involves a duty to act fairly and in accordance with natural justice, without any of the analysis which has been made into such an unnecessary obstacle.

'Acting fairly' is a phrase of such wide implications that it may ultimately extend beyond the sphere of procedure. It was suggested in one case that it included a duty of acting with substantial fairness and consistency.[86] But when Lord Denning MR said much the same thing (that not only must there be a fair hearing but 'the decision itself must be fair and reasonable') the House of Lords repudiated his opinion.[87] On the other hand, fairness may not necessarily comprise the whole domain of natural justice. Inspectors investigating the affairs of companies, who are subject to the duty to act fairly, are not required to be free from bias.[88] Yet the same phrase has been used to describe a duty to act honestly and without bias or caprice but without any need to disclose the charge or give a hearing.[89] Judges seem to be using it in a variety of different situations, so that it has no precise meaning except when used as a synonym for natural justice.

Void or voidable

Ridge v. *Baldwin* brought with it a rash of conflicting opinions about whether failure to give a fair hearing rendered the dismissal of the chief constable void or voidable.[90] In the long history of the cases on natural justice as applied to administrative action this question had never before been agitated, for the simple reason that the logic of the situation excluded it. It had always previously been held that a breach of the rules of natural justice resulted in the determination being null and void, in the same way as any other act which was ultra vires. For the duty to act

[84] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 at 407.

[85] Lord Denning MR in the *Liverpool* case (above).

[86] *HTV Ltd.* v. *Price Commission* [1976] ICR 170 at 189 (Scarman LJ); above, p. 373.

[87] *Chief Constable of North Wales Police* v. *Evans* [1982] 1 WLR 1155, perhaps giving Lord Denning's words a wider meaning than he intended. In *Daganayasi* v. *Minister of Immigration* [1980] 2 NZLR 130 Cooke J said that 'fairness need not be treated as confined to procedural matters'. See also above, p. 370 as to unfairness amounting to abuse of power.

[88] *R.* v. *Secretary of State for Trade, ex p. Perestrello* [1981] QB 19.

[89] *McInnes* v. *Onslow-Fane* [1978] 1 WLR 1520.

[90] For discussion see (1967) 83 *LQR* 499, (1968) 84 *LQR* 95 (Wade); (1968) 31 *MLR* 2, 138 (M. B. Akehurst).

fairly, just like the duty to act reasonably,[91] was enforced as an implied statutory requirement, so that failure to observe it meant that the administrative act or decision was outside the statutory power, unjustified by law, and therefore ultra vires and void. This assumption was so well understood that it was rarely spelled out in judgments.[92] As explained already,[93] there was no other basis on which the courts could intervene. The majority of the House of Lords in *Ridge* v. *Baldwin* decided entirely consistently with this hypothesis, holding expressly that the chief constable's dismissal was void. Lord Reid said:[94]

> Then there was considerable argument whether in the result the watch committee's decision was void or merely voidable. Time and time again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in *Wood* v. *Woad*.[95] I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.

Lord Morris and Lord Hodson likewise held that the decision of the watch committee was void, and could be called voidable only in the sense that unless and until the chief constable contested it, it would stand[96] (this point is discussed elsewhere).[97]

But the dissentient judges who would have held that the chief constable had no right to a fair hearing were of opinion that the watch committee's decision was not void but voidable. As expounded by Lord Evershed in the House of Lords, the motive was a desire to enlarge judicial discretion. He argued that if the decision were merely voidable, the court need quash it only in case of 'a real substantial miscarriage of justice'.[98] This policy is open to the objection that it would introduce dangerous uncertainty—one might say, palm-tree injustice. Natural justice has for centuries been enforced as a matter of law and not of discretion. The dissentient opinions, nevertheless, were adopted by the Privy Council in a case from Ceylon, where a minister had failed to give a fair hearing to a municipal council before dissolving it on grounds of incompetence.[99] For no evident reason

[91] See above, p. 344.

[92] It was spelled out with perfect clarity in *Anisminic Ltd.* v. *Foreign Compensation Commission* [1968] 2 QB at 890 (Diplock LJ); [1969] 2 AC at 171 (Lord Reid), 195 (Lord Pearce) and 207 (Lord Wilberforce). Yet another proof is that failure to give a fair hearing renders the decision 'not within the powers of this Act' for the purposes of statutory remedies: below, p. 735. See also the quotations above, p. 441.

[93] Above, p. 37.

[94] [1964] AC at 80.

[95] (1874) LR 9 Ex. 190.

[96] [1964] AC at 125.

[97] Above, p. 304.

[98] [1964] AC at 91. But *Osgood* v. *Nelson*, from which support is claimed, does not in fact support this proposition: see (1968) 84 *LQR* at 112.

[99] *Durayappah* v. *Fernando* [1967] 2 AC 337. The verbal confusions in the judgment are inextricable, but it turns on the justifiable point that the correct plaintiff was not the mayor but the council.

the Privy Council resorted to 'void or voidable', holding that the minister's order was voidable, but only at the instance of the Council.[1] An end was put to such arguments when the House of Lords later reaffirmed that an order made contrary to natural justice was outside jurisdiction and void.[2]

FAIR HEARINGS—GENERAL ASPECTS

Scope and limits of the principle

Ridge v. *Baldwin* reinstated the right to a fair hearing as 'a rule of universal application' in the case of administrative acts or decisions affecting rights; and, in Lord Loreburn's oft-repeated words, the duty to afford it is 'a duty lying upon every one who decides anything'.[3] The decision gave the impetus to a surge of litigation over natural justice, in which the courts have been able to consider many of its facets and to build up something like a canon of fair administrative procedure. For the most part the numerous decisions have served only to show the correctness of the above-quoted words, sweeping though they are. Natural justice has achieved something like the status of a fundamental right.[4]

For example, the courts have repudiated earlier suggestions that the principles of natural justice do not apply to disciplinary bodies: 'they must act fairly just the same as anyone else; and are just as subject to control by the courts'.[5] Disadvantaged groups such as prisoners,[6] immigrants[7] and gipsies[8] have succeeded in invalidating decisions made against them when they have not been treated fairly—though there was for a time an illogical exception in the case of prisoners, mentioned later.[9] At the other end of the spectrum of power, public authorities themselves are now given the benefit of natural justice, as illustrated at the end of this section. Basically the principle is confined by no frontiers.

On the other hand it must be a flexible principle. The judges, anxious as always

[1] Lord Morris is said by the Privy Council to have decided in *Ridge* v. *Baldwin* that the decision of the watch committee was voidable and not a nullity. But this is a mistake: see (1967) 83 *LQR* at 513; *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd.* [1971] Ch. 233 at 258–59 (Megarry J).

[2] *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147; and see *A.-G.* v. *Ryan* [1980] AC 143.

[3] Above, p. 483.

[4] In *Fraser* v. *State Services Commission* [1984] 1 NZLR 116 at 121. Cooke J said *obiter*, in the context of natural justice, that 'it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the courts to have destroyed them'.

[5] *Buckoke* v. *Greater London Council* [1971] Ch. 655 (Lord Denning MR).

[6] See below, p. 549.

[7] See below, p. 553.

[8] *R.* v. *Brent LBC ex p. MacDonagh*, 22 March 1999 (gipsies entitled to hearing after assurance from local authority).

[9] Below, p. 549.

to preserve some freedom of manœuvre, emphasise that 'it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter'.[10] Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject matter of the case. 'In the application of the concept of fair play there must be real flexibility'.[11] There must also have been some real prejudice to the complainant: there is no such thing as a merely technical infringement of natural justice.[12]

Sometimes urgent action may have to be taken on grounds of public health or safety, for example to seize and destroy bad meat exposed for sale[13] or to order the removal to hospital of a person with an infectious disease.[14] In such cases the normal presumption that a hearing must be given is rebutted by the circumstances of the case. So it was when the Secretary of State for Transport provisionally suspended the permit of a Romanian airline because its pilots had failed the British civil aviation examinations,[15] and where a local authority prohibited the sale of allegedly dangerous toys as 'an emergency holding operation'.[16] The presumption is rebutted also, for obvious reasons, where the police have to act with urgency, e.g. in making arrests.[17]

Even in cases not involving urgency it may be equally clear that no hearing is required. A decision to prosecute or bring legal proceedings,[18] or to carry out a search,[19] damaging though it may be to the accused, does not entitle him to be consulted or shown the evidence in advance. The same applies to a decision by the Department of Trade to appoint inspectors to investigate suspicious circumstances in the affairs of a company: it may injure the company's reputation, but that risk has to be accepted as the price of the legal privileges enjoyed by companies; and in many cases prior warning would frustrate the objects of the legislation.[20] Nor need a minister offer a hearing to a local authority before calling in their local plan for his approval or consult them about objections to it received by him.[21] Another

[10] *R.* v. *Gaming Board for Great Britain ex p. Benaim and Khaida* [1970] 2 QB 417 at 439 (Lord Denning MR). For cases of national security see below, p. 553.

[11] *Re Pergamon Press Ltd.* [1971] Ch. 388 at 403 (Sachs LJ).

[12] *George* v. *Secretary of State for the Environment* (1979) 77 LGR 689.

[13] *White* v. *Redfern* (1879) 5 QBD 15.

[14] *R.* v. *Davey* [1899] 2 QB 301.

[15] *R.* v. *Secretary of State for Transport ex p. Pegasus Holdings (London) Ltd.* [1988] 1 WLR 990.

[16] *R.* v. *Birmingham CC ex p. Ferrero Ltd.* [1991] 3 Admin. LR 613, discussed above, p. 707.

[17] *Grech* v. *Minister of Immigration* (1991) 105 ALR 107.

[18] *Wiseman* v. *Borneman* [1971] AC 297 at 308 (Lord Reid); *Nicol* v. *Attorney-General of Victoria* [1982] VR 353.

[19] *R.* v. *Leicester Crown Court ex p. Director of Public Prosecutions* [1987] 1 WLR 1371.

[20] *Norwest Holst Ltd.* v. *Secretary of State for Trade* [1978] Ch. 201. But as to the conduct of the investigation see below, p. 516.

[21] *R.* v. *Secretary of State for the Environment ex p. Southwark LBC* (1987) 54 P & CR 226 (plan rejected by minister).

obvious case is where a minister grants to a local authority an extension of time for submitting a compulsory purchase order in connection with a slum-clearance scheme.[22] In resolving to adopt a slum-clearance scheme a local authority need not first give a hearing to an objecting landowner, since under the statutory procedure this resolution is the initial step and the Act provides amply for the hearing of objections at a statutory inquiry.[23] Sometimes a right of appeal may imply that no earlier hearing is necessary.[24] There are other situations in which an opportunity for later challenge is sufficient, as in the case of a subpoena to a witness. And it is always possible for hearings to be excluded by the scheme of the legislation.[25] But where the grant of a fair hearing is consistent with the exercise of the legal power, the law leans strongly in its favour. Judges of the highest authority have approved the epigram of Byles J, that 'the justice of the common law will supply the omission of the legislature'.[26] Nor is this presumption to be excluded merely for the sake of administrative convenience: 'convenience and justice are often not on speaking terms'.[27]

In order to preserve flexibility the courts frequently quote general statements such as the following:[28]

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.

To the same effect is a passage, much cited, in a speech of Lord Bridge in the House of Lords:[29]

> My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.

[22] *Aristides* v. *Minister of Housing and Local Government* [1970] 1 All ER 195.

[23] *Fredman* v. *Minister of Health* (1935) 154 LT 240.

[24] Below, p. 527.

[25] As in *Commissioner of Business Franchises* v. *Borenstein* [1984] VR 375; *Building Construction Federation* v. *Minister for Industrial Relations* [1985] 1 NSWLR 197.

[26] Above, p. 481; approved in *Ridge* v. *Baldwin* [1964] AC 40; *Durayappah* v. *Fernando* [1967] 2 AC 337, *Wiseman* v. *Borneman* [1971] AC 297. But 'it is not to be used to frustrate the intention of the legislature': *Norwest Holst Ltd.* v. *Secretary of State for Trade* (above), (Ormrod LJ).

[27] *General Medical Council* v. *Spackman* [1943] AC 627 at 638 (Lord Atkin). See *R.* v. *Hull Prison Visitors ex p. St Germain* (No. 2) [1979] 1 WLR 1401.

[28] *Russell* v. *Duke of Norfolk* [1949] 1 All ER 109 at 118 (Tucker LJ).

[29] *Lloyd* v. *McMahon* [1987] AC 625 at 702.

But the flexibility of natural justice does not imply a variable standard of procedural justice. As Sedley J has observed:

> The well attested flexibility of natural justice does not mean that the court applies differential standards at will, but that the application of the principles (which, subject to known exceptions, are constant) is necessarily as various as the situations in which they are invoked.[30]

In other words the courts apply the same principles in many different situations. Ample illustration will be found in the remainder of this chapter.

The principle is in no way limited to particular categories of cases such as interference with property, dismissal from office, and charges of personal misconduct. It applies equally to the allocation of compensation for a 'well maintained' house as between landlord and tenant,[31] to the banning of one member of the public from local authority premises which are open to others,[32] to the removal of a name from a list of approved foster-parents,[33] or of approved contractors,[34] and to the right to be heard at a coroner's inquest.[35] The scope of the principle is at least as wide as it was under the old authorities cited earlier in this chapter. If anything, it is now wider, partly owing to the general administrative duty to act fairly which has now been repeatedly recognised. It is just as applicable in favour of public authorities as against them, as a series of decisions now shows. Thus a municipal council in Ceylon dissolved by the minister under his default powers was entitled to a fair hearing before the minister could legally make the order.[36] A local authority's rate support grant, as mentioned above, could not lawfully be reduced without giving the authority a fair hearing. A ministerial order requiring the Greater London Council to make the maximum payment to London Regional Transport was quashed for the same reason.[37] And where a mental health review tribunal discharged a patient without notifying the Secretary of State, so that he had no opportunity to be heard, the tribunal's order was set aside in 'a classic case of a failure of natural justice'.[38]

[30] *R.* v. *Home Secretary ex p. Moon* (1996) 8 Admin. LR 477 at 480.

[31] *Hoggard* v. *Worsborough Urban District Council* [1962] 2 QB 93.

[32] *R.* v. *Brent LBC ex p. Assegai*, The Times, 18 June 1987.

[33] *R.* v. *Wandsworth LBC ex p. P.* [1988] 87 LGR 370. Similarly, *R.* v. *Secretary of State for Health ex p. C*, [2000]FLR 627 (fairness required in maintenance of non-statutory child care index of persons unsuitable to work with children).

[34] *R.* v. *Enfield LBC ex p. T. F. Unwin (Roydon) Ltd.* (1989) 1 Admin. LR 51.

[35] *Annetts* v. *McCann* (1990) 97 ALR 177.

[36] *Durayappah* v. *Fernando* (above). See likewise *R.* v. *Secretary of State for the Environment ex p. Norwich City Council* [1982] QB 808; *Balmain Association Inc.* v. *Planning Administrator* (1991) 25 NSWLR 615.

[37] *R.* v. *Secretary of State for Transport ex p. Greater London Council* [1986] QB 556.

[38] *R.* v. *Oxford Regional Mental Health Review Tribunal ex p. Home Secretary* [1986] 1 WLR 1180, affirmed [1988] AC 120.

Legitimate expectation

The classic situation in which the principles of natural justice apply is where some legal right, liberty or interest is affected, for instance where a building is demolished or an office-holder is dismissed or a trader's licence is revoked. But good administration demands their observance in other situations also, where the citizen may legitimately expect to be treated fairly. The doctrine of legitimate expectation[39] has been developed, both in the context of reasonableness, as already explained,[40] and in the context of natural justice. As Lord Bridge has said:[41]

> The courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation.

A case of 'promise' was where the government of Hong Kong announced that certain illegal immigrants, who were liable to deportation, would be interviewed individually and treated on their merits in each case. The Privy Council quashed a deportation order where the immigrant had only been allowed to answer questions without being able to put his own case, holding that 'when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty'.[42] Another example was where the Court of Appeal, as explained earlier, quashed the refusal of the Home Office to admit an immigrant when this was contrary to the legitimate expectation created by one of its published circulars.[43] And where a government department encouraged a company to suppose that it would receive a grant, it could not lawfully refuse the

[39] For discussion, with European comparisons, see [1988] *CLJ* 238 (Forsyth). See also Jowell and Oliver (eds.), *New Directions in Judicial Review*, 37 (P. Elias); (1992) 108 *LQR* 79 (P. P. Craig). For criticism of the doctrine by the High Court of Australia see *Annetts* v. *McCann* (1991) 97 ALR 177.

[40] Above, p. 372.

[41] *Re Westminster CC* [1986] AC 668 at 692. Lord Diplock made a formal statement in the *Council of Civil Service Unions* case (below) at 408, saying that the decision must affect some other person either

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn.

For Lord Diplock's statement in its context see Appendix 1. One case which does not seem to be covered is that of a first-time applicant for a licence (below, p. 536).

[42] *Attorney-General of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 AC 629. Another 'promise' case, in effect one of legitimate expectation, is *R.* v. *Liverpool Cpn. ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, for which see above, pp. 332 and 335. See also *Cole* v. *Cunningham* (1983) 49 ALR 123.

[43] *R.* v. *Home Secretary ex p. Asif Mahmood Khan* [1984] 1 WLR 1337; above, p. 373.

grant without first granting a hearing.[44] In several such cases the expectation is of some actual grant or benefit rather than merely of a hearing, and it is difficult to divide them cleanly from cases of unreasonableness.[45]

A case of 'established practice' was where civil servants employed in secret work in the government communications headquarters were prohibited from belonging to trade unions. Since there was a well-established practice of consultation in such matters, but no consultation had been offered, the House of Lords held that the procedure would have been unfair and unlawful had there not been overriding considerations of national security.[46] For the same reason a local education authority acted unlawfully in proceeding with a school reorganisation without adequately consulting parents, since this was habitually done in such cases under the emphatic advice of the Secretary of State.[47] In 'a classic example of legitimate expectation' the court quashed the government's and British Coal's decision to close a large number of collieries in disregard of the established colliery review procedure and without consulting the miners and trade unions affected. It was held that only a substantially similar review procedure, including some form of independent scrutiny, would satisfy the expectations legitimately held.[48]

Even where no promise of a benefit has been made and there is no established practice of granting that benefit, the person concerned is, elementarily, entitled to be treated fairly.[49] But he is not entitled to rely upon his expectation of a benefit unless it is founded upon some promise or established practice. To do this is to confuse the protection of legitimate expectations with the duty to act fairly. As Simon Brown LJ has said, it is 'superfluous and unhelpful' to contend that a claimant has 'a legitimate expectation that the public body will act fairly towards him'.[50] The doctrine of legitimate expectation thus extends the procedural protec-

[44] *R.* v. *Secretary of State for Transport ex p. Sherriff & Sons Ltd.*, The Times, 18 December 1986.

[45] See (1992) 108 *LQR* 79 at 92 (P. P. Craig).

[46] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374.

[47] *R.* v. *Brent LBC ex p. Gunning* (1985) 84 LGR 168. See also *Walsh* v. *Secretary of State for Scotland* 1990 SLT 526 (prisoner's legitimate expectation of release frustrated by transfer to Scotland; detention held contrary to natural justice).

[48] *R.* v. *British Coal Cpn. ex p. Vardy* [1993] ICR 720. The decision also violated statutory employment law.

[49] Thus stall-holders in a market are entitled to be consulted before charges are increased: *R.* v. *Birmingham CC ex p. Dredger* [1993] COD 340. But residents in an old people's home to whom no promise of consultation has been made need not be consulted before the local authority closes the home: *ex p. Baker* (below).

[50] *R.* v. *Devon County Council ex p. Baker* [1995] 1 All ER 73 at 89 adopting the approach of *A.-G. for New South Wales* v. *Quin* (1990) 93 ALR 1 at 39. Cf. *R.* v. *Secretary of State for Wales ex p. Emery* [1996] 1 All ER 1 (no need for knowledge of practice or promise). Some South African cases hold that, if it is fair and reasonable to expect a hearing, a hearing is legitimately expected: *Minister of Justice, Transkei* v. *Gemi* 1994(3) SA 28; cf. *Ngema* v. *Minister of Justice, Kwazulu* 1992(4) SA 349. For criticism see Kahn (ed.), *The Quest for Justice: Essays in Honour of M M Corbett* (1995), pp. 204–6 (Forsyth). And see *R.* v. *Home Secretary ex p. Hindley* [2000] 2 WLR 730 at 737 (mandatory life prisoner had no expectation that Home Secretary would not impose a 'whole life' tariff, since she was unaware of the provisional decision to that effect).

tion that would otherwise be applicable; it enhances but does not replace the duty to act fairly.

Whether an expectation exists is, self-evidently, a question of fact. If a person did not expect anything, then there is nothing that the doctrine of legitimate expectation can protect. So a person unaware of an undertaking made by a public authority, cannot expect compliance with that undertaking.[51] A decision not to honour such an undertaking may, however, be flawed for some other reason. It may, for instance, amount to unfair discrimination where it has been honoured in many other cases.

Although a person who seeks to rely upon an expectation must be aware of it, the better view is that he need not have relied to his detriment upon it for that would be to assimilate legitimate expectations to estoppel.[52] But a taxpayer, it seems, must rely upon a representation from the Revenue before his expectation will be protected.[53] Reliance, however, provides strong evidence of the existence of the expectation.[54] And an applicant who has relied to his detriment upon a statement by an official will find the courts readier to protect his expectation.

Furthermore, taxpayers seeking revenue clearance for their proposals must make full disclosure before the Revenue's assurances will be binding.[55] The assurance must itself be clear and unambiguous.[56]

[51] *R.* v. *Secretary of State for National Heritage ex p. J Paul Getty Trust*, [1997] EU LR 407 (statement of which Trust was unaware could not found legitimate expectation) and *Chundawara* v. *Immigration Appeal Tribunal* [1988] Imm. AR 161 (unincorporated but ratified treaty of which claimant unaware could not found legitimate expectation). Cf. majority judgment in *Minister of Ethnic Affairs* v. *Teoh* (1995) 128 ALR 353 ('It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention [upon which the expectation was founded] or should personally entertain the expectation'; at 365, contra however McHugh J at 383). See (1996) 112 *LQR* 50 (M. Taggart). See, *R.* v. *Secretary of State for Wales* [1996] 4 All ER 1, favouring legitimate expectations without knowledge.

[52] *R.* v. *Ministry of Agriculture, Fisheries and Food ex p. Hamble Fisheries (Offshore) Ltd* [1995] 2 All ER 714 (reliance not required; 'legitimate expectation is [not] another name for estoppel' (Sedley J)); *R.* v. *Home Secretary ex p. Jaramillo-Silva* [1995] 7 Admin. LR 445 (CA) ('reliance and detriment as such are not necessarily required in every legitimate expectation case' (Simon Brown LJ)). For criticism see [1998] *Judicial Review* 196 (Bamforth). For the relationship between legitimate expectations and estoppel, see above, p. 339.

[53] *R.* v. *Inland Revenue Commissioners ex p. Matrix-Securities Ltd* [1994] 1 WLR 334 ('advance' clearance undertaking to tax a Docklands property development in a certain way given by revenue but withdrawn before funds invested, no protection of expectation).

[54] See *ex p. Begbie*, below, where the absence of reliance was said by Gibson LJ to be 'very much the exception, rather than the rule'. And to like effect: *R. (Bibi)* v. *Newnham LBC* [2002] 1 WLR 237 (CA) (reliance not required as matter of law, but reliance was a relevant consideration in deciding whether it was unfair for the authority to resile from their promise).

[55] *R.* v. *Inland Revenue Commissioners ex p. MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545; *ex p. Matrix-Securities* (above).

[56] *ex p. MFK Underwriting Agencies Ltd* and *ex p. Matrix-Securities*.

Disclosure and reliance are, however, inappropriate requirements in many cases. While a taxpayer cannot expect the Revenue to be bound by a personal assurance given when the full nature of the taxpayer's scheme has not been disclosed, nothing more than proof that the claimant falls within the terms of the published policy should be required when the legitimate expectation is founded upon the announcement of such a policy. And the only reliance that a prisoner will be able to place in a promise of home leave or consideration for parole will be to use it to kindle hope.

The expectations that individuals may have are very various.[57] And determining whether an expectation exists, and whether it is legitimate, requires the investigation of many circumstances. Clear statutory words, of course, override any expectation howsoever founded.[58] In principle a legitimate expectation can be founded upon an unincorporated treaty, but it is seldom that the terms of the treaty will be sufficiently precise or known to the individual concerned.[59] A statement made by a minister cannot found an expectation that another independent officer will act in a particular way.[60] Similarly, an election promise made by a shadow minister did not

[57] In *R.* v. *Devon County Council ex p. Baker* (above) at 88 Simon Brown LJ identified four categories of legitimate expectation. One category consisted of a legitimate expectation of fairness discussed and rejected above. The other three categories are substantive expectations substantively protected (category (1), substantive right), substantive expectations procedurally protected (category (2) interest or benefit that triggers duties of fairness and reasonableness), and procedural expectations procedurally protected (category (3), special procedural entitlement)—discussed now. Category 1 expectations—substantive expectations, substantively protected—are discussed, above, p. 375.

[58] *R.* v. *DPP ex p. Kebilene* [1999] 3 WLR 972 (HL) (no legitimate expectation that prosecutorial discretion would be exercised in accordance with the European Convention, since the Human Rights Act 1998, s. 22, clearly postponed the operation of the Convention). See above, p. 166. And see *R.* v. *Secretary of State for Education, ex p. Begbie* [2000] 1 WLR 1115 (CA) (to give effect to expectation that the state funding for private schooling of a class of children would continue until the end of their schooling, would fetter the minister's statutory discretion to allow such funding in exceptional cases). And see *R. (Bloggs 61)* v. *Home Secretary* [2003] 1 WLR 2724.

[59] Although the dictum from *Teoh*, see above, p. 502, n. 51, founding a legitimate expectation on the terms of a treaty was approved obiter in *R.* v. *Home Secretary ex p. Ahmed* [1999] COD 69 (Lord Woolf MR), the principle has not since been adopted: *R.* v. *DPP ex p. Kebilene* [1999] 3 WLR 175 (DC) (ratification of the European Convention does not found legitimate expectation that it would be followed): 'It was generally assumed at the time [in 1950] that ratification would have no practical effect on British law or practice, as proved for many years to be the case. It cannot plausibly be said that [this] gives rise to any legitimate expectation today'; and *R.* v. *Home Secretary ex p. Behluli* [1998] COD 328 (no legitimate expectation that asylum applications would be dealt with in accordance with the Dublin Convention (see above, p. 78); statements relied upon lacked 'the requisite degree of clarity and certainty'). Cf. *R.* v. *Uxbridge Magistrates' Court ex p. Adimi* [2001] QB 667 (asylum seekers had a legitimate expectation that they would not be prosecuted for using false documents contrary to Art. 31 of the UN Convention Relating to the Status of Refugees, Cmd. 9171 (1951)). *Teoh* was also approved, *en passant*, in *Higgs* v. *Minister of National Security* [2000] 2 AC 228 (PC), 241.

[60] *R.* v. *DPP ex p. Kebilene*, above (DC) (statement by minister could not found expectation concerning the future decisions of the Director of Public Prosecutions).

bind the responsible minister after the change of government.[61] The notification of a relevant change of policy destroys any expectation founded upon the earlier policy.[62]

Expectations may, however, broadly be divided into two groups. An expectation may, first of all, be a procedural expectation where a particular procedure not otherwise required has been promised. Thus where the government of Hong Kong announced that certain illegal immigrants would be interviewed before deportation a procedural expectation was established.[63] Secondly, what is expected may be a particular or favourable decision by the authority. Thus where the Home Secretary had specified the criteria applicable to a decision to allow a child to enter the UK with a view to adoption there was a substantive expectation that those criteria (which were satisfied by the applicant) and not others would be used when the decision was taken.[64]

Procedural expectations are protected simply by requiring that the promised procedure be followed. Substantive expectations are often protected procedurally, i.e. by extending to the person affected an opportunity to make representations before the expectation is dashed. Thus where recommended applicants for hospital posts were rejected in breach of a long-established practice because they had complained about bad conditions, they were held entitled to a hearing before rejection.[65] The person affected is not entitled to a favourable decision but the trust which he has reposed in the decision-maker's undertaking should be protected. But there are other cases in which procedural protection cannot adequately remedy the unfairness occasioned by the decision-maker's breach of his promise or established practice. Thus in the case of the boy seeking admission with a view to adoption the Court of Appeal found that refusing admission on an altogether different ground amounted to 'grossly unfair administration' and, in the absence of an 'overriding public interest' justifying the change, the old criteria should apply.[66] Although such substantive protection has been recognised several times in

[61] *Ex parte Begbie*, above.

[62] *Fisher* v. *Minister of Public Safety* (No. 2) [1999] 2 WLR 349 (any expectation that prisoners would not be executed while their petition was being considered by Inter-American Commission on Human Rights dashed by letters to the prisoners' solicitors stating date beyond which the government would not wait for the IACHR's decision) and many other cases. *Fischer* was distinguished in *Lewis* v. *A.-G. of Jamaica* [2001] 2 AC 50. The latter decision, however, rested on a constitutional right to 'the protection of the law' which was held wide enough to encompass petition to the IACHR. See further p. 505 (change of policy).

[63] *A.-G. of Hong Kong* v. *Ng Yeun Shui*, above, p. 500.

[64] *R.* v. *Home Secretary ex p. Asif Mahmood Khan* [1984] 1 WLR 1337.

[65] *Administrator, Transvaal* v. *Traub* 1989(4) SA 731. For English authority recognising this category see *Schmidt* v. *Home Secretary* [1969] 2 Ch. 149 (the first legitimate expectation case in English law), *R.* v. *Secretary of State for Transport ex p. Richmond upon Thames LBC* [1994] 1 WLR 74 at 92G and *ex p. Baker* at 88.

[66] *Ex parte Khan*, above, pp. 372 and 500.

the decided cases,[67] it sits awkwardly with the need not to fetter the exercise of discretion and, moreover, decision-makers must not, by the substantive protection of expectations, be prevented from changing their policies. Two Court of Appeal decisions hold that substantive protection of expectations will only be possible where the change in policy is irrational.[68] Thus a change in prisoners' home leave policy meant that certain prisoners' first home leave took place significantly later than they were led to expect when they entered the prison; but the court held that this change was not irrational and their expectations were not protected.[69] But a decision by the Revenue to abandon a twenty-year-old practice of allowing a taxpayer, because of the complexity of its affairs, to make late claims for loss relief was irrational; and the expectation of the practice continuing was protected.[70] In a later case, however, a health authority which, for practical and financial reasons, wished to close a specially built home for very seriously injured long-term patients, in breach of its promise to the residents that it was their 'home for life', was prevented from doing so.[71] The Court of Appeal, in rejecting rationality as the appropriate standard of review, held that it was for the court to judge 'whether there [was] a sufficient overriding interest to justify a departure from what has previously been promised'.[72] This approach is consistent with European law which balances the protection of the general public interest against the individual's legitimate expectation.[73] These cases reveal that expectations may be more readily protected substantively when the expectation is given individually to a small group (such as the residents of a care home) than where a general announcement of policy is made to a large group (such as prisoners).[74] In the first class of case the decision-maker's freedom of action is being restricted only in exceptional cases, while in the second a general restriction applicable in all cases is required. As discussed above,[75] these decisions link the concepts of fairness and reasonableness in a fruitful way.

[67] *Ex p. Khan* (above); *R.* v. *Home Secretary ex p. Ruddock* [1987] 1 WLR 1482; *R.* v. *Inland Revenue Commissioners ex p. MFK Underwriting Agents Ltd* [1990] 1 WLR 1545; *R.* v. *Jockey Club ex p. RAM Racecourses* [1993] 2 All ER 225; *Oloniluyi* v. *Home Secretary* [1989] Imm AR 135 and *ex p. Baker* (above). And see above, p. 373.

[68] *R.* v. *Home Secretary ex p. Hargreaves* [1997] 1 WLR 906 and *R.* v. *Inland Revenue Commissioners ex p. Unilever plc* [1996] STC 681 (decision also based upon fairness). For comment see [1997] *PL* 375 (Forsyth) and (1997) 56 *CLJ* 1 (Bamforth). And see above, p. 373.

[69] *Ex p. Hargreaves* (above).

[70] *Ex p. Unilever plc* (above).

[71] *R.* v. *North and East Devon Health Authority ex p. Coughlan*, [2000] 2 WLR 622. For discussion see above p. 375. For criticism see [2000] *Judicial Review* 27 (Elliott).

[72] Lord Woolf, Sedley and Mummery LJJ concurring.

[73] See *Mulder* v. *Minister of Landbouw and Visserij* [1998] ECR 2321 and *Mulder* v. *Council and Commission*, C-104/89 and C-37/90 [1992] ECR I-3061 discussed fully (1996) 55 *CLJ* 289 (Craig). A similar approach was adopted by Sedley J in *R.* v. *Ministry of Agriculture, Fisheries and Food ex p. Hamble Fisheries (Offshore) Ltd.* [1995] 2 All ER 714 but this was rejected as a 'heresy' in *ex p. Hargreaves* as explained above, p. 373.

[74] The size of the group affected also played a role in *Ng Siu Tung* v. *Director of Immigration* [2002] 1 HKLRD 561 discussed (2002) 10 *Asia Pacific Law Review* 29 (Forsyth and Williams).

[75] See p. 372, especially in regard to *ultra vires* expectations.

Supplementation of statutory procedures

Many cases cited in this chapter illustrate the way in which the principles of natural justice are used to supplement procedures which themselves provide for a hearing or inquiry, with or without detailed regulation of the procedure. As Lord Reid said:[76]

> For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.

Or, in the words of Lord Bridge:

> In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.[77]

No statutory procedure is likely to cover every possibility of unfairness. Gaps may therefore be filled by resorting to 'the justice of the common law'. Thus objectors at public inquiries must be given a fair opportunity to meet adverse evidence, even though the statutory provisions do not cover the case expressly,[78] inquiries must not be unfairly renewed;[79] adjournments must be granted where fairness so demands;[80] and rival applications must be treated fairly.[81] And issues that 'the public law principle of fairness' requires to be taken separately, must be heard and decided separately.[82]

Where a fair hearing 'would make no difference'

Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no

[76] *Wiseman* v. *Boardman* [1971] AC 297 at 308. See also *R.* v. *Hull Prison Visitors ex p. St Germain* [1979] 1 WLR 1401 at 1408; *R.* v. *Home Secretary ex p. Abdi* [1996] 1 WLR 298 at 313 (HL).

[77] *Lloyd* v. *McMahon* [1987] AC 625 at 702. Several of the judgments emphasise this point.

[78] *Errington* v. *Minister of Health* [1935] 1 KB 249 and other cases cited below, p. 512. And see *Steele* v. *Minister of Housing and Local Government* (1956) 6 P & CR 386 (inspector and minister must act judicially in accordance with natural justice).

[79] *R.* v. *Secretary of State for the Environment ex p. Fielder Estates (Canvey) Ltd.* (1989) 57 P & CR 424.

[80] *Majorpier Ltd.* v. *Secretary of State for the Environment* (1989) 59 P & CR 453.

[81] *Lakin Ltd.* v. *Secretary of State for Scotland* 1988 SLT 780.

[82] *Raji* v. *General Medical Council* [2003] UKPC 24; [2003] 1 WLR 1052 (PC), para. 16 (Professional Conduct Committee of the GMC not free to decide whether to restore practitioner to register at the same time as it decided whether he could make further applications for restoration).

difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly. Lord Wright once said:[83]

> If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.

The dangers were vividly expressed by Megarry J, criticising the contention that 'the result is obvious from the start':[84]

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

The last few words are especially apt for administrative decisions. They were adopted in a later case where the court quashed a Secretary of State's order reducing a local authority's rate support grant for failure to grant them a hearing at the proper time.[85] Even though it was 'certainly probable' that the decision would have been the same, since all the arguments had been fully rehearsed at an earlier stage, the court declined to hold that a hearing would have been a useless formality. In another case it has been held that it is a breach of natural justice for a magistrates' court to order the destruction of a dog under the Dangerous Dogs Act 1991 without hearing the owner, even where the court has no discretion but to order the destruction, since the procedure was fundamentally faulty. The argument that it would not have made any difference 'is to be treated with great caution. Down that slippery slope lies the way to dictatorship'.[86] In the leading case Bingham LJ gave six reasons why such a holding should be a very rare event, although the court then proceeded so to hold in validating the dismissal of a probationer police constable for obesity, a physical fact which could not be gainsaid, even though an adverse report about him was not disclosed.[87] And in a difficult case where the police did not disclose adverse reports on ex-prisoners before informing their neighbours

[83] *General Medical Council* v. *Spackman* [1943] AC 627 at 644; and see *Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] AC 945 at 956 (Lord Denning).

[84] *John* v. *Rees* [1970] Ch. 345 at 402. Approved in *R. (Amin)* v *Home Secretary* [2003] UKHL 51; [2003] 3 WLR 1169 (HL), para 52 (Lord Steyn). See similarly *ex p. Fanneran* (below) at 359 (Rougier J).

[85] *R.* v. *Secretary of State for the Environment ex p. Brent LBC* [1982] QB 593, followed in *Simpex (G. E.) Holdings Ltd.* v. *Secretary of State for the Environment* (1988) 57 P & CR 306 at 324. Contrast *R.* v. *Secretary of State for the Environment ex p. Hammersmith and Fulham LBC* [1991] 1 AC 521.

[86] *R.* v. *Ealing Magistrates' Court ex p. Fanneran* [1996] 8 Admin. LR 351 at 356 (Staughton LJ).

[87] *R.* v. *Chief Constable of Thames Valley Police ex p. Cotton* [1990] IRLR 64 (medical report had advised that constable's weight made him unfit for full duty). Bingham LJ quotes his six points in [1991] *PL* at 72.

that they were convicted paedophiles, the Court of Appeal held that although the reports, or at least their gist, should have been disclosed, the omission was immaterial since disclosure would have made no difference.[88]

This question profoundly affected the course of *Ridge* v. *Baldwin*. The argument favoured by the lower courts, and in Lord Evershed's dissenting speech, was that natural justice need not be enforced in the absence of a miscarriage of justice or some probable effect on the result.[89] The House of Lords rejected this reasoning decisively, but nevertheless it has made a reappearance in several later cases. In one, a university student had been rusticated without a hearing and in breach of natural justice, but the courts refused him relief on the ground that his offence was of the kind that merited a severe penalty and the penalty inflicted on him was perfectly proper.[90] In another case, where a schoolteacher's dismissal was annulled by the House of Lords because he had not been fairly heard, it was said that a man had no right to be admitted to state his own case unless he could show that he had a case of substance to make, since the 'court does not act in vain'; and that it need not be determined whether a hearing was required where it 'could only be a useless formality' because there was nothing that the person affected could say against the action taken.[91] Much the same was said by the Court of Appeal where car-hire drivers were banned from London Airport because of repeated and persistent offences against the regulations.[92] There may be cases where it is merely futile to grant relief, as where food hawkers were refused street trading consent without being allowed to see objections which had been lodged but which, as was found when the judge inspected them, could not have affected the decision.[93]

Judges are naturally inclined to use their discretion when a plea of breach of natural justice is used as the last refuge of a claimant with a bad case. But that should not be allowed to weaken the basic principle that fair procedure comes first, and that it is only after hearing both sides that the merits can be properly considered. A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim

[88] *R.* v. *Chief Constable of North Wales Police ex p. AB* [1998] 3 WLR 57.

[89] See [1963] 1 QB at 556 (contention that no hearing was required since police officer had convicted himself out of his own mouth). See also *Byrne* v. *Kinematograph Renters Society Ltd.* [1958] 1 WLR 762. For criticism see above, p. 495; [1975] *PL* 27 (D. H. Clark).

[90] *Glynn* v. *Keele University* [1971] 1 WLR 487; see below, p. 510.

[91] *Malloch* v *Aberdeen Cpn.* [1971] 1 WLR 1578 at 1595 (Lord Wilberforce), 1600 (Lord Simon), criticised by D. H. Clark (as above). For this case see below, p. 544. See also *Wislang* v. *Medical Practitioners Disciplinary Committee* [1973] 1 NZLR 29 (fact that defence was likely to be unsuccessful taken into account in refusing relief in discretion); *Stininato* v. *Auckland Boxing Association* [1978] 1 NZLR 1 (relief refused to boxer denied licence because of complaints).

[92] *Cinnamond* v. *British Airports Authority* [1980] 1 WLR 582 (Shaw and Brandon LJJ).

[93] *R.* v. *Bristol CC ex p. Pearce* (1984) 83 LGR 711.

are such that it would in any case be hopeless. But in the case of a discretionary administrative decision, such as the dismissal of a teacher or the expulsion of a student, hearing his case will often soften the heart of the authority and alter their decision, even though it is clear from the outset that punitive action would be justified.[94] This is the essence of good and considerate administration, and the law should take care to preserve it.

Relief refused in discretion

Closely akin to the subject of the foregoing paragraphs, and overlapping it in some cases, is the question of the court's discretion. The remedies most used in natural justice cases—certiorari, prohibition, mandamus, injunction, declaration—are discretionary, so that the court has power to withhold them if it thinks fit; and from time to time the court will do so for some special reason, even though there has been a clear violation of natural justice.[95]

In one case a magistrates' clerk was dismissed from office for misconduct and was deprived of his pension rights, in both cases without a hearing, and was subsequently imprisoned for fraudulent conversion. Later he sought declarations that the dismissal and deprivation were void, and it was held that the authorities had wrongly denied him a hearing. Nevertheless the court refused to grant relief as regards his pension rights (the other claim having been abandoned) since he had been offered a full hearing but had refused it in order to pursue legal claims which he later dropped, had given inconsistent evidence, and had brought about a situation where to grant the declaration would mean further waste of time.[96]

The House of Lords exercised discretion in an unusual way in the case of a police probationer who had been unjustly required to resign. Since he was the holder of an office, and since he was held entitled to treat himself as unlawfully dismissed, he should have been granted mandamus so as to reinstate him. The House of Lords shrank from this because 'in practice it might border on usurpation of the powers of the chief constable', and they declared the probationer entitled only to the remedies of unlawful dismissal.[97] In other words, the House were not willing to

[94] For an example see Wade, *Towards Administrative Justice*, 10. In *Ridge* v. *Baldwin* the hearing later given to the chief constable's solicitor induced three members of the watch committee to change their minds: [1964] AC 40 at 47; and see at 68 (Lord Reid).

[95] For a general statement see *Hoffmann–La Roche* v. *Secretary of State for Trade and Industry* [1975] AC 295 at 320 (Lord Denning MR). For discretionary remedies generally see below, p. 700.

[96] *Fullbrook* v. *Berkshire Magistrates' Courts Committee* (1970) 69 LGR 75. And see *Wislang* v. *Medical Practitioners Disciplinary Committee* [1973] 1 NZLR 29.

[97] *Chief Constable of the North Wales Police* v. *Evans* [1982] 1 WLR 1155 (Lord Brightman). Lord Bridge was in favour of granting mandamus. Contrary to its title and the report (at 1157), this was an application for judicial review. For further discussion see (1983) 99 *LQR* 171, (1985) 101 *LQR* 154 (Wade).

protect this particular office specifically in the circumstances of the case[98], feeling perhaps that the chief constable's hand ought not to be forced.

Discretion has been exercised in several cases where fair hearings have not been given to university students in disciplinary proceedings. One is in the case of the rusticated student mentioned above, in which an injunction was refused.[99] In another, students who had been required to withdraw for failure in examinations ought to have been given a hearing, but they delayed for seven months before taking legal action and the court declined to grant prerogative remedies to 'those who sleep upon their rights'.[1] Academic discipline is discussed further below.[2]

Where it is by the applicant's own default, or by that of his advisers, that his case cannot be heard, the courts have sometimes been willing to exercise discretion in his favour. But the House of Lords reversed such a decision in a deportation case where the applicant missed the hearing of his appeal because his solicitor wrote to him at the wrong address,[3] and this decision appears to mark the end of these indulgences.

Judicial discretion in withholding remedies is very carefully exercised and is a good deal less dangerous than some other arguments which have been used as excuses for condoning breaches of natural justice. Nevertheless it needs to be exercised with constant regard to the dangers mentioned in the preceding section.

Who is entitled to sue?

It seems plain that denial of a fair hearing is a wrong which is personal to the party aggrieved. If he himself waives the objection and does not complain, it is not the business of other people to do so, for as against them there is nothing wrong with the decision.[4] In the Ceylon case already mentioned, accordingly, the proper person to challenge the minister's action was the municipal council itself, which had not been lawfully dissolved.[5] Since in fact the proceedings were brought by the mayor personally, he failed as not being the proper plaintiff. The Privy Council held that this was because the minister's order was merely voidable, as already

[98] For specific protection of offices see below, p. 539.

[99] *Glynn* v. *Keele University* (above).

[1] *R.* v. *Aston University Senate ex p. Roffey* [1969] 2 QB 538. The application for prerogative remedies was probably misconceived: see (1974) 90 *LQR* 157 (Wade).

[2] Below, p. 545.

[3] *R.* v. *Home Secretary ex p. Al-Mehdawi* [1990] 1 AC 876. Contrast *R.* v. *Diggines ex p. Rahmani* [1985] QB 1109 (affirmed on other grounds [1986] AC 475); *R.* v. *Immigration Appeal Tribunal ex p. Enwia* [1984] 1 WLR 117 at 130.

[4] *Hoffman–La Roche & Co.* v. *Secretary of State for Trade and Industry* [1975] AC 295 at 320 (Lord Denning MR); *Credit Suisse* v. *Allerdale B.C.* [1997] QB 306 at 356 (Hobhouse LJ); *R.* v. *Home Secretary ex p. Jeyeanthan* [2000] 1 WLR 354 at 365.

[5] *Durayappah* v. *Fernando* [1967] 2 AC 337; above, p. 495.

explained. The true reason, it is submitted, is to be found by asking what is the condition to be read into the statute. That condition need not be that any order made without giving a hearing is void: it should rather be that such an order is void unless accepted by the person concerned. The same point could be expressed in terms of locus standi, but more probably it is inherent in the principle of natural justice itself.

Similarly if in *Ridge* v. *Baldwin* the chief constable had not contested his dismissal, a third party could not have contested some order made by his successor on the ground that the former chief constable's dismissal was void, so that he was still in office.[6] It would be absurd to imply into any statute a condition capable of producing that effect. Consequently there is no contradiction in saying that a breach of natural justice can be waived but that if it is not waived the act is void.[7]

It does not follow that no third party can ever complain of a breach of natural justice, though this may be true as regards denial of a fair hearing. If a biased licensing authority grants an application, this is a wrong done not to the applicant but to other interested parties and to the public interest generally. In that case the court may suitably grant a remedy, as happened in one such case.[8]

Where the Secretary of State calls in a local plan for decision by himself instead of by the local planning authority, that authority has no right to be heard since it is not sufficiently affected.[9] Nor, probably, has a shareholder in a company the listing of whose shares is cancelled by the stock exchange, when the company itself does not complain.[10]

Sometimes third parties may be seriously affected and then they may be entitled to claim fair treatment. In one case an insurance company was prohibited by LAUTRO from accepting further business from a particular agent. Under LAUTRO's rules only the company was entitled to appeal, and the company did not do so. The agent himself was given no opportunity of resisting the prohibition, which seriously damaged his business. The Court of Appeal held that LAUTRO had a duty to act fairly towards the agent as well as towards the company, and that where for the protection of the public the prohibition had to be issued urgently, the agent should have the right to apply for its rescission and also a right of appeal. But the agent's complaint was that he was not consulted before the notice of prohibition

[6] As pointed out in *Durayappah* v. *Fernando*, above, at 353, saying that it was 'a matter of ordinary common sense'. It might also have been affected by the doctrine of officers de facto: see above, p. 285.

[7] See above, p. 494, and (1968) 84 *LQR* at 109 (Wade).

[8] *R.* v. *Hendon Rural District Council ex p. Chorley* [1933] 2 KB 696.

[9] *R.* v. *Secretary of State for the Environment ex p. Southwark LBC* (1987) 54 P & CR 226, holding also that there is no right to be heard before rejection of the plan, except where a statutory inquiry is held.

[10] *R.* v. *International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd. ex p. Else (1982) Ltd.* [1993] QB 534 (dealing with both domestic and EC law).

was served, and in this he failed, since LAUTRO was in the dilemma that so often besets regulatory authorities and was justified in acting with urgency.[11]

The right to know the opposing case

A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view'.[12] Lord Denning has added:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.[13]

Accordingly where a chief constable required a police probationer to resign on account of allegations about his private life which he was given no fair opportunity to rebut the House of Lords granted him the remedies of unlawful dismissal.[14] The Court of Appeal likewise quashed the refusal of renewal of a taxi-driver's licence because an adverse medical report was not disclosed to him;[15] and the High Court quashed the entry on a child abuse register of the name of a suspect who was not told about the accusation.[16] Where a police officer was dismissed in Malaya, after a hearing before an adjudicating officer, the Privy Council declared the dismissal void because the adjudicating officer was in possession of a report of a board of inquiry which made charges of misconduct but which was not available to the police officer.[17] A similar case in England led to the quashing by certiorari of a decision of an Industrial Injuries Commissioner.[18] After hearing the case the

[11] *R.* v. *Life Assurance Unit Trust Regulatory Organisation Ltd. ex p. Ross* [1993] QB 17, not applying to the dictum of Lord Diplock in *Cheall* v. *APEX* [1983] 2 AC 190, where the case was much weaker. See also *R.* v. *LAUTRO Ltd ex p. Tee* (1994) 8 Admin. LR 289.

[12] Above, p. 483.

[13] *Kanda* v. *Government of Malaya* [1962] AC 322. See similarly *A.-G.* v. *Ryan* [1980] AC 718 (application for citizenship refused without disclosing grounds).

[14] *Chief Constable of the North Wales Police* v. *Evans* [1982] 1 WLR 1155; see similarly *R.* v. *Home Secretary ex p. Benwell* [1985] QB 554; *R.* v. *Chief Constable of Thames Valley Police ex p. Stevenson*, The Times, 22 April 1987; *R.* v. *Chief Constable of Avon & Somerset ex p. Clarke*, The Independent, 27 November 1986.

[15] *R.* v. *Assistant Metropolitan Police Commissioner ex p. Howell* [1986] RTR 52. See likewise *R.* v. *Secretary of State for Health ex p. Gandhi*, [1991] 1 WLR 1053 (failure to disclose papers needed by doctor appealing against non-appointment).

[16] *R.* v. *Norfolk CC Social Services Department ex p. M.* [1989] QB 619. Contrast *R.* v. *Harrow LBC ex p. D.* [1990] Fam. 133 (written submissions allowed, procedure held fair).

[17] *Kanda* v. *Government of Malaya* (above); similarly *Shareef* v. *Commissioner for Registration of Indian and Pakistani Residents* [1966] AC 47. The same principle has been applied to the ejection of a housing authority's tenant: *Re Webb and Ontario Housing Cpn.* (1978) 93 DLR (3d) 187; and to the discharge of a soldier from the army: *State (Gleeson)* v. *Minister for Defence* [1976] IR 280; and to the non-reappointment of magistrates: *Macrae* v. *Attorney-General for New South Wales* (1987) 9 NSWLR 268.

[18] *R.* v. *Deputy Industrial Injuries Commissioner ex p. Jones* [1962] 2 QB 677.

Commissioner obtained, as he was empowered to do, a report from an independent medical expert; but the parties were not notified and were therefore unable to comment on the report. The Commissioner had, in effect, taken further evidence, unknown to the parties, between the hearing and the decision.[19] The same principle applies where a party is allowed to know only part of the real charge against him, as where a minister made it clear in a later speech that he had acted partly on grounds which he had not notified to the person against whom he made his order.[20] Another case in the same class is where a tribunal decides a case on some point which has not been argued before it, without giving the party an opportunity to comment on it.[21] Another is where a rent tribunal, having inspected the property before the hearing, fails to inform the landlord of unfavourable conclusions formed at the inspection.[22] Another is where a tribunal follows some previous decision of its own without disclosing it.[23] And where the Home Secretary is considering whether to refer a prisoner's case to the Court of Appeal on the ground that there may have been a miscarriage of justice, the prisoner is 'in the vast majority of cases' entitled to the expert witnesses' reports prepared on his case.[24] A fair procedure must be followed when exercising the prerogative of mercy. Thus the Governor-General of Jamaica who chaired the committee, the Jamaican Privy Council, which decided[25] whether to reprieve a convicted murderer sentenced to death, had to ensure that notice of the date of the crucial meeting and all the documents before the committee were available to the condemned man.[26]

A group of cases concerning statutory public inquiries also falls into this class. As already explained, natural justice does not require a minister to disclose all the information about a proposed housing scheme which his department collected before any objection to the scheme was lodged.[27] Nor need he necessarily disclose other schemes in his department which might possibly affect the scheme in

[19] See similarly *Taylor* v. *National Union of Seamen* [1967] 1 WLR 532 (evidence heard in accused party's absence); *Kane* v. *University of British Columbia* (1980) 110 DLR (3d) 311.

[20] *Maradana Mosque Trustees* v. *Mahmud* [1967] 1 AC 13. See also *R.* v. *Home Secretary ex p. Awuku*, The Times, 3 October 1987 (Home Secretary's decision quashed since based on facts which immigrant was given no opportunity to explain); *R.* v. *Bedfordshire CC ex p. C* (1986) 85 LGR 218 (council's refusal to return child to father quashed since based on mother's allegations not put to him).

[21] *R.* v. *Industrial Injuries Commissioner ex p. Howarth* (1968) 4 KIR 621; *Sabey (H.) & Co.* v. *Secretary of State for the Environment* [1978] 1 All ER 586 (public inquiry); *TLG Building Materials* v. *Secretary of State for the Environment* (1980) 41 P & CR 243 (public inquiry).

[22] *R.* v. *Paddington etc. Rent Tribunal ex p. Bell London Properties Ltd.* [1949] 1 KB 666.

[23] *R.* v. *Criminal Injuries Compensation Board ex p. Ince* [1973] 1 WLR 1334 at 1345.

[24] *R.* v. *Home Secretary ex p. Hickey* (1995) 7 Admin. LR 549.

[25] Governer General is bound to act on the Jamaican Privy Council's advice: Constitution of Jamaica 1962, s. 90(2).

[26] *Lewis* v. *A.-G. of Jamaica* [2001] AC 50 (PC) – *de Freitas* v. *Benny* [1976] AC 239 (PC); *Reckley* v. *Minister of Public Safety* (No. 2) [1996] AC 527 not followed.

[27] Above, p. 484.

question.[28] But after objection is lodged he must not receive evidence from one party without disclosing it to the others, as is shown by the case of the Jarrow clearance order.[29] The inspector who holds the inquiry must also take care to disclose all the material facts to all concerned. Compulsory purchase orders have been quashed where the inspector during his site inspection asked the residents about their wishes and failed to inform the objectors of the answers, even though it was not clear that the answers had prejudiced the objectors' case;[30] and where the inspector based his recommendations upon what he had himself seen on his site inspection, without disclosing to the objectors that this raised questions quite different from those ventilated at the inquiry.[31] In such cases the inspector ought to give the parties a fair opportunity to comment on the new evidence.[32] Likewise the minister, when considering the inspector's report, ought not to take account of new factual evidence relating to the particular case without giving the parties an opportunity to comment on it.[33] But for this situation there are usually statutory rules, explained elsewhere.[34]

Disclosure of the charge or of the opposing case must be made in reasonable time to allow the person affected to prepare his defence or his comments.[35] He must have fair notice of any accusation against him, and this is commonly included in the right to a fair hearing by calling it the right 'to notice and hearing'. At an inquiry, for example, any person who might be affected by adverse findings should be given fair warning so that he can defend himself against them at the hearing.[36] But notice may not be indispensable as to matters where no fact is in dispute and there is no prejudice to the party charged.[37]

As several of the above-mentioned cases show, natural justice often requires the

[28] *Rea* v. *Minister of Transport* (1982) 48 P & CR 239 (claim that motorway schemes were interdependent; disclosure not required).

[29] *Errington* v. *Minister of Health* [1935] 1 KB 249, discussed above, p. 485, and citing other cases. See also *Lake District Special Planning Board* v. *Secretary of State for the Environment* (1975) 236 EG 417; *Reading BC* v. *Secretary of State for the Environment* (1985) 52 P & CR 385, where a planning authority was given the benefit of this rule; *British Muslims' Association* v. *Secretary of State for the Environment* (1987) 57 P & CR 205 (inspector spoke with council officers: decision quashed).

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

[31] *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 WLR 1255 (inspector noticed signs of unsafe foundations).

[32] Compare *Second City (South West) Ltd.* v. *Secretary of State for the Environment* (1990) 60 P & CR 498 (failure to disclose change of policy). As to site inspections see *Winchester CC* v. *Secretary of State for the Environment* (1978) 36 P & CR 455.

[33] *Geraghty* v. *Minister for Local Government* [1976] IR 153. Compare *R.* v. *Secretary of State for Education and Science ex p. Islam* (1992) 5 Admin. LR 177 (refusal of grant-aided status for school quashed for non-disclosure of changed circumstances).

[34] Below, p. 981. See also *Pfizer Co. Ltd.* v. *Deputy Minister of National Revenue* (1975) 68 DLR (3d) 9.

[35] *R.* v. *Thames Magistrates' Court ex p. Polemis* [1974] 1 WLR 1371; *Brentnall* v. *Free Presbyterian Church of Scotland* 1986 SLT 471.

[36] *Mahon* v. *Air New Zealand Ltd.* [1984] AC 808.

[37] See *Davis* v. *Carew-Pole* [1956] 1 WLR 833.

disclosure of reports and evidence in the possession of the deciding authority. A licensing authority must disclose any objections lodged with it so that the applicant may reply to them.[38] A prisoner whose release on parole is revoked is entitled to be notified of adverse facts to be put before the parole board.[39] Where a police officer was compulsorily retired after being examined by a medical officer chosen by the police authority, the Court of Appeal held that natural justice had been violated because the police officer's own doctor had not been allowed to see the report of an inquiry and a medical report made to the police authority, though it was also held that these need not necessarily be disclosed to the police officer himself.[40] A tribunal must disclose reports and evidence bearing upon the case before it, although it may use its own knowledge and experience as to general questions.[41] The decision of an assessment committee was therefore quashed when it failed to disclose a report by an expert valuer which made it fix a rating assessment at a figure higher than that contended for by the rating authority; and the majority of the Court of Appeal held that it made no difference whether the report was obtained before or after the assessment was objected to or whether the report was of a general or specific character.[42] In New Zealand the decision of a town planning committee was held to be void because at the hearing given to the parties the committee failed to disclose a long report from its planning officer about the case;[43] and the dismissal of a civil servant was invalid because an adverse report about him was not disclosed.[44] In Australia the court has rejected the plea that the undisclosed material was not considered or would have made no difference.[45]

Limits to the right to see adverse evidence

In some administrative situations there are limits to the broad principles stated above. The court must always consider the statutory framework within which natural justice is to operate, and a limit may sometimes necessarily be implied.

[38] *R.* v. *Huntingdon DC ex p. Cowan* [1984] 1 WLR 501 (objections to entertainments licence not disclosed; refusal quashed).

[39] *R.* v. *Home Secretary ex p. Georghiades* (1992) 5 Admin. LR 457. For other cases concerning prisoners see below, p. 549.

[40] *R.* v. *Kent Police Authority ex p. Godden* [1971] 2 QB 662. See likewise *R.* v. *London County Council ex p. Commercial Gas Co.* (1895) 11 TLR 337 (reports of gas testing must be disclosed).

[41] *R.* v. *National Insurance Commissioner ex p. Viscusi* [1974] 1 WLR 646; *Freeland* v. *Glasgow Licensing Board* 1980 SLT 101; and see below, p. 931.

[42] *R.* v. *Westminster Assessment Committee ex p. Grosvenor House (Park Lane) Ltd.* [1941] 1 KB 53. Scott LJ considered that a report obtained before the objection was lodged was part of the committee's expert knowledge and need not be disclosed.

[43] *Denton* v. *Auckland City* [1969] NZLR 256.

[44] *Fraser* v. *State Services Commission* [1984] 1 NZLR 116.

[45] *Minister for Immigration* v. *Taveli* (1990) 94 ALR 177.

What is essential is substantial fairness to the person adversely affected. But this may sometimes be adequately achieved by telling him the substance of the case he has to meet, without disclosing the precise evidence or the sources of information. The extent of the disclosure required by natural justice may have to be weighed against the prejudice to the scheme of the Act which disclosure may involve.[46] In a leading case the Court of Appeal applied these considerations to the procedure of the Gaming Board in granting certificates of consent to persons wishing to operate gaming clubs.[47] It was the Board's duty to investigate the credentials of applicants and to obtain information from the police and other confidential sources. Such sources, it was held, need not be divulged if there were objections properly based on the public interest. The Board must, however, give the applicant an indication of the objections raised against him so that he can answer them, as fairness requires. The same doctrine was applied to the preparation of a report by inspectors appointed by the Board of Trade to investigate the affairs of a company: their duty to act fairly did not require them to disclose the names of witnesses or the transcripts of their evidence, or to show to a director any adverse passages in their proposed report in draft.[48] But, without quoting chapter and verse, they must give him a fair opportunity to contradict what is said against him, as by giving him an outline of the charge; and if their information is so confidential that they cannot reveal it even in general terms, they should not use it.[49] Similarly, the Home Secretary in considering an application for naturalisation in which all the statutory requirements, save good character, were not in dispute, was obliged to identify the matters causing him difficulty and to provide an opportunity for the applicants to make representations about those matters.[50]

In the first two cases mentioned above, the authorities were held to have acted properly, since they had given fair hearings on the substance of the charges. But in

[46] But the statutory exclusion of the duty to give reasons does not limit the duty to disclose the adverse case (*ex p. Fayed*, below, p. 524).

[47] *R.* v. *Gaming Board for Great Britain ex p. Benaim and Khaida* [1970] 2 QB 417. Cf. *Ainsworth* v. *Criminal Justice Commission* (1991) 106 ALR 11.

[48] *Re Pergamon Press Ltd.* [1971] Ch. 388; and see *Maxwell* v. *Department of Trade and Industry* [1974] QB 523 (no duty to disclose inspectors' proposed conclusions); *Campbell* v. *Mason Committee* [1990] 2 NZLR 577. See also *Ceylon University* v. *Fernando* [1960] 1 WLR 223 (student suspended for cheating in examination not offered opportunity to confront accuser, but adequately informed of case to be met: student's suspension upheld); *O'Rourke* v. *Miller* (1985) 58 ALR 269.

[49] Cf. *Canterbury Building Society* v. *Baker* (1979) 2 NSWLR 265. As to cases involving national security see below, p. 553.

[50] *R.* v. *Home Secretary ex p. Fayed* [1997] 1 All ER 228 (CA). See also *R.* v. *Home Secretary ex p. McAvoy* [1998] 1 WLR 790 (prisoner whose security status was under review was entitled to gist of reports made to the review body but not to the reports in full. A prisoner was not entitled to detailed information (which was confidential) about the basis on which he was categorised as an exceptional high risk prisoner: *R.* v. *Home Secretary ex p. Mulkerrins* [1998] COD 235.

the last case the minister had not disclosed even the gist of matters causing difficulty and his decision was quashed. Similarly an immigration officer, who gave a suspected illegal immigrant a full opportunity to understand and contradict the case against him but who did not reveal reports which he had obtained when making inquiries was held to have acted fairly.[51] Lord Denning MR said that 'the rules of natural justice must not be stretched too far'. But he made it clear that the duty to act fairly applied in the same way to the investigations of the Race Relations Board (now the Commission for Racial Equality) and its committees.[52] This duty likewise obliges the Monopolies and Mergers Commission, in examining a proposed company take-over, to ensure that the parties understand the issues and arguments which will be decisive, but they need not necessarily disclose to one party every piece of evidence submitted by the other, provided always that there is no manifest unfairness.[53] A professional body in considering whether to approve an applicant as suitable for appointment to a senior post, was not obliged to disclose confidential reports containing consultants' opinions on the applicant's suitability.[54]

Procedure generally

A 'hearing' will normally be an oral hearing.[55] But in some cases it may suffice to give an opportunity to make representations in writing, provided that any adverse material is disclosed and provided, as always, that the demands of fairness are substantially met. The House of Lords has furnished the leading example in the case of the Liverpool councillors who had failed to make a valid rate and were surcharged by the district auditor for wilful misconduct. The auditor gave them full particulars of his complaints and offered to consider their representations in writing, which they duly made without asking to be heard orally. The Court of Appeal held that this procedure fell short of fairness, since the charges were serious, they attributed bad faith, and past practice had almost invariably been to give oral hearings in surcharge cases. The House of Lords held the contrary, finding that in dealing with a group of forty-nine councillors acting collectively, none of whom asked to be heard orally, the auditors had adopted a procedure which was both suitable and fair in all the circumstances.[56]

[51] *R.* v. *Home Secretary ex p. Mughal* [1974] QB 313. And see *Lim* v. *Minister of the Interior, Malaya* [1964] 1 WLR 554; *Herring* v. *Templeman* [1973] 3 All ER 569.

[52] *R.* v. *Race Relations Board ex p. Selvarajan* [1975] 1 WLR 1686.

[53] *R.* v. *Monopolies and Mergers Commission ex p. Matthew Brown Plc* [1987] 1 WLR 1235. Compare *Public Disclosure Commission* v. *Isaacs* [1988] 1 WLR 1043 (commission investigating allegations not required to disclose details to complainant).

[54] *R.* v. *Joint Higher Committee on Surgical Training ex p. Milner* (1995) 7 Admin. LR 454.

[55] *R.* v. *Immigration Tribunal ex p. Mehmet* [1977] 1 WLR 795 (tribunal's decision and resulting deportation order quashed for failure to afford oral hearing).

[56] *Lloyd* v. *McMahon* [1987] AC 625.

In various situations practicalities may justify dispensing with oral hearings.[57] It has been held that a statutory board, acting in an administrative capacity, may decide for itself whether to deal with applications by oral hearing or merely on written evidence and argument, provided that it does in substance 'hear' them;[58] and that dealing with an appeal on written communications only is not contrary to natural justice.[59] The visitor of a college may similarly deal with an appeal on written submissions only[60] and a student may be rusticated from his college without an oral hearing, if he has been told the nature of the complaints against him and given a fair opportunity to state his case in writing.[61] A licensing authority may give a 'hearing' on paper,[62] provided that the applicant is allowed to reply to any objections known to the authority.[63] An immigrant appealing against a deportation order need not be offered an interview.[64] Some statutory tribunals have power to dispense with oral hearings,[65] but if they do so, they must be careful to give a party a fair opportunity to comment on any adverse statement submitted.[66] Large numbers of planning appeals are disposed of on paper, but in those cases the appellant previously waived his right to a statutory hearing.[67] A number of tribunals may dispense with hearings under their statutory rules in certain circumstances.[68]

Where an oral hearing is given, it has been laid down that a tribunal must (a) consider all relevant evidence which a party wishes to submit; (b) inform every party of all the evidence to be taken into account, whether derived from another party or independently; (c) allow witnesses to be questioned; (d) allow comment on the evidence and argument on the whole case.[69] Failure to allow the last two

[57] See 'The Economics of Procedural Fairness' in *Johns* v. *Release on Licence Board* (1987) 9 NSWLR 103 at 113 (Kirby P), mentioning the need for cost–benefit analysis.

[58] See *R.* v. *Local Government Board ex p. Arlidge* [1914] 1 KB 160 at 191, approved in *R.* v. *Immigration Appeal Tribunal ex p. Jones (Ross)* [1988] 1 WLR 477; *R.* v. *Amphlett (Judge)* [1915] 2 KB 223 (district wages board); *Jeffs* v. *New Zealand Dairy Board* [1967] 1 AC 551 (dairy zoning order); *R.* v. *Harrow LBC ex p. D.* [1990] Fam. 133 (child abuse register).

[59] *Stuart* v. *Haughley Parochial Church Council* [1935] Ch. 452, affirmed [1936] Ch. 32 (lay electoral commission).

[60] *R.* v. *Bishop of Ely* (1794) 5 TR 475 at 477 (Buller J).

[61] *Brighton Cpn* v. *Parry* (1972) 70 LGR 576. See also *Ayanlowo* v. *Commissioners of Inland Revenue* [1975] IRLR 253 (dismissal of probationer civil servant: letter sufficient).

[62] *Kavanagh* v. *Chief Constable of Devon and Cornwall* [1974] QB 624. And see *British Oxygen Co. Ltd.* v. *Board of Trade* [1971] AC 610 at 625 (Lord Reid).

[63] *R.* v. *Huntingdon DC ex p. Cowan* [1984] 1 WLR 501.

[64] *R.* v. *Home Secretary ex p. Malhi* [1991] 1 QB 194.

[65] See below, p. 929.

[66] *R.* v. *Housing Appeal Tribunal* [1920] 3 KB 334. To like effect see *R.* v. *Law Society ex p. Ingham Foods Oy AB* [1997] 2 All ER 666.

[67] See below, p. 987. The procedure is now statutory.

[68] See below, p. 929.

[69] *R.* v. *Deputy Industrial Injuries Commissioner ex p. Moore* [1965] 1 QB 456 at 490 (Diplock LJ). See also *Asher* v. *Secretary of State for the Environment* [1974] Ch. 208 (district auditor); *R.* v. *Secretary of State for the Environment ex p. Stewart* (1978) 77 LGR 431 (inquiry: evidence wrongly excluded); *R.* v. *North Yorkshire FHSA ex p. Wilson* [1991] 8 Admin. LR 613 (decision-maker not obliged to hear argument on irrelevant consideration).

rights, which include the right of cross-examination,[70] has led to the quashing of punishments awarded by prison visitors in a series of cases.[71] In one, the visitors refused to allow prisoners to call witnesses because of the administrative inconvenience of bringing them from distant prisons to which they had been dispersed after a riot, and for other inadequate reasons.[72] In another, a prisoner was not allowed to question his own witness or to comment on the evidence.[73] In a third, there was a witness unknown to the prisoner but known to the investigating officer, who failed to inform the visitors.[74] This last case shows that natural justice may be violated by the conduct of those who bring forward the accusation as well as by that of the tribunal—as also does a later case, where a prosecution was instigated by a detective who concealed his own criminal record.[75] But a mistake by the applicant's own advisers, even though it deprives him of the opportunity to be heard in an appeal against deportation, will not entitle him to relief, since he has not been the victim of unfair procedure.[76] Where there is a charge of serious misconduct it is especially important, as the Court of Appeal has emphasised,[77] that procedural fairness should be carefully observed. In various other contexts, however, it is scarcely less important.

Failure to allow cross-examination by an objector at a statutory inquiry has led to the quashing of the Secretary of State's decision,[78] though not where the objections went beyond the proper scope of the inquiry.[79] And the order of a Scottish magistrate who ordered the destruction of a large quantity of cheese on grounds of food safety without allowing cross-examination of the food safety experts was reduced (quashed).[80] On the other hand there must be many administrative pro-

[70] For dicta favourable to a right of cross-examination see *Osgood* v. *Nelson* (1872) LR 5 HL 636 at 646; *Marriott* v. *Minister of Health* (1936) 154 LT 47 at 50; *R. v. Newmarket Assessment Committee ex p. Allen Newport Ltd.* [1945] 2 All ER 371 at 373.

[71] In the past prison visitors had important disciplinary functions but these were removed as recommended in the Woolf Report, *Prison Disturbances, April 1990*, Cm. 1456 (1991). For the former disciplinary functions of prison visitors see above, p. 75.

[72] *R.* v. *Hull Prison Visitors ex p. St Germain* (No. 2) [1979] 1 WLR 1401, an exemplary judgment of Geoffrey Lane LJ. See likewise *Re Cheeung and Minister of Employment and Immigration* (1981) 122 DLR (3d) 41 (adjudicator refused to allow immigration officer to be called as witness: deportation order set aside).

[73] *R.* v. *Gartree Prison Visitors ex p. Mealy*, The Times, 14 November 1981.

[74] *R.* v. *Blundeston Prison Visitors ex p. Fox-Taylor* [1982] 1 All ER 646.

[75] *R.* v. *Knightsbridge Crown Court ex p. Goonatilleke* [1986] QB 1 (it being a case of one man's word against another's, the conviction was quashed).

[76] *R.* v. *Home Secretary ex p. Al-Mehdawi* [1990] 1 AC 876 (solicitor sent letters to wrong address). See above, p. 510. But where the default is that of the tribunal the position is different: *Fisher* v. *Hughes* [1998] COD 281 (applicant represented by deaf person, tribunal failed to provide trained interpreter; proceedings unfair).

[77] In the *Hull Prison* case (above).

[78] *Nicholson* v. *Secretary of State for Energy* (1978) 76 LGR 693; and see *Errington* v. *Minister of Health* [1935] 1 KB 249 at 272; *Wednesbury Cpn.* v. *Ministry of Housing and Local Government* (No. 2) [1966] 2 QB 275 at 302; cf. *National Companies and Securities Commission* v. *News Corporation Ltd.* (1984) 52 ALR 417.

[79] *Bushell* v. *Secretary of State for the Environment* [1981] AC 75. For this question see below, p. 977.

[80] *Errington* v. *Wilson*, The Times, 2 June 1995 (Court of Session).

ceedings in which formal testimony and cross-examination are inappropriate, the inquiry being informal.[81] When offering a hearing after an investigation the Commission for Racial Equality need not produce witnesses for cross-examination.[82] It has been said that even the Crown Court, when acting administratively in a licensing appeal, need not allow cross-examination.[83]

It is clear that the strict legal rules of evidence need not be observed.[84] In an industrial injury case the Commissioner was therefore held entitled to take into account evidence given at a hearing of medical reports made in previous cases, although in a court of law these might have been inadmissible under the rule against hearsay.[85] But this dispensation is subject to the overriding obligation to give a genuinely fair hearing. The admission of hearsay evidence may make it all the more necessary to allow it to be tested by cross-examination, and if that is not practicable the right course in some cases may be to exclude the evidence from consideration.[86]

It has twice been held that natural justice demands that the decision should be based on some evidence of probative value.[87] As we have seen elsewhere, the courts are now showing a strong disposition to develop 'no evidence' as a head of judicial review,[88] and it may be that natural justice will supply the peg on which to hang it.

The right to representation by a lawyer or other person may prove to be a part of natural justice in suitable cases, but this is not as yet clearly established. It probably exists in the case of a formal tribunal[89] or investigation[90] if there is no provision to the contrary,[91] but regulations excluding it have been upheld.[92] In cases

[81] See *Re Pergamon Press Ltd.* [1971] Ch. 388 at 400; *Herring* v. *Templeman* [1973] 3 All ER 569 (no witnesses allowed); cf. *Ceylon University* v. *Fernando* [1960] 1 WLR 223 at 253 (opportunity to cross examine not requested); *O'Rourke* v. *Miller* (1984) 58 ALR 269 (police probationer not allowed to cross-examine); *Re Irvine and Restrictive Trade Practices Commission* (1987) 41 DLR (4th) 429 (statutory inquiry, no right to cross-examine).

[82] *R.* v. *Commission for Racial Equality ex p. Cottrell & Rothon* [1980] 1 WLR 1580.

[83] *Kavanagh* v. *Chief Constable of Devon and Cornwall* (above).

[84] *Mahon* v. *Air New Zealand Ltd.* [1984] AC 808.

[85] *R.* v. *Deputy Industrial Injuries Commissioner ex p. Moore* (above); and see *Kavanagh's* case (above); *Miller (T. A.) Ltd.* v. *Minister of Housing and Local Government* [1968] 1 WLR 992 (hearsay evidence at statutory inquiry). The Supreme Court of the Irish Republic does not permit the 'laissez-faire attitude' of these decisions: *Kiely* v. *Minister for Social Welfare* [1977] IR 267.

[86] See the *Hull Prison* case (above) at 1409.

[87] *R.* v. *Deputy Industrial Injuries Commissioner ex p. Moore* (above); *Mahon* v. *Air New Zealand Ltd.* [1984] AC 808. But a tribunal may accept statements agreed between the parties without violating natural justice: *R.* v. *Oxford Local Valuation Panel ex p. Oxford CC* (1981) 79 LGR 432.

[88] Above, p. 278.

[89] *R.* v. *Assessment Committee, St Mary Abbotts, Kensington* [1891] 1 QB 378.

[90] *R.* v. *Commissioner of Police ex p. Edwards* (1977) 32 FLR 183.

[91] See below, p. 913.

[92] *Maynard* v. *Osmond* [1977] QB 240 (police discipline regulations). The Court of Appeal took account of the fact that there could be legal representation on appeal to the Home Secretary. Contrast *Joplin* v. *Chief Constable of Vancouver* (1985) 20 DLR (4th) 314 (police regulation excluding right to counsel held ultra vires on grounds of fairness).

concerning non-statutory domestic tribunals the Court of Appeal has favoured the right of legal representation where a serious charge was made,[93] but has held that it may be excluded by an association's rules.[94] It may also be excluded, as both the Court of Appeal and the House of Lords have held, in disciplinary proceedings which demand a rapid hearing and decision, as in the case of offences committed by prisoners,[95] though on some occasions it has been held that principles of fairness must be observed.[96] There is also a right to legal assistance and representation under the European Convention on Human Rights.[97] A party conducting his case in person will normally be allowed the assistance of a friend to give advice and take notes.[98]

Arrangements for hearings must be fair and justice may not be sacrificed to speed.[99] Wrongful refusal of an adjournment, when reasonably requested, may amount to refusal of a fair hearing, particularly where the party affected is thereby disabled from appearing at all.[1] The Take-over Panel of the Stock Exchange narrowly escaped from having its investigation of a company invalidated when it refused adjournments in a manner which was 'insensitive and unwise' but which did not in fact cause injustice.[2] Natural justice was violated by the exclusion from a juvenile court of a social worker who might have assisted a boy who was convicted,[3] and by alteration of the time and place of a hearing without notice.[4]

Lord Denning MR has summed up the procedure in the case of an investigating body such as the Commission for Racial Equality which is under a duty to act fairly:[5]

[93] *Pett* v. *Greyhound Racing Association* [1969] 1 QB 125, not followed in (No. 2) [1970] 1 QB 46 (Lyell J).

[94] *Enderby Town Football Club Ltd.* v. *Football Association Ltd.* [1971] Ch. 591. See also *London Passenger Transport Board* v. *Moscrop* [1942] AC 332; *Tait* v. *Central Radio Taxis (Tollcross) Ltd.* 1987 SLT 506.

[95] *Fraser* v. *Mudge* [1975] 1 WLR 1132; *R.* v. *Maze Prison Visitors ex p. Hone* [1988] AC 379.

[96] *R.* v. *Home Secretary ex p. Tarrant* [1985] QB 251 (visitors held that representation could not be allowed: decisions quashed); *ex p. Hone* (above). Contrast *R.* v. *Risley Remand Centre Visitors ex p. Draper*, The Times, 24 May 1988 (prisoner pleaded guilty: refusal of representation upheld); *Abbas* v. *Home Secretary* 1993 SLT 502 (rule against representation of deportees before advisory panel upheld). The disciplinary jurisdiction of the visitors has now been abolished: see above, p. 75.

[97] *Campbell and Fell* v. *United Kingdom* ECHR (1984) Series A, no. 80 (prisoners' claim succeeded). See the ECHR judgment discussed in the *Maze Prison* case (above) at 187. And see *P, C & S* v. *UK* (2002) 35 EHRR 31.

[98] *R.* v. *Leicester City Justices ex p. Barrow* [1991] 2 QB 260, deprecating the term 'McKenzie friend', for which see below, p. 938.

[99] *R.* v. *Portsmouth CC ex p. Gregory & Moss* [1991] 2 Admin. LR 681.

[1] *Priddle* v. *Fisher & Sons* [1968] 1 WLR 1478; *Re M (an infant)* [1968] 1 WLR 1897; *Rose* v. *Humbles* [1972] 1 WLR 33; *Lucy* v. *Royal Borough of Kensington and Chelsea* [1997] COD 191. Contrast *Ostreicher* v. *Secretary of State for the Environment* [1978] 1 WLR 810 (religious objection to date of inquiry).

[2] *R.* v. *Panel on Take-overs and Mergers ex p. Guinness Plc* [1990] 1 QB 146.

[3] *R.* v. *Southwark Juvenile Court ex p. J.* [1973] 1 WLR 1300.

[4] *Supermarchés Jean Labrecque Inc.* v. *Labour Court* (1987) 43 DLR (4th) 1.

[5] *R.* v. *Race Relations Board ex p. Selvarajan* [1975] 1 WLR 1686; and see *R.* v. *Commission for Racial Equality ex p. Cottrell & Rothon* (above); same *ex p. Hillingdon LBC* [1982] AC 779.

The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name the informants. It can give the substance only. Moreover, it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decisions and make its own report.

Reasons for decisions

The principles of natural justice do not, as yet, include any general rule that reasons should be given for decisions.[6] Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others. 'No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions.'[7]

The need for this obligation was recognised both by the Committee on Ministers' Powers of 1932[8] and by the Committee on Administrative Tribunals and Enquiries of 1957,[9] and the latter's recommendation was implemented by the Tribunals and Inquiries Act 1958, as explained elsewhere,[10] which required reasons to be given on request by statutory tribunals and by ministers after statutory inquiries. American federal law has a comparable requirement.[11] In Australian federal law the right to reasons has been extended to administrative decisions generally.[12] But the High Court of Australia emphatically reversed an attempt by

[6] *R.* v. *Home Secretary ex p. Doody* [1994] 1 AC 531 at 564E ('the law does not *at present* recognise a general duty to give reasons for administrative decisions' (emphasis added)). No general duty has developed since *ex p. Doody*: *R.* v. *Minister of Defence ex p. Murray* [1998] COD 134.

[7] *Administration under Law* (a JUSTICE booklet), 23.

[8] Cmd. 4060 (1932), 80, 100.

[9] Cmnd. 218 (1957), paras. 98, 351.

[10] Below, p. 938.

[11] Administrative Procedure Act of 1946, s. 8(b).

[12] Administrative Decisions (Judicial Review) Act 1977, s. 13. The Administrative Law Act 1978, s. 8, of Victoria is similar. Both Acts require reasons in writing to be given on request.

the New South Wales Court of Appeal to introduce a right to reasons as a general rule of common law.[13] A more enlightened doctrine prevails in the European Union, where the Council and the Commission are required to state the reasons for their regulations, directives and decisions.[14] And as already noted,[15] Article 6(1) of the European Convention on Human Rights, where it applies, requires the giving of reasons.

Notwithstanding that there is no general rule requiring the giving of reasons,[16] it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully. The House of Lords has recognised 'a perceptible trend towards an insistence on greater openness . . . or transparency in the making of administrative decisions'[17] and consequently has held that where, in the context of the case, it is unfair not to give reasons, they must be given.[18]

There is no closed list of the circumstances in which fairness will require reasons to be given but the more important examples may be given here. First, decisions that appear aberrant without reasons have to be explained, so that it may be judged whether the aberration is real or apparent. Thus an award of abnormally low compensation to an unfairly dismissed prison officer by the Civil Service Appeal Board, which made it a rule not to give reasons, was quashed by the Court of Appeal, holding that natural justice demanded the giving of reasons both in deciding whether dismissal was unfair and in assessing compensation, since other employees were entitled to appeal to industrial tribunals which were obliged by law

[13] *Public Service Board of New South Wales* v. *Osmond* (1986) 60 ALJ 209 (Board dismissed New South Wales civil servant's appeal against non-promotion and refused to state reasons). The case for the right to reasons is strongly argued by Kirby CJ in the court below, [1984] 3 NSWLR 447, and in Taggart (ed.), *Judicial Review of Administrative Action in the 1980s*, where the editor also criticises the High Court's decision. In Canada, on the other hand, a common law duty for administrative decision makers to give reasons is recognised 'in certain circumstances', including where the decision has 'important significance for an individual' or where there is a right of appeal: *Baker* v. *Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

[14] Treaty of Rome, Art. 190. A regulation is invalid if reasons are not given: *REWE* v. *Hamptzollamt Kiel* [1982] 1 CMLR 449. Other EU provisions may apply where Art. 190 does not. Thus information may only be denied to the public by EU institutions after stating the particular ground (of several listed) on which the denial is founded (Code of Conduct on Access to Information (adopted by Commission Decision 94/90 pursuant to Declaration No. 17 in the Maastricht Treaty 1992); and those grounds will be narrowly construed (*WWF UK* v. *Commission*, T-105/95 [1997] ECR II-1).

[15] Above, p. 479.

[16] The suggestion, in *R.* v. *Lambeth LBC ex p. Walters* (1994) 26 HLR 170, that there was such a duty has been disapproved twice by the Court of Appeal (*R.* v. *Kensington and Chelsea Royal LBC ex p. Grillo* (1996) 28 HLR 94 and *R.* v. *Home Secretary ex p. Duggan* [1994] 3 All ER 277). Judges, but not magistrates, are under a general duty to give reasons. *Flannery* v. *Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381.

[17] *ex p. Doody* (above).

[18] Moreover, the authority seeking not to give reasons must show that that procedure is not unfair: *ex p. Doody* at 561A.

to give reasons.[19] Similarly, where the decision-maker departs from a previously adopted policy (even if not published) fairness will require that departure to be explained.[20] Thus a health authority's refusal, without giving reasons, to follow the policy of the National Health Service Executive to introduce a new (and expensive drug) was quashed.[21]

Then, secondly, there are cases in which the interests concerned (for instance, personal liberty) are 'so highly regarded by the law that fairness requires that reasons . . . be given as of right'.[22] The House of Lords has held that a mandatory life prisoner should be able to make meaningful representations to the Home Secretary on what his 'tariff period'[23] should be, thus where the Home Secretary was minded to depart from the judicial recommendation of 'tariff' he has to disclose his reasons to the prisoner.[24] Similarly, given the benefits attached to citizenship, fairness would require reasons to be given for the denial of an application for naturalisation were it not that statute specifically excluded that duty.[25] And reasons had to be given when certifying that medication should be given to a competent but non-consenting mental patient.[26] Even the DPP may in exceptional circumstances be required to give the reasons why he decided not to prosecute.[27]

And, thirdly, it is always possible that the failure to give reasons for a decision may justify the inference that the decision was not taken for a good reason.[28] But

[19] *R.* v. *Civil Service Appeal Board ex p. Cunningham* [1991] 4 All ER 310. Cf. *Lawrie* v. *Commission for Local Authority Accounts* 1994 SLT 1185 (no apparent irrationality and Commission an administrative, not a judicial body; no duty to give reasons).

[20] *R.* v. *Home Secretary ex p. Urmaza* [1996] COD 479.

[21] *R.* v. *North Derbyshire Health Authority ex p. Fisher* (1998) 10 Admin. LR 27.

[22] *R.* v. *Higher Education Funding Council ex p. Institute of Dental Surgery* [1994] 1 WLR 242 at 263, *per* Sedley J interpreting *ex p. Doody*.

[23] i.e. that period considered necessary to meet the needs of retribution for the offence and general deterrence.

[24] *ex p. Doody* (above). See also *R.* v. *Home Secretary ex p. Murphy* [1997] COD 478 (mandatory life prisoner entitled to reasons why Parole Board's recommendation that he be transferred to open prison not accepted); *R.* v. *Home Secretary ex p. Duggan* [1994] 3 All ER 277 (mandatory life prisoner entitled to reasons why he continued to be classified as category A (and so not eligible for parole)); *R.* v. *Home Secretary ex p. Follen* [1996] COD 169 (prisoner entitled to reasons why Parole Board's recommendation that he be released on licence not accepted).

[25] *R.* v. *Home Secretary ex p. Fayed* [1997] 1 All ER 228. Under the British Nationality Act 1981, s. 44(2) the Home Secretary 'shall not be required to assign any reasons for the grant or refusal of any application under this Act'.

[26] *R. (Wooder)* v. *Feggetter and another* [2002] 3 WLR 591 (CA), paras. 24, 25 (per Brooke LJ) (decision based on the common law, not the Human Rights Act 1998; cf. Sedley LJ, paras. 46, 47 relying on Art. 8 of the European Convention).

[27] *R.* v. *DPP, ex p. Manning* [2001] QB 330 (inquest jury verdict of unlawful killing on death in custody; reasons for decision not to prosecute required). Cf. *R.* v. *Solicitor-General, ex p. Taylor* [1996] COD 61 (A.-G. need not give reasons in declining to prosecute in particular cases).

[28] *R.* v. *Secretary for Trade and Industry ex p. Lonrho plc* [1989] 1 WLR 525 at 540 ('if all the other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision' (Lord Keith). And see, *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] AC 997.

these cases are not concerned with a legal duty to give reasons but with proving that there was some other flaw in the decision-making process.

The courts often warn themselves against imposing too onerous a duty to give reasons.[29] Thus there are cases in which reasons need not be given even where fairness may appear to require reasons. Reasons do not need to be given for refusals of appointments or promotions or examination failures,[30] or for a reduction of research funds depending upon academic judgment.[31] And there is no general duty on the Professional Conduct Committee of the General Medical Council to give reasons for its findings of fact.[32] Where the case for reasons is strong but there is some countervailing reason to restrict the duty, the tendency is to accept or require only brief reasons. The publication of a short press notice containing 'brief reasons' sufficed when the Secretary of State made a controversial decision following a complex consultation process that would increase the amount of aircraft noise near Heathrow.[33] Where an alderman's election had to be confirmed by the Court of Aldermen, the court had to explain 'in short reasons' its decision not to confirm even if different members of the court had had different reasons for their conclusion.[34] Similarly, where the Millenium Commission rejected an application for funding on the ground that the application 'was less attractive than others', this was sufficient compliance with the duty.[35]

As explained above, an important consideration underlying the extension of the duty to give reasons, referred to in many cases, is that in the absence of reasons the person affected may be unable to judge whether there has been 'a justiciable flaw in the [decision-making] process';[36] and thus whether an appeal, if available, should

[29] In *Institute of Dental Surgery* (above) at 257A (approved in *ex p. Murray* (above) at 136 and *Asha Foundation*, below, para. 25) the following grounds for denying a duty to give reasons were given: 'it may place an undue burden upon decision-makers; demand an appearance of unanimity when there is diversity; call for articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge' (Sedley J).

[30] See *ex parte Cunningham* (above) at 316 (Lord Donaldson MR). But in *Bradley* v. *Attorney-General* [1988] 2 NZLR 454, non-promotion of a naval officer was held to entitle him to a hearing and in *R.* v. *University of Cambridge ex p. Evans* [1998] ELR 515 Sedley J considered it 'arguable' that non-promotion of a university lecturer required reasons (sed quaere). Legitimate expectation may make a difference, as it did in the New Zealand case.

[31] *R.* v. *Higher Education Funding Council ex p. Institute of Dental Surgery* [1994] 1 WLR 242 but since doubted on this point by Sedley LJ himself (*Wooder*, above, para. 41).

[32] *Gupta* v. *General Medical Council* [2001] UKPC 1; [2002] 1 WLR 1691 (PC) (but a serious flaw in the committee's fact finding may thus go undetected).

[33] *R.* v. *Secretary of State for Transport ex p. Richmond-upon-Thames LBC* (No. 4) [1996] 4 All ER 903.

[34] *R.* v. *City of London Corporation ex p. Matson* [1997] 1 WLR 765.

[35] *R. (Asha Foundation)* v. *The Millenium Commission* [2003] EWCA Civ. 88 (an explanation of rejection had been promised).

[36] *ex p. Institute of Dental Surgery* at 256 approved in *ex p. Matson* at 776 and *ex p. Murray* at 136. And in *ex p. Doody* (above) Lord Mustill said (at 565) 'To mount an effective attack on the decision ... [the person affected] has [in the absence of reasons] virtually no means of ascertaining whether ... the decision-making process has gone astray'. See also *R.* v. *Inland*

be instituted or an application for judicial review made. Since today there are few exercises of governmental power which are not subject to judicial review,[37] it will be rare that a person affected by a decision—for which reasons were not given—will not be able to say that the absence of reasons has denied him effective recourse to judicial review. A general duty to give reasons is latent in this argument; and the courts seem willing to see sufficient weight given to it to enable such a duty to develop.[38] The Court of Appeal has stressed that a judge's reasons should address the issues critical to the decision so that the parties can assess whether to appeal.[39] Application for permission to appeal to the Hight Court (from an arbitrator's award) or to the Privy Council from the court below may, however, be dismissed without reasons.[40] In these cases there is no further remedy and so reasons could not buttress a further appeal.

Where leave to apply for judicial review is granted the decision-maker has a duty of candour to the court and must reveal why the challenged decision was made.[41] Thus the question arises whether a failure to give reasons at or about the time of the disputed decision, may be remedied by reasons given much later in the respondent's affidavit responding to the grant of leave. If the duty to give reasons is an element of natural justice, the failure to give reasons, like any other breach of natural justice, should render the disputed decision void.[42] And a void decision could not be validated by late reasons even if they show that the decision was justified. Consistently with this analysis the Court of Appeal has quashed a decision that an applicant was intentionally homeless notwithstanding that the bad reasons given when the decision was made were supplemented by good reasons given in the respondent's affidavit.[43] 'It is not ordinarily open', the Court of Appeal said in another case,[44] 'to a decision maker, who is required to give reasons, to respond to

Revenue Commissioners ex p. Coombe & Co. (1989) 2 Admin. LR 1 (order quashed since court cannot perform its review function in absence of reasons).

[37] Below, p. 631.

[38] Significantly, Lord Neill, for long a proponent of a general statutory duty to give reasons, now favours continued judicial development (in 'The Duty to Give Reasons' in Forsyth and Hare (eds.), *The Golden Metwand and the Crooked Cord* (1998), 183).

[39] *English* v. *Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 (CA), paras. 18, 19. This conclusion reached notwithstanding an 'unwelcome' 'cottage industry' manufacturing application for permission to appeal on ground of insufficient reasons (para. 2). See also *R.* v. *Lambert* [2002] 1 SCR 869.

[40] *Mousaka Inc* v. *Golden Seagull Maritime Inc* [2002] 1 WLR 395 (arbitrator's award: provision of reasons in the circumstances 'completely worthless') (approved *North Range Shipping Ltd* v. *Seatrans Shipping Corp* [2002] 1 WLR 2397 (CA)); *Webb* v. *U.K.* (1997) 24 EHRR CD 73 (Privy Council: held by the Human Rights Commission compliant with Art. 6(1)).

[41] *R.* v. *Lancashire County Council ex p. Huddleston* [1986] 2 All ER 941 at 945.

[42] See above, p. 494.

[43] *R.* v. *Westminster City Council ex p. Ermakov* [1996] 2 All ER 302. There was a statutory duty to give reasons in this case. See also, *R.* v. *South West Thames Mental Health Review Tribunal ex p. Demetri* [1997] COD 445, *R.* v. *Croydon LBC ex p. Graham* (1994) 26 HLR 286 and *Akel* v. *Immigration Appeal Tribunal* [1996] COD 50; and *Nash* v. *Chelsea College* [2001] EWHC Admin. 538.

[44] *R. (S)* v. *Brent LBC* [2002] EWCA Civ. 693, para. 26 (Schiemann LJ).

a challenge by giving different or better reasons.' The cases to the contrary must be considered doubtful.[45] European law requires reasons to be given with the decision.[46]

The time has now surely come for the court to acknowledge that there is a general rule that reasons should be given for decisions, based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise. Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them.

Appeals

Natural justice does not require that there should be a right of appeal from any decision.[47] This is an inevitable corollary of the fact that there is no right of appeal against a statutory authority unless statute so provides.[48]

Whether a hearing given on appeal is an acceptable substitute for a hearing not given, or not properly given, before the initial decision is in some cases an arguable question. In principle there ought to be an observance of natural justice equally at both stages; and accordingly natural justice is violated if the true charge is put forward only at the appeal stage.[49] If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of a fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial. This was pointed out by Megarry J in a trade union expulsion case, holding that, as a general rule, a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in the appellate

[45] *R.* v. *Northampton County Council ex p. W* [1998] COD 108 (affidavit 'amply justified ... decision'), *R.* v. *Home Secretary ex p. Jahromi* (1996) 8 Admin. LR 197 (national security case; affidavit lifted reasons above the 'bare minimum') and *R.* v. *Camden LBC ex p. Mohammed* (1997) 9 Admin. LR 639 ('if the matter was capable of being put right [by late reasons, the court] should allow the process to be completed'). Note, however, that a powerful Divisional Court (Lord Parker CJ, Cooke J and Bridge J) held in *Mountview Court Properties Ltd* v. *Devlin* (1970) 21 P & CR 689, [1970] RVR 451 that failure to comply with a statutory duty to give reasons did not itself amount to an error of law justifying the quashing of the decision (although unsatisfactory reasons might reveal such a flaw). But this decision has since been doubted: *R.* v. *Northants CC ex p Marshall* [1998] COD 457 (Sedley J) and *Crake* v. *Supplementary Benefits Commission* [1982] 1 All ER 498 (Woolf J).

[46] *Michel* v. *European Parliament*, 195/80 [1981] ECR 2861.

[47] *Ward* v. *Bradford Cpn.* (1971) 70 LGR 27.

[48] See below, p. 915.

[49] *Annamunthodo* v. *Oilfields Workers Trade Union* [1961] AC 945.

body.[50] He distinguished a Canadian case in which a law student had been refused leave to take a degree: he had been allowed to submit only a written statement to the faculty council, but on appeal had been given a full oral hearing and represented by counsel in a fully judicial proceeding, and the Supreme Court of Canada held that the appeal cured any earlier defect.[51] In New Zealand, also, it has been held that a fair appeal does not normally redeem a failure of natural justice at first instance, though it may be taken into account in considering the award of discretionary remedies.[52] Nor does a full hearing on appeal justify cancellation of a taxi-driver's licence[53] or dismissal of a schoolteacher[54] without an initial hearing.

According to the Privy Council, however, Megarry J's 'general rule' was too broadly stated, since in some cases members of organisations, whose rights depend upon contract, 'should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect'. An appeal to the committee of the Australian Jockey Club was held, for this reason, to cure an initial decision of the stewards which failed to observe the principles of natural justice in disqualifying the owner of a horse found to have been raced improperly.[55] But the Privy Council emphasised that their reservations applied to domestic disputes which have to be settled by agreed procedure under contractual rules. Those cases fall outside administrative law, since they do not concern governmental action.

Squarely within the field of public law, however, is the case of the Liverpool councillors, in which the House of Lords followed the lead of the Privy Council. The councillors had been surcharged by the district auditor with losses resulting from their failure to make a valid rate. It was held that they had been given a fair hearing, but that, in any case, a defective hearing would have been cured by the full

[50] *Leary* v. *National Union of Vehicle Builders* [1971] Ch. 34. See also *R.* v. *Aston University Senate ex p. Roffey* [1969] 2 QB 538; *Glynn* v. *Keele University* [1971] 1 WLR 487; *Re Cardinal and Cornwall Police Commissioners* (1973) 42 DLR (3d) 323; *Fagan* v. *Coursing Association* (1974) 8 SASR 546 at 562; *Hall* v. *New South Wales Trotting Club* [1976] 1 NSWLR 323.

[51] *King* v. *University of Saskatchewan* (1969) 6 DLR (3d) 120. Megarry J in *Leary's* case (above) would if necessary have declined to follow this decision. See also *Pillai* v. *Singapore City Council* [1968] 1 WLR 1278, where the question was governed by rules of procedure for the dismissal of employees; *Re Clark and Ontario Securities Commission* (1966) 56 DLR (2d) 585; *Twist* v. *Randwick Municipal Council* (1976) 12 ALR 379 at 387; *Re Harelkin and University of Regina* (1979) 96 DLR (3d) 14.

[52] *Reid* v. *Rowley* [1977] 2 NZLR 472; *Wislang* v. *Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29.

[53] *Moran* v. *A.-G.* [1976] IR 400.

[54] *Pratt* v. *Wanganui Education Board* [1977] 1 NZLR 476.

[55] *Calvin* v. *Carr* [1980] AC 574, approving the judgment of Cooke J in *Reid* v. *Rowley* (above). See also *Murray* v. *Greyhound Racing Control Board of Queensland* [1979] Qd. R 111. *Calvin* v. *Carr* was followed in *Modahl* v. *British Athletic Federation Ltd* [2001] EWCA Civ. 1447, [2002] 1 WLR 1192 (CA) ('where an apparently sensible appeal structure has been put in place [by contract] the parties should [be] taken [to] have agreed to accept what is in the end a fair decision' (para. 61, Latham LJ)).

rehearing of their case on their appeal to the High Court.[56] It was stressed that the scope of the statutory appeal was as ample as it could be and more ample than that of judicial review;[57] and a distinction was drawn between full appeals where all the evidence may be examined and limited appeals on questions of law only or where the appellate body does not investigate findings of fact.[58] It is only where the appellate body can enter into the merits and determine the issue itself that the House of Lords' reasoning applies; and in that case it is hard to deny that a fair hearing has been given, even though two fair hearings were legally due. And an appeal may have greater curative effect where the appeal tribunal has original as well as appellate jurisdiction.[59] As already noted[60] access to a court of 'full jurisdiction' may cure non-compliance with Article 6(1) of the Human Rights Convention by the initial decision maker. And in a later similar case[61] involving councillors surcharged by the district auditor for wilful misconduct, the extensive powers of the High Court on Appeal secured compliance both with Article 6(1) and the common law duty of fairness.

A similar principle—although the appeal body was not a court—was applied in a school discipline case.[62] It was found that while Parliament had intended that pupils were entitled to fairness at each stage of the procedure before exclusion, it had also intended that the appeal to an independent appeal tribunal, rather than judicial review, should be the normal remedy for the aggrieved pupil. This was shown by the IAP's hearing of all the evidence and its extensive powers.[63]

It is always possible that some statutory scheme may take the further step and imply that an 'appeal' is to be the only opportunity of a hearing. It is surprising that this question has not been settled under the Town and Country Planning Acts. If planning permission is refused by the local planning authority the applicant may appeal to the Secretary of State who must, if requested, hold an inquiry or hearing.[64] But does this absolve the local planning authority from giving a fair hearing before refusing the initial application? In 1952 a judge said that it did,[65] but that

[56] *Lloyd* v. *McMahon* [1987] AC 625. See similarly *R.* v. *Visitors to the Inns of Court ex p. Calder* [1994] QB 1 (Stuart-Smith LJ); *Re Chromex Nickel Mines Ltd.* (1970) 16 DLR (3d) 273. Contrast *O'Laughlin* v. *Halifax Longshoremen's Association* (1972) 28 DLR (3d) 315; *Pollock* v. *Alberta Union of Provincial Employees* (1978) 90 DLR (3d) 506; *Colpitts* v. *Australian Telecommunications Commission* (1986) 70 ALR 554.

[57] At 709 (Lord Bridge).

[58] At 716 (Lord Templeman). Note the reservations of Staughton LJ in *ex p. Calder*, above.

[59] As in *Clark* v. *Young* [1927] NZLR 348; *Twist* v. *Randwick Municipal Council* (1976) 12 ALR 379; *R.* v. *Marks ex p. Australian Building Federation* (1981) 35 ALR 241; *Marine Hull Insurance* v. *Hereford* (1985) 62 ALR 253; contrast *Courtney* v. *Peters* (1990) 98 ALR 645.

[60] Above, p. 448.

[61] *Porter* v. *Magill* [2002] 2 WLR 37 (HL), paras. 92–94 (Lord Hope) (adoption of unlawful housing policy for political reasons led to loss to council of £31 million).

[62] *R. (Dr)* v. *Head Teacher of St George's Catholic School and others* [2002] EWCA Civ. 1822.

[63] Paras. 37, 38.

[64] Town and Country Planning Act 1990, s. 79(2), replacing earlier Acts.

[65] Parker J *obiter* in *Hanily* v. *Minister of Local Government and Planning* [1952] 2 QB 444 at 452.

was at the time when judicial concern for natural justice was at its lowest ebb. In 1987, by contrast, a judge held that a planning authority was in breach of its duty to act fairly in not giving rival traders an opportunity to oppose a grant of permission for an amusement area and arcade.[66]

The existence of a full right of appeal on the merits may be taken into account in holding that the scheme of the Act does not require a hearing for some preliminary administrative step, as where an inspector of taxes applied for leave to raise assessments outside the usual time on grounds of fraud, wilful default or neglect.[67]

The Court of Appeal on one occasion held that the exercise of a right of administrative appeal (by a police officer to the Home Secretary) deprived the appellant of his right to complain to the court of a denial of natural justice at the initial stage. Here there was clearly a confusion between a right of appeal on the merits of the case and judicial review of the legality of the whole proceedings; and the decision was duly reversed by the House of Lords.[68]

Delegated hearings

Does natural justice require that 'the one who decides must hear'?[69] In other words, may the hearing be given by one body, e.g. a committee of the deciding authority, and the decision itself by another?

Where the deciding authority is a minister or central government department, it must be assumed that Parliament intends the department to operate in its usual way, so that the minister's duties may be performed by subordinate officials.[70] In other cases, the courts allow some relaxation of the normal rule which requires statutory powers to be exercised by the precise person or body on whom they are conferred and makes it impossible for them to be legally exercised by others, e.g. sub-committees.[71] The Privy Council has held that a dairy board, in making zoning orders affecting milk producers, may appoint a person or persons to receive evidence and submissions from interested parties; and that if, before deciding to make an order, the board is fully informed of the evidence and submissions, there will be no breach of natural justice.[72] In some circumstances, it was added, an

[66] *R.* v. *Great Yarmouth BC ex p. Botton Bros. Arcades Ltd.* (1987) 56 P & CR 99. See similarly *R.* v. *Monmouth DC ex p. Jones* (1985) 53 P & CR 108 (planning permission quashed since objector not given opportunity to explain his case).

[67] *Pearlberg* v. *Varty* [1972] 1 WLR 534; and see *Wiseman* v. *Borneman* [1971] AC 279.

[68] *Ridge* v. *Baldwin* [1963] 1 QB 539, reversed [1964] AC 40; and see *Annamunthodo* v. *Oilfields Workers Trade Union* [1961] AC 945.

[69] For this American proposition see below, p. 991.

[70] *Local Government Board* v. *Arlidge* [1915] AC 120; see above, p. 319.

[71] See above, p. 311.

[72] *Jeffs* v. *New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551. Contrast *Re Macquarie University ex p. Ong* (1989) 17 NSWLR 113 (committee specifically empowered).

accurate summary of the evidence and submissions might suffice. But since the board had merely acted on the report of a committee of inquiry which held a public hearing on its own initiative and did not report the evidence to the board, the board's order was quashed.[73] The Court of Appeal decided similarly in a licensing case where a licensing panel failed to report the applicant's submissions or the objections to them to the committee which made the decision,[74] even though delegation of the hearing was authorised by statutory rules.

There is no breach of natural justice if the deciding authority appoints a committee to investigate and report, then discloses the report to the person affected and gives him a fair hearing before itself.[75] There is here no delegation of any of the authority's powers or duties.

Hearing held after decision

What is an administrative authority to do if it has failed to give a fair hearing, so that its decision is quashed or declared void? It still has the duty to give a proper hearing and decide the case, but it has prejudiced itself by its defective decision, which it may well have defended in legal proceedings. It cannot be fair procedure to take a decision first and hear the evidence afterwards, even though the first decision is legally a nullity. But usually the only possible course is for the same authority to rehear the case.[76] For that authority will be the only authority with statutory power to proceed, and there is therefore 'a case of necessity' of the kind we have already met.[77] In the case of a tribunal with variable membership the court may order the hearing to be held by a differently constituted tribunal.[78]

It was acknowledged in *Ridge* v. *Baldwin* that, if there was no such alternative, the original body would have to reconsider the case as best it could. Lord Reid said:[79]

> . . . if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid.

But in that case the hearing, when given by the watch committee, was defective in that the charges were not fully disclosed, so that the second decision was as void as

[73] *Jeffs'* case (above); and see *Wislang* v. *Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 (statutory requirement of 'full report' not satisfied).

[74] *R.* v. *Preston BC ex p. Quietlynn Ltd.* (1984) 83 LGR 308 (refusal of sex shop licence quashed).

[75] *Osgood* v. *Nelson* (1872) LR 5 HL 636.

[76] As in *R.* v. *Secretary of State for the Environment ex p. Hackney LBC*, below.

[77] Above, p. 459.

[78] As in *Metropolitan Properties (FGC) Ltd.* v. *Lannon* [1969] 1 QB 577.

[79] [1964] AC at 79.

the first. A Canadian case, arising out of disciplinary proceedings by the Toronto Stock Exchange, affords an example of the second decision being valid, since everything possible was done to hold a full and fair hearing on the second occasion.[80] Likewise the Secretary of State for the Environment, whose decision to reduce a local authority's rate support grant was quashed because he failed to hear their objections at the proper stage, validly came to the same decision as before after hearing the objections correctly.[81]

A different but comparable situation is where the hearing is given after action has been decided upon, but in time to prevent the decision being void. This happened in Trinidad where the Governor had power to transfer the indentures of immigrant workers from one estate to another. The Governor made an order for such a transfer without consulting the estate owner, but as soon as he heard that the owner objected he gave him a fair hearing. He then declined to cancel the order. Since the hearing was given while there was still power to cancel the order, the procedure was held valid.[82] In Canada the cancellation of a vehicle permit was upheld even though the holder was given only the opportunity to persuade the Registrar afterwards that the cancellation should be revoked.[83] Since the initial decision in such cases will almost inevitably have a prejudicial effect, the law ought to be slow to admit such dubious procedure.

FAIR HEARINGS—PARTICULAR SITUATIONS

Wide discretionary power

It is of the essence of natural justice that it should be observed generally in the exercise of discretionary power. The mere fact that the discretion conferred is wide is no reason for weakening this principle. Although it has been said that there has in the past been some correlation between wide discretionary power and absence of a duty to observe natural justice,[84] this scarcely seems to be supported except by

[80] *Posluns* v. *Toronto Stock Exchange* (1968) 67 DLR (2d) 165.

[81] *R.* v. *Secretary of State for the Environment ex p. Hackney LBC* [1984] 1 WLR 592.

[82] *De Verteuil* v. *Knaggs* [1918] AC 557. See similarly *Pagliara* v. *A.G.* [1974] 1 NZLR 86. Compare *Vestry of St James and St John Clerkenwell* v. *Feary* (1890) 24 QBD 703.

[83] *Registrar of Motor Vehicles* v. *Canadian American Transfer Ltd.* (1972) 26 DLR (3d) 112. Contrast *Re McGavin Toastmaster Ltd.* (1972) 31 DLR (3d) 370 (Manitoba Human Rights Commission required undertakings from company before hearing it: proceedings set aside as unduly prejudicial).

[84] De Smith, *Judicial Review of Administrative Action*, 4th edn. 186 (but now see 5th edn., 415). One of the few true examples seems to be *Re Barnett* [1967] 2 NSWR 746, but the reasoning invites criticism. Another may be the case of offices held at pleasure: see below, p. 543. Note also the *Essex County Council* case, below, p. 552.

decisions which are explicable on other grounds. At any rate, now that the frontiers of natural justice have been advanced considerably (and, as a Lord Chancellor has added, rightly),[85] there seems to be no detectable correlation of this character. All discretionary powers have limits of some kind, and whether those limits are widely or narrowly drawn, the discretion ought to be exercised fairly, just as it must also be exercised reasonably.[86]

This is corroborated, in particular, by cases in which the power has been conferred in wide subjective language. One example is the case of the bishop who was empowered to act against a vicar 'when satisfied either of his own knowledge or by affidavit' of the vicar's default.[87] Another is the case of the colonial governor empowered to act 'on sufficient ground shown to his satisfaction'.[88] Even the favourite statutory formulae which represent the ultimate in wide discretion, 'Where the Minister is satisfied'[89] and 'If it appears to the Minister',[90] which purport to make the extent of his powers depend upon his own state of mind, do not exclude the right to a fair hearing. Nor does a local authority's power to divide a payment between landlord and tenant 'in such shares as the authority think equitable in the circumstances'[91] exclude the right. Nor does the Home Secretary's wide discretion in granting or refusing naturalisation to an alien.[92]

Cases determined by policy

Closely akin to the question of wide discretionary power is the question of policy. Policy is of course the basis of administrative discretion in a great many cases, but this is no reason why the discretion should not be exercised fairly vis-à-vis any person who will be adversely affected. The decision will require the weighing of any such person's interests against the claims of policy; and this cannot fairly be done without giving that person an opportunity to be heard. The cases of slum-clearance and similar orders, already discussed,[93] are a clear illustration of decisions based upon policy which are nevertheless subject to the principles of natural justice.

[85] *Pearlberg* v. *Varty* [1972] 1 WLR 534 at 540 (Lord Hailsham LC).

[86] Above, p. 351.

[87] *Capel* v. *Child*, above, p. 478. But contrast *Abergavenny (Marquis)* v. *Bishop of Llandaff* (1888) 20 QBD 460.

[88] *De Verteuil* v. *Knaggs*, above, p. 481.

[89] *Maradana Mosque Trustees* v. *Mahmud* [1967] 1 AC 13.

[90] *Durayappah* v. *Fernando* [1967] 2 AC 337.

[91] *Hoggard* v. *Worsborough Urban District Council* [1962] 2 QB 93. Compare *Re Webb and Ontario Housing Corporation* (1978) 93 DLR (3d) 187 (housing authority required to act fairly in terminating lease) but contrast *Sevenoaks DC* v. *Emmett* (1979) 78 LGR 346 (council not required to give hearing or reasons when ejecting tenant).

[92] *R.* v. *Home Secretary ex p. Fayed* [1997] 1 All ER 228.

[93] Above, p. 484–85.

The plainest possible case of 'pure policy' occurred where a minister refused to meet a delegation of London borough council representatives protesting against his decision to reduce their rate support grant on account of their excessive spending. His policy had been fully discussed with them and debated in Parliament before the passing of the Act empowering the cuts. But fairness demanded that their objections should be heard at some point between the granting of the power and its exercise, particularly since the borough councils would otherwise have a statutory right to the normal rate support grant. For this failure to observe natural justice, as well as for the unlawful fettering of his discretion, the minister's decision was quashed.[94] A similar 'pure policy' case, where also a ministerial order was quashed, was where the minister ordered the Greater London Council to make the maximum financial transfer to London Regional Transport without offering any opportunity of consultation.[95]

But a statutory procedure may contain elements which do not concern the person who will ultimately be affected, and in which therefore he is not entitled to a hearing. Where the lord lieutenant of a county had to certify that it was 'necessary or expedient' for defence purposes that land should be acquired compulsorily within the county, it was held that this preliminary step was for purposes of defence policy and general control, and that 'the owner of the land has got nothing to do with it at all'.[96] But this was certainly not a decision that any order could be made against him personally without the usual right to be heard.

In some situations considerations of policy may be overriding. If schoolteachers are dismissed because the education authority is closing schools,[97] or taxicab licences are cancelled because there are too many taxicabs, these are very different cases from those where some personal default has to be established before the power can be exercised. But even in cases of this class the right to be heard may be appropriate: it ought to operate in the case of loss of livelihood just as much as in the case of loss of property. However dominant policy may be, fair procedure remains the same.

In cases affecting large numbers of individuals, it may be sufficient for their representatives to be heard on behalf of the whole class. In a case where a local authority proposed to increase the number of taxicab licences, contrary to the interests of the existing operators, the Court of Appeal held that the authorities, though acting purely on grounds of policy, must act fairly and afford a hearing to the operators' association.[98] Lord Denning MR said:

[94] *R.* v. *Secretary of State for the Environment ex p. Brent LBC* [1982] QB 593.
[95] *R.* v. *Secretary of State for Transport ex p. Greater London Council* [1986] QB 556.
[96] *Hutton* v. *A.-G.* [1927] 1 Ch. 427. Compare *Pearlberg* v. *Varty* [1972] 1 WLR 534.
[97] For the status of schoolteachers see below, p. 576. A nurse dismissed because of staff reductions necessitated by a cut in government grant was not entitled to a hearing: *Hickey* v. *Eastern Health Board* [1991] 2 IR 208.
[98] *R.* v. *Liverpool Cpn. ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299. Cf. *R.* v. *Bristol CC ex p. Pearce* (1984) 83 LGR 711 (policy to reduce street traders; relief refused in discretion), noted above, p. 508.

To apply that principle here: suppose the corporation proposed to reduce the number of taxicabs from 300 to 200, it would be their duty to hear the taxicab owners' association: because their members would be greatly affected. They would certainly be persons aggrieved. Likewise suppose the corporation propose to increase the number of taxicabs from 300 to 350 or 400 or more: it is the duty of the corporation to hear those affected before coming to a decision adverse to their interests.

Roskill LJ pointed out that this procedure should assist rather than inhibit the corporation in the performance of their licensing duties. It must be remembered that there is another side to natural justice quite apart from fairness to the individual: it helps the administrator to take a better decision if he hears the objections to his policy from those who have the strongest interest in contesting it. This may be the motive behind the statutory procedure for the compulsory amalgamations of police forces, by which their number has been greatly reduced as a matter of national policy: every police authority affected by the scheme is entitled to have its objections considered by the Home Secretary,[99] and the government must, as a matter of proper procedure, disclose the case to be met.[1]

Although no such questions arose in *Ridge* v. *Baldwin*, Lord Reid at one point made some problematical remarks about policy.[2] He said that where a minister was not dealing with a single isolated case, but with something like, say, a scheme for an important new road, his primary concern would be not with the damage to landowners' rights but with the fulfilment of his policy; and that it would be quite wrong to require the minister to act in the same sort of way as a board of works deciding whether a house should be pulled down. The passage is only a short digression and is plainly not intended to change established law. But it seems to suggest that in such a case the minister would be entitled to acquire land compulsorily without giving the owner a hearing—a suggestion which conflicts not only with decisions on natural justice[3] but with the enacted law of compulsory purchase.[4] The slum-clearance schemes in issue in the Housing Act cases involved just such acts of policy, but the courts did not hesitate to apply the rules of natural justice by quashing the minister's decision when he consulted the local authority behind the backs of the objectors.[5]

It is in just these 'policy' cases that Parliament reinforces the common law by

[99] Police Act 1996, s. 33.

[1] *Ayr Magistrates* v. *Lord Advocate* 1950 SC 102.

[2] [1964] AC at 72. See also *R.* v. *Secretary of State for the Environment ex p. Ostler* [1977] QB 122; *Lovelock* v. *Secretary of State for Transport* (1979) 39 P & CR 468.

[3] Above, p. 513.

[4] See below, p. 966.

[5] *Errington* v. *Minister of Health* [1935] 1 KB 249; above, p. 484. The Privy Council's summary decision in *Mukta Ben* v. *Suva CC* [1980] 1 WLR 767 that there was no right to be heard before a compulsory purchase order was authorised in Fiji was evidently due to the fact that the landowner had no genuine intention of disputing the order at the relevant time.

providing for statutory inquiries, which is the best possible proof of the need for the right to be heard. The dominance of policy in no way affects the minister's duty to hear a landowner's case. What it affects is the weight that he may give to that case after he has heard it. But that is the minister's political responsibility and outside the sphere of the law.

Licensing and commercial regulation

As the preceding section has illustrated, licensing cases often contain a large element of policy, since the licensing authority will commonly be free to grant or withhold licences as it thinks best in the public interest. Very extensive licensing powers are possessed by the central government, local authorities, the police, magistrates, tribunals and other authorities, and in many cases they give what might be called powers of commercial life or death over a person's trade or livelihood.[6] Local authorities license such things as cinemas, nursing homes, road vehicles, animal boarding establishments, knackers' yards, fireworks factories, pawnbrokers and slaughterhouses. Police licensing powers cover, *inter alia*, firearms, pedlars, taxicabs and taxi-drivers. Many of these arrangements might be thought to cry out for administrative rationalisation and procedural regularity, but before *Ridge* v. *Baldwin* only the licensing of public-houses and places of entertainment, which has been in the hands of magistrates since the sixteenth century, had made much contribution to the case-law. Although it was firmly established that this form of licensing was a judicial function, and therefore subject to natural justice,[7] this was so far from being recognised as a general principle that the Privy Council was able to hold in 1950 that a trader's licence could be cancelled without fair procedure of any kind.[8]

Ridge v. *Baldwin* transformed the situation;[9] and in particular the courts have shown a strong disposition to bring licensing functions generally within their doctrine that administrative powers must be exercised fairly. The wide statement by Lord Denning MR as to the duty to give fair hearings by a local authority licensing taxicabs has been quoted above; it is especially notable since it extends to decisions of licensing policy which affect whole classes of licence-holders, and not merely to individual cases. Nor is the duty excluded because the licence is in the

[6] For licensing powers see Street, *Justice in the Welfare State*, 70; Hart, *Local Government*, 9th edn., 756; Glanville Williams (1967) 20 *Current Legal Problems* 81.

[7] *Frome United Breweries Co.* v. *Bath Justices* [1926] AC 586 is a leading example. See further below, p. 610.

[8] Above, p. 487.

[9] See *Banks* v. *Transport Regulation Board (Vic.)* (1968) 119 CLR 222 at 233 (Barwick CJ); *Murdoch* v. *New Zealand Milk Board* [1982] 2 NZLR 108; (1967) 2 NZULR 282 (J. A. Farmer). As to taxi-drivers see *Moran* v. *A.G.* [1976] IR 400 (no hearing: cancellation invalid); *R.* v. *Assistant Metropolitan Police Commissioner ex p. Howell* (below).

form of a contract with a local authority, since all authorities' powers are statutory.[10] Nor is the principle confined to cases of cancellation or suspension on grounds of misconduct, where the claims of natural justice are obviously strongest. It is recognised that licensing is a drastic power, greatly affecting the rights and liberties of citizens, and in particular their livelihoods, and that this alone demands fair administrative procedure. Thus where a street trader, allowed to sell food under an informal arrangement with the local authority, was summarily given notice to quit, the decision was quashed because she had not first been given a hearing, even though she was a mere temporary licensee; and the court stressed the duty of fairness where livelihood is at stake.[11]

It seems, furthermore, that no distinction is drawn in principle between initial applications for the grant of licences and the revocation or non-renewal of licences already granted.[12] Subject to what was said about decisions of policy,[13] a first-time applicant for a licence should normally be allowed to state his case before being refused, and in particular where the refusal is on personal grounds. It was said in a [illegible].[14]

> Persons who are called upon to exercise the functions of granting licences for carriages and omnibuses are, to a great extent, exercising judicial functions; and though they are not bound by the strict rules of evidence and procedure observed in a court of law, they are bound to act judicially. It is their duty to hear and determine according to law, and they must bring to that task a fair and unbiased mind.

In approving this passage Lord Denning MR said that according to the modern judicial vocabulary such persons act administratively but are required to act fairly.[15] He had previously laid down the same law in what was in effect a 'first application' case in which the purchasers of a gaming club applied to the Gaming Board for a certificate of consent, without which they could not apply for a licence

[10] *Jones* v. *Swansea CC* [1990] 1 WLR 54 70, at 85. In *ex p. Binks* (below) the court preferred to base its decision on the 'public law' character of market licensing. For criticism see (1990) 106 *LQR* 277 at 281 (S. Arrowsmith).

[11] *R.* v. *Wear Valley DC ex p. Binks* [1985] 2 All ER 699. In *R.* v. *Basildon DC ex p. Brown* (1981) 79 LGR 655, there discussed, a similar licence was validly terminated by three months' notice, written representations having first been received. Compare *R.* v. *Barnsley MC ex p. Hook* [1976] 1 WLR 1052, above, p. 470.

[12] In *McInnes* v. *Onslow-Fane* [1978] 1 WLR 1520 at 1529 Megarry V-C says that there is a substantial distinction between 'application cases' and 'forfeiture cases' and that this is well recognised in the case of membership of a social club. But that is a case based upon contract (above, p. 478) where a member has the protection of his contract of membership and an applicant has not. It does not follow that any such distinction applies to the exercise of statutory powers. Nor is it correct that in application cases 'in all normal circumstances there are no charges and so no requirement of an opportunity to be heard in answer to the charges'. Applicants are often prejudiced by unfavourable information possessed by the licensing authority, as in the *Gaming Board* case, below. Cf. *A.-G.* v. *Ryan* [1980] AC 718 (above, p. 491).

[13] Above, p. 533.

[14] *R.* v. *Brighton Cpn. ex p. Thomas Tilling Ltd.* (1916) 85 LJKB 1552 (Sankey J).

[15] In *R.* v. *Liverpool Cpn. ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

under the Gaming Act 1968. The Court of Appeal there held that the Board must hear the applicants fairly, though subject to the limitations which have already been explained.[16] It has been held, also, that the rules of natural justice apply to an application for an entertainments licence, and although the case was in effect one of renewal, it was treated as if it were one of first application.[17]

Where a licence is due for renewal the case is still stronger, and may be reinforced by 'legitimate expectation', as in the case of the taxi-driver mentioned earlier.[18] It has been held in Canada that a new condition ought not to be attached to the renewed licence without first offering the holder an opportunity to make representations about it.[19]

On the basis of these authorities the duty to observe natural justice is now extremely wide. But it is probably safe to say that there must be many thousands of adverse licensing decisions annually in which no hearing is in fact given. These will mostly occur at the two extremes of the scale of importance: both in much petty administrative licensing by local authorities and the police; and also in the case of certain wide powers of commercial and industrial regulation under which many decisions are made from day to day and which have no statutory procedural safeguards. Examples[20] are import and export licensing, the control of insurance companies, and, before they were discontinued, foreign exchange control and the grant of industrial development certificates.[21] So far the authorities have succeeded in wielding these far-reaching powers without provoking challenge in the courts on procedural grounds. But in principle natural justice should play its normal part, subject to administrative exigencies and to any implication to the contrary that can fairly be inferred from the scheme of any particular Act of Parliament. The interests of an applicant for an import licence or for an industrial development certificate may be no less important, to put it no higher, than those of an applicant to the Gaming Board or of a taxicab-owners' association. The fact that Parliament has failed to provide any rights of hearing or appeal can hardly found an argument against natural justice, since the same is true in so many other cases,

[16] *R.* v. *Gaming Board for Great Britain ex p. Benaim and Khaida* [1970] 2 QB 417; above, p. 516. See also *R.* v. *Herrod ex p. Leeds City District Council* [1976] QB 540 at 560, where Lord Denning MR said that the initial grant of a licence should be in accordance with natural justice, although natural justice was excluded by statute in the case before him.

[17] *R.* v. *Huntingdon DC ex p. Cowan* [1984] 1 WLR 501.

[18] *R.* v. *Assistant Metropolitan Police Commissioner ex p. Howell* [1986] RTR 52. See also *R.* v. *Huntingdon DC ex p. Cowan* (above), and Lord Diplock's statement in *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 at 408 (see Appendix 1); *Smitty's Industries Ltd.* v. *A.-G.* [1980] 1 NZLR 355; *FAI Insurances Ltd.* v. *Winneke* (1982) 41 ALR 1 (legitimate expectation of renewal of approval to provide worker's compensation insurance).

[19] *Re CTV Television Network Ltd.* (1980) 116 DLR (3d) 741.

[20] Some but not all of the Department of Trade's drastic powers over insurance companies are subject to a hearing procedure: Insurance Companies Act 1974, ss. 38, 39.

[21] Lord Denning MR has said that there is no right to a hearing on the grant of industrial development certificates or the award of television programme contracts: see *Cinnamond* v. *British Airports Authority* [1980] 1 WLR 582 at 590.

where the courts have imported it in order to 'supply the omission of the legislature'.[22]

The question whether there should be a right to be heard by a local planning authority, which is in effect a licensing authority, before refusal of planning permission has been discussed above.[23]

Offices and employments

A line has to be drawn between an office which gives its holder a status which the law will protect specifically, on the one hand, and, on the other hand, a mere employment under a contract of service. Offices used in old times to be looked upon as a form of property which could be held and recovered in specie: if the holder was wrongfully removed he could obtain restoration by mandamus; or he might be granted prohibition or an injunction. Nowadays he can also obtain a declaration that his removal was void, and that he is therefore still in office, as was done in *Ridge* v. *Baldwin*, since this remedy likewise operates specifically. In other words, he is removable only by a due and lawful exercise of the power of removal, failing which he remains legally in office. A servant under a mere contract of service enjoys no such protection, according to a long-established rule of law: whatever his contractual rights, he can always be dismissed and his remedy lies in damages for breach of contract.[24] In other words, there is always a power to dismiss him, even though under the contract there is no right to do so. The principle is that one man will not be compelled to employ another against his will. By contrast, the law will give specific protection to a status such as membership or office in a trade union, association or club, even though it is merely contractual; this is a less personal relationship, and an injunction or declaration may be granted so as to preserve the status.[25] A statutory status, such as that of a registered dock worker, will be protected similarly,[26] subject always to the discretion of the court in awarding remedies.[27]

The distinction is of importance for the purposes of the right to be heard. If an office-holder is removed without a hearing in a case where he has a right to one, he can recover his office specifically. But if in a similar situation a mere servant is dismissed, his dismissal remains legally effective and there is no remedy by which he can compel his employer to continue to employ him. The law then holds that the right to a fair hearing has no application in a mere relationship of master and servant. This is not because justice does not so require (for in many cases it does)

[22] Above, p. 481.
[23] Above, p. 529.
[24] See below, p. 575.
[25] See above, pp. 478.
[26] See below, p. 576.
[27] See the *North Wales Police* case (above), p. 509.

but because the law will not restore the employment specifically. For this reason the Privy Council refused certiorari to a university lecturer who had been dismissed without a hearing from his post in Ceylon—though the case itself looked more like one of statutory status since the university's power to dismiss was statutory and was restricted (just as in *Ridge* v. *Baldwin*) to cases of incapacity or misconduct.[28] Lord Wilberforce has said that he could not follow this decision and has commented:[29]

> A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of the rules of natural justice, according to the master and servant test, looks illogical and even bizarre. A specialist surgeon is denied protection which is given to a hospital doctor; a university professor, as a servant, has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied.

Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes 'office' has long been defined as a 'subsisting, permanent substantive position which has an existence independent of the person who fills it',[30] but for the purposes of natural justice the test may not be the same.[31] Nor need an office necessarily be statutory,[32] although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.[33] A prison officer holding the office of constable, has the rights of an office-holder,[34]

[28] *Vidyodaya University Council* v. *Silva* [1965] 1 WLR 77, following the *Barber* case (below). Contrast *McCarthy* v. *Calgary RC School District* (1979) 101 DLR 48 (school superintendent: office).

[29] *Malloch* v. *Aberdeen Cpn.* [1971] 1 WLR 1578 at 1595, at 1596, citing the *Barber, Palmer* and *Vidyodaya* cases and *Glynn* v. *Keele University* [1971] 1 WLR 487.

[30] Approved by the House of Lords in *Edwards* v. *Clinch* [1982] AC 845, holding (by 3:2) that a surveyor engaged from time to time to hold public inquiries was not the holder of an office.

[31] For tax purposes 'office' has to be distinguished from 'profession', whereas for purposes of natural justice it has to be distinguished from 'employment'.

[32] See e.g. *Fisher* v. *Jackson* [1891] 2 Ch. 84 (school established under deed of trust: schoolmaster granted injunction against dismissal without hearing); *Stevenson* v. *United Road Transport Union* [1976] 3 All ER 29 (trade union officer: declaration granted).

[33] *Malloch* v. *Aberdeen Cpn.* [1971] 1 WLR 1578 at 1582 (Lord Reid). Lord Wilberforce (at 1596) defined 'pure master and servant cases' more narrowly as involving 'no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection.' By this criterion all public employees would appear to count as office-holders, but that may not have been intended. See also *Social Club (102) Ltd.* v. *Bickerton* [1977] ICR 911: *R.* v. *Brent LBC ex p. Assegai*, The Times, 18 June 1987 (school governor; protected office; Lord Wilberforce's criterion applied). In Ireland the protection of natural justice has been given to a fireman (*R. (Hennessy)* v. *Department of the Environment* [1980] N. Ireland Bulletin No. 6) and an army private (*State (Gleeson)* v. *Minister for Defence* [1976] IR 280).

[34] *R.* v. *Home Secretary ex p. Benwell* [1985] QB 554.

but a nursing officer employed by a local health authority is an ordinary employee.[35] In England it has been held that a consultant surgeon employed under the national health service by a regional hospital board is a mere contractual servant, despite the 'strong statutory flavour' attaching to the contract.[36] But where, as happened in Scotland, a surgeon similarly employed was denied a hearing before the hospitals board when they decided to reject a report in the surgeon's favour by their appeals committee, it was held that the appeals procedure, as set out in a departmental circular, was 'an inherent condition of his contract of service' and that the breach of natural justice nullified the dismissal.[37] This case therefore departed from the usual rule that a contract of service will not be specifically enforced; and an exception to that rule has been admitted in England in abnormal circumstances.[38] Even a contractual servant may be able to have his dismissal declared void if there are statutory procedural safeguards which have not been observed, so that in effect the power to dismiss is statutory.[39]

Extended employment protection

Radical changes in the rights of contractual employees were made by the Industrial Relations Act 1971 (replaced first by the Employment Protection (Consolidation) Act 1978, and now by the Employment Rights Act 1996),[40] giving protection against unfair dismissal. This new right is enforceable in industrial tribunals, which must have regard to the code of practice, now issued by ACAS, which requires formal procedure and an opportunity for the employee to state his case; and apart from the code, fairness alone will require this in most cases.[41] But the tribunal has no power to restore the employment specifically: it may recommend reinstatement or re-engagement, and if the employer refuses it may award compensation.[42] Where the dismissal was in fact justified, failure to give a fair hearing will involve no loss and therefore no compensation.[43]

[35] *R.* v. *East Berkshire Health Authority ex p. Walsh* [1985] QB 152. For this and the *Benwell* case see below, p. 669.

[36] *Barber* v. *Manchester Regional Hospital Board* [1958] 1 WLR 181 (declaration refused). See similarly *Francis* v. *Kuala Lumpur Councillors* (above). The *Barber* case was doubted in *Irani* v. *Southampton Health Authority* [1985] ICR 590, but in *R.* v. *Trent Regional Health Authority ex p. Jones*, The Times, 19 June 1986, a consultant surgeon in the national health service was held to be employed under an ordinary contract of service.

[37] *Palmer* v. *Inverness Hospitals Board* 1963 SC 311, cited with apparent approval in *Malloch*'s case, below.

[38] See below, p. 576.

[39] *Malloch* v. *Aberdeen Cpn.* [1971] 1 WLR 1578 at 1596 (Lord Wilberforce) (schoolteacher).

[40] Pt. X. As to civil servants see above, p. 65. For ACAS see below, p. 868.

[41] *Earl* v. *Slater & Wheeler (Airlyne) Ltd.* [1973] 1 WLR 51; and see *Polkey* v. *Dayton (A.E.) Services Ltd.* [1988] AC 344.

[42] s. 106, as continued by the Act of 1974 (above).

[43] See the *Earl* case (above).

The employment protection legislation, it has now been held, 'has substantially changed the position at common law so far as dismissal is concerned', so that 'even the ordinary contract of master and servant now has many of the attributes of an office', and the court can intervene by way of injunction and declaration. An employee of the BBC, whose contract contained elaborate procedural rights of appeal, would by this decision have been protected against dismissal in breach of those rights, had she not elected to avail herself of a different procedure.[44]

A distinction is evidently developing between contracts containing express procedural rights, which the court now seems disposed to protect specifically, and contracts containing no such rights, where the employee has only the statutory protection. There is a clear tendency to extend the ambit of natural justice in the field of employment, as fairness undoubtedly demands. In some sense it may already be said, as in New Zealand, that the requirements of fairness apply to virtually all employment relationships, whether public or private.[45]

Suspension from office

Suspension from office, as opposed to dismissal, may be nearly as serious a matter for the employee, but the courts have wavered between two different views. One is that the employer needs a summary power to suspend without hearing or other formality as a holding operation, pending inquiries into suspicions or allegations.[46] The other is that 'suspension is merely expulsion pro tanto. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office'.[47] Taking the former view in a controversial decision, a majority of the Privy Council held that a schoolteacher in New Zealand need not be given a hearing before being suspended without pay pending the determination of a disciplinary charge against him on which he would be fully heard in accordance with statutory regulations.[48] Although it was recognised that suspension without pay might involve hardship and also a temporary slur on the teacher, it was held that he

[44] *R.* v. *British Broadcasting Cpn. ex p. Lavelle* [1983] 1 WLR 23 (Woolf J). See likewise *Irani* v. *Southampton Health Authority* [1985] ICR 590 (injunction granted to protect contractual dismissal procedures).

[45] *Marlborough Harbour Board* v. *Goulden* [1985] 2 NZLR 378. They apply to the transfer of an officer to other duties if it is made for disciplinary as opposed to administrative reasons: *Poananga* v. *State Services Commission* [1985] 2 NZLR 385. Contrast *Bullen* v. *State Services Commission* [1985] 1 NZLR 402.

[46] *Lewis* v. *Heffer* [1978] 1 WLR 1061 (party officers suspended 'as a matter of good administration'); cf. *R.* v. *Cole* (1979) 27 ACTR 13 (suspension without hearing valid, but not as to withholding of pay).

[47] *John* v. *Rees* [1970] Ch. 345 (Megarry J). See also *R.* v. *Committee of Lloyd's ex p. Posgate*, The Times, 12 January 1983.

[48] *Furnell* v. *Whangarei High Schools Board* [1973] AC 660 (Lords Reid and Dilhorne dissenting).

had accepted this possibility in the terms of his employment and that the disciplinary procedure as a whole was fair. It has been said also that a police officer need not be heard before being suspended from duty pending investigation of charges of misconduct.[49]

Favouring the opposite view, the Court of Appeal of New Zealand has rejected the distinction between suspension and expulsion and has held that natural justice is required equally in both cases;[50] and there are similarly clear Australian decisions.[51] Suspension without pay, in particular, may be a severe penalty, and even suspension with pay may gravely injure reputation. In principle the arguments for a fair hearing are unanswerable. They were recognised by the Privy Council when quashing the suspension of a judge by the Chief Justice of Trinidad and the recommendation of the judicial services commission, made without giving him any notice or hearing, that his removal ought to be investigated. The suspension was unlawful under the constitution and the recommendation was contrary to natural justice which, it was held, might apply similarly in other cases and not merely in the case of judges.[52]

Offices held at pleasure

Where the holder of an office is subject to removal 'at pleasure', as opposed to removal 'for cause' such as unfitness or neglect of duty, it has been held that he has no right to be heard before removal.[53] In *Ridge* v. *Baldwin* Lord Reid approved the decision of 1844 on which the rule rests, though admitting that it had been doubted.[54] He stated that since no reasons need be given for the removal, the court could not determine whether it would be fair to hear the officer's case. But this is circular reasoning, and it is unsatisfying on grounds of justice as well as of logic. As already explained, natural justice does not necessarily require the giving of reasons for decisions, but nevertheless it does require fair notice of the case to be met, and this requirement of notice is something quite different from a duty to give reasons

[49] *Norwest Holst Ltd.* v. *Secretary of State for Trade* [1978] Ch. 201 at 224, repeated in *Cinnamond* v. *British Airports Authority* [1980] 1 WLR 582 at 590 (Lord Denning MR).

[50] *Birss* v. *Secretary for Justice* [1984] 1 NZLR 513 (suspension of probation officer without notice or hearing declared invalid, there being no immediate urgency. The suspension was initially with pay but later without).

[51] *Dixon* v. *Commonwealth* (1981) 55 FLR 34; *Schmohl* v. *Commonwealth* (1983) 49 ACTR 24.

[52] *Rees* v. *Crane* [1994] 2 AC 173.

[53] *R.* v. *Darlington School Governors* (1844) 6 QB 682 (dismissal of schoolmaster by governors of chartered grammar school), following *R.* v. *Stratford-on-Avon (Mayor)* (1670) 1 Lev. 291. In *Tucker* v. *British Museum Trustees*, The Times, 8 December 1967, the Court of Appeal held that a senior scientific officer of the British Museum had no right to be heard before dismissal, since he held an 'office, employment or service' terminable at the trustees' pleasure; whether he held an office was therefore not decided.

[54] [1964] AC at 66.

for the decision when taken.[55] If the officer is subject to some accusation, justice requires that he should be allowed a fair opportunity to defend himself, whatever the terms of his tenure. To deny it to him is to confuse the substance of the decision, which may be based on any reason at all, with the procedure which ought first to be followed. It is then an example of the fallacy, already mentioned, that the argument for natural justice is weaker where the discretionary power is wide.

It is therefore not surprising that Lord Hatherley LC said that he was not altogether satisfied with the reasoning of the decision of 1844,[56] and that it has been more enthusiastically distinguished than followed.[57] Reviewing the position in 1971, the House of Lords held that a Scottish schoolteacher, who by statute held his appointment 'during the pleasure' of the school board, could not validly be dismissed without a hearing.[58] Lip-service was paid to the decision of 1844, but it was distinguished on the ground that the teacher was entitled by statute to three weeks' notice of the proposal to dismiss him, and that the only possible reason for this was to enable him to prepare his defence, which the board ought accordingly to hear. Lord Reid partly refuted the explanation which he had himself given in *Ridge* v. *Baldwin*, saying that 'it seems to me perfectly sensible for Parliament to say to a public body: you need not give formal reasons but you must hear the man before you dismiss him'.[59]

Why then should this sensible provision not normally be implied, in accordance with the general presumption in favour of a fair hearing? Lord Wilberforce, though upholding the case of 1844 'as a general principle', observed that the very possibility of dismissal without reason given, which might vitally affect a man's career or pension, made it all the more important for him to be able to state his case.[60] In other words, the basis of the 'general principle' is wrong, at least if justice is the criterion. Lord Wilberforce also said that the rules of natural justice were to be excluded only where there was 'no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection'. This formula leaves no room for officers not protected by natural justice, especially when they are public and statutory. It was adopted in the case of a school governor appointed under statute by a local authority, who was held entitled to the opportunity to make representations in writing before being

[55] See above, pp. 515 and 522 and in particular the *Fayed* case, where the Act expressly ruled out any duty to give reasons but did not affect the requirement of notice.

[56] *Dean* v. *Bennett* (1870) 6 Ch. App. 489.

[57] See *Willis* v. *Childe* (1851) 13 Beav. 117 (schoolmaster removed by grammar school trustees; power to remove on such grounds as they deemed just held not a power to remove at pleasure).

[58] *Malloch* v. *Aberdeen Cpn.* [1971] 1 WLR 1578 (dismissal held a nullity). Cf. *Coutts* v. *Commonwealth of Australia* (1985) 59 ALR 699; *Knight* v. *Indian Head School Division No. 19* [1990] 1 SCR 653. If there is a statutory duty to dismiss, natural justice is excluded: *Scott* v. *Aberdeen Cpn.* 1976 SLT 141.

[59] At p. 1582.

[60] At p. 1597.

removed from his office.[61] The way now lies open, therefore, for the abandonment of the precedent of 1844, which is clearly out of line with the duty to act fairly as it exists today.

The key to the problem, it is submitted, is to be found not in the terms on which the office is held, but in the specific protection of the office. It is this which distinguishes offices on the one hand from mere contractual employment on the other. In a perfect world even a mere employee would doubtless have a right to be heard before dismissal for misconduct, and to some extent he now has one by statute.[62] But since the law lacks any mechanism for restoring his employment specifically, it cannot supply the remedy which is usually wanted. In the case of offices, membership, status, and so forth it is able to do so; and it would seem right therefore to protect the officer or member against wrongful deprivation of every kind and to accord him the procedural rights without which deprivation is not fair and lawful. Whether he is removable for cause or at pleasure should make no difference.

Academic discipline

The right to a fair hearing has been invoked in a number of cases by senior and junior members of universities and colleges, though not as yet with success. The courts have in general held that academic disciplinary proceedings require the observance of the principles of natural justice,[63] but equally they have refused to apply unduly strict standards, provided that the proceedings are substantially fair. Universities and colleges have in many cases established detailed disciplinary procedures under their own internal rules, often with rights of appeal. But where the case calls for the application or interpretation of internal rules, and the university or college has a visitor,[64] it will fall within the visitor's exclusive jurisdiction and the court will not entertain it. The visitor will commonly be the Crown (acting through the Lord Chancellor),[65] unless the Crown or the founder have denominated some other visitor. The law as to visitorial jurisdiction has been clarified by the House of Lords in two cases of dismissed university lecturers, holding that it extends to all questions arising out of the institution's internal rules, notwithstanding that they involve contractual relations and notwithstanding that the complain-

[61] *R.* v. *Brent LBC ex p. Assegai*, The Times, 18 June 1987.

[62] Above, p. 541.

[63] For disciplinary cases generally see above, p. 496.

[64] i.e. where it was endowed by its founder, or where its charter or statutes so provide. The colleges of Oxford and Cambridge thus have visitors, but the universities themselves do not. In the *Patel* case (below) Megarry V-C said that in most of the modern universities the Crown appears to be the visitor. For discussion of university visitors and the Human Rights Convention see [2002] *JR* 221 (Beloff and Bamforth).

[65] For procedure where the Crown is visitor see below, p. 573.

ant is not a member of the institution;[66] but that it is subject to judicial review for breach of natural justice as well as for lack of jurisdiction and of power.[67] Thus, as Megarry V-C has said, 'the extent of visitatorial jurisdiction in university life has greatly expanded in recent years'. Consequently a claim for reinstatement by a student who has failed examinations will be within the exclusive jurisdiction of the visitor and not cognisable in the courts.[68] There is no appeal from a visitor's decision, unless internal rules so provide, but the court can compel him to adjudicate and to keep within his jurisdiction, as explained later.[69]

A university lecturer was in one case held by the Privy Council to be a mere contractual employee, so that he could be dismissed without a hearing as explained in the preceding section.[70] This decision has been criticised by high authority[71] and may not now be a safe guide. But it is at least possible that academic staff of some grades may in law be mere servants. More probably holders of established posts would be regarded as office-holders and so entitled to the benefit of natural justice. Jurisdiction will be in the visitor if the case turns upon internal rules. But if it comes within the statutory law of employment protection, protecting against unfair dismissal, the statutory law is overriding.[72] Elaborate dismissal procedures for universities and colleges have been instituted under the Education Reform Act 1988.[73] To that extent Parliament has transferred the jurisdiction of the visitor to special statutory bodies and tribunals.

Students have the protection of their contracts of membership: it will be implied that in return for their fees they will be treated in accordance with the university or college rules, and natural justice will operate in the same way as with members of a trade union or association,[74] though jurisdiction will in most cases lie with the visitor as explained above. Before being expelled for failure in examinations[75] or

[66] *Thomas* v. *University of Bradford* [1987] AC 795, applied in *R.* v. *Committee of the Privy Council ex p. Vijayatunga* [1990] 2 QB 444 (appointment of examiners: complaint failed) and *Oakes* v. *Sidney Sussex College, Cambridge* [1988] 1 WLR 431 (refusing to entertain action by student who failed examination). For valuable surveys of the law see (1970) 86 *LQR* 531 (J. W. Bridge); (1981) 97 *LQR* 610 and (1986) 136 NLJ 484, 519, 567 (P. M. Smith). For the rights of students generally see [1973] JSPTL 252 (A. Samuels).

[67] *R.* v. *Hull University Visitor ex p. Page* [1993] AC 682.

[68] *Patel* v. *Bradford University Senate* [1978] 1 WLR 1488, affirmed [1979] 1 WLR 1066; *Oakes* v. *Sidney Sussex College, Cambridge* (above).

[69] Below, pp. 633 and 637.

[70] *Vidyodaya University* v. *Silva* [1965] 1 WLR 77; above p. 540.

[71] Lord Wilberforce in *Malloch* v. *Aberdeen Cpn.* [1971] 1 WLR 1578 at 1596.

[72] See *Thomas* v. *University of Bradford* (above) at 824.

[73] ss. 202–08. For the complicated transitional position see *Pearce* v. *University of Aston in Birmingham* (No. 1) [1991] 2 All ER 461, (No. 2) ibid. 469.

[74] See *Herring* v. *Templeman* [1973] 3 All ER 569 at 585. In his Report on the Sit-in at Cambridge University (1973, para. 154) Lord Devlin said that the foundation of the disciplinary power was the contract of matriculation.

[75] *R.* v. *Aston University Senate ex p. Roffey* [1969] 2 QB 538 (it was conceded that the university had no visitor: see *Patel* v. *Bradford University Senate* [1978] 1 WLR 1488 at 1501, [1979] 1 WLR 1066 at 1068); and see *Brighton Cpn.* v. *Parry* (1972) 70 LGR 576 (unsatisfactory work).

for misconduct[76] they are entitled to be treated fairly and given a hearing—though clearly this does not apply to the conduct of examinations themselves.[77] In one case students expelled for failure in examinations succeeded in showing that they had not been treated in accordance with natural justice by the examiners, but this was because the examiners had themselves decided that they be asked to withdraw after taking into account personal factors as well as examination marks; and relief was refused in discretion owing to undue delay in bringing the proceedings.[78] In another case a student who had been fined and rusticated for exhibiting himself nude on the campus was able to show that the Vice-Chancellor had failed to observe the requirements of natural justice since he had given the student no hearing initially but had merely informed him that he could appeal against the penalties.[79] Once again, relief was refused in discretion, since the facts were not contested and the penalties were obviously proper; but this reasoning is dangerous,[80] and the judge himself recognised that such discretion ought to be exercised sparingly.

In cases which have gone to the court, as opposed to the visitor, the court sometimes fails to explain whether the duty to observe natural justice is based upon statute or upon contract. This may make an important difference to the remedies available. If the university or college is established by statute, it may be treated as a statutory public authority subject to remedies such as certiorari and mandamus. If it is merely incorporated by charter or privately, rights against it will depend upon contract, so that the natural remedies will be injunction, declaration or damages. These questions are discussed in the context of remedies.[81] Since administrative law is concerned with the powers and duties of governmental and statutory public authorities, a statutory university or college may fall within its scope but a private one may not.

Preliminary and advisory acts, investigations and reports

Natural justice is concerned with the exercise of power, that is to say, with acts or orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which

[76] *Ceylon University* v. *Fernando* [1960] 1 WLR 223; *Ward* v. *Bradford Cpn.* (1971) 70 LGR 27.

[77] See *Thorne* v. *University of London* (above).

[78] *R.* v. *Aston University Senate ex p. Roffey* (above).

[79] *Glynn* v. *Keele University* [1971] 1 WLR 487; and see *R.* v. *Oxford University ex p. Bolchover*, The Times, 7 October 1970, quoted in *Glynn's* case.

[80] See above, p. 507.

[81] Below, p. 635.

do so.[82] In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to persons affected.[83]

The House of Lords considered this question in an income tax case where the tax authorities, before they could take the taxpayer before the tribunal which determines whether the object of some transaction is tax avoidance, were required to show a prima facie case to the tribunal. The tribunal refused to allow the taxpayer to be represented, or to see the evidence submitted to it by the authorities, at that stage. The House of Lords upheld this ruling, since the taxpayer would have full opportunity to state his case to the tribunal in the later proceedings.[84] As Lord Reid said, every public officer who has to decide whether to prosecute ought first to decide whether there is a prima facie case, but no one supposes that he need consult the accused. There was nothing inherently unjust in the procedure, which as a whole was found to be fair in its statutory context. But the House of Lords strongly reaffirmed the general doctrine of the right to a fair hearing, and held that there was nothing about the determination of a prima facie case which automatically excluded it:[85] the procedure must pass the test of fairness at each and every stage. In another tax case the House of Lords held that the tax authorities might apply for leave to raise assessments for years beyond the normal time-limit without reference to the taxpayer, since the statutory scheme showed that leave was to be applied for ex parte.[86]

In general, however, the courts are favourable to the observance of natural justice in the making of preliminary investigations and reports which may lead to serious legal consequences to some person.[87] The Commission for Racial Equality and its committees must act fairly in making their investigations, though considerable latitude is allowed as to its procedure.[88] Inspectors investigating the affairs of a company under statutory powers must give the directors a fair opportunity to

[82] In *Peko-Wallsend Ltd.* v. *Minister for Arts, Heritage and Environment* (1986) 70 ALR 523 a mining company was held entitled to put its case to the cabinet before they proposed part of a national park for designation under an international convention which under Australian legislation would then empower the government to prohibit the company's operations if it so wished.

[83] See (1974) 12 Osg. HLJ 179 (R. D. Howe).

[84] *Wiseman* v. *Borneman* [1971] AC 297, Lord Wilberforce concurring with hesitation and holding that the tribunal must disclose the official evidence for the taxpayer's use at the hearing, and that the tribunal had a residual duty of fairness in case prejudicial evidence was introduced unfairly. See similarly *Balen* v. *Inland Revenue Cmrs* [1978] 2 All ER 1033; *Moran* v. *Lloyds* [1981] 1 Ll. R. 423.

[85] Contrast *Parry-Jones* v. *Law Society* [1969] 1 Ch. 1.

[86] *Pearlberg* v. *Varty* [1972] 1 WLR 534.

[87] See *R.* v. *Agricultural Dwelling-house Advisory Committee ex p. Brough* [1897] 1 EGLR 106.

[88] Above, p. 521.

meet criticisms, even though the object is merely to make a report.[89] A police officer threatened with compulsory retirement is entitled to have the report of a preliminary inquiry disclosed to his own doctor.[90] A gas company should be given the opportunity to comment on an adverse report by a gas tester which might lead to an order against it by the local authority.[91] These are really instances of the right to know the opposing case.[92] But an academic board considering a student's record and recommending his expulsion was not obliged to give him a hearing since it merely made a recommendation and there was adequate opportunity for his case to be heard by the governing body when considering the recommendations.[93] For similar reasons the court refused to intervene when the visitors of a hospital declined to hear the mother of a mental defective when they were preparing a report for the board of control which the board was required by statute to consider before deciding to prolong a detention order. The visitors' report was said to be a report of their opinion and 'nothing more nor less than a piece of evidence'; the body to whom the mother's representations ought to be made was the board of control itself.[94] These various cases show that procedures involving the taking of advice or the receiving of a report may turn upon the stage at which the effective determination is made. The findings of company inspectors are likely to be accepted as definitive and therefore fair procedure is required. But where a report is merely 'a piece of evidence' the situation is different.

In New Zealand, where royal commissions are statutory, their findings can be set aside for failure to observe natural justice.[95] This should also be possible in England, where royal commissions are not armed with legal powers, since the court would probably add them to the list of non-legal bodies over which it has asserted jurisdiction.[96]

Prisoners' rights

The benefit of the principles of natural justice was extended to prisoners, as already noted, when they were charged with serious disciplinary offences before boards of

[89] *Re Pergamon Press Ltd.* [1971] Ch. 388; above, p. 516; and see *State (McPolin)* v. *Minister for Transport* [1976] IR 93 (preliminary wreck inquiry: shipowner entitled to contest evidence given by crew). Contrast *Guay* v. *Lafleur* (1965) 47 DLR (2d) 226 (taxpayer not entitled to participate in inquiry into his affairs by tax authorities. The decision was later reversed by statute). For this and other Canadian cases see (1974) 12 Osg. HLJ 179 (R. D. Howe).

[90] *R.* v. *Kent Police Authority ex p. Godden* [1971] 2 QB 662; above, p. 457.

[91] *R.* v. *London County Council ex p. Commercial Gas Co.* (1895) 11 TLR 337.

[92] Above, p. 515.

[93] *Herring* v. *Templeman* [1973] 3 All ER 569.

[94] *R.* v. *St Lawrence's Hospital Statutory Visitors* [1953] 1 WLR 1158. The application for certiorari to quash the report, as distinct from the order of the board of control, may have been misconceived. The date of this case should be noted: it is reported next to the discredited case of *R.* v. *Metropolitan Police Commissioner ex p. Parker* (above, p. 487).

[95] As in *Mahon* v. *Air New Zealand Ltd.* [1984] AC 808 (the Mount Erebus Disaster case). The Commission's order as to costs was consequently invalidated.

[96] See below, p. 631.

prison visitors, who for this purpose have now been abolished.[97] In one case the Court of Appeal held that judicial review did not extend to the disciplinary decisions of prison governors in the day-to-day administration of prisons, which at that time might impose penalties including loss of remission of sentence up to 28 days.[98] The case recalled earlier decisions, since shown to be unsound, where the court refused relief against the exercise of disciplinary powers on the ground that it would undermine disciplinary authority.[99] The House of Lords, however, has now held that a prison governor adjudicating in this way 'bears all the classic hallmarks of an authority subject to judicial review', and has overruled the earlier decision.[1] The door has thus been opened for the operation of judicial review generally and for the rules of natural justice in particular. In sufficiently serious cases governors cannot deny prisoners legal representation.[2] The House of Lords has eliminated the supposed exception with a decision firmly based upon broad principle, which should ensure the full measure of procedural justice for prisoners. Non-disciplinary action, such as the transfer of a troublesome prisoner to a segregation unit, is another matter.[3]

Since procedural fairness is a fundamental matter, it may in addition be possible to claim it under another decision of the Court of Appeal which holds that judicial review is not excluded where a prison governor is alleged to be violating rights which are fundamental.[4] One fundamental right is that of access to the courts,[5] but that does not necessarily entitle a prisoner to appear in person or to be conveyed to court free of charge if he has the ability to pay.[6]

Another problematical case is the grant or revocation of parole. A prisoner has been held entitled to see adverse material considered by the parole board in reviewing his case.[7] Where a prisoner released on licence is recalled to prison it has been held that he need not first be given a hearing, at least if the reasons have been fully explained to him.[8] But after the European Court of Human Rights found the

[97] Above, p. 75.

[98] *R.* v. *Camphill Prison Deputy Governor ex p. King* [1985] QB 735 (leave to appeal refused by House of Lords). In *R.* v. *Hull Prison Visitors ex p. St Germain* [1979] QB 425 dicta in the Court of Appeal had been conflicting. The Court of Appeal in Northern Ireland refused to follow the *Camphill* decision: *R.* v. *Maze Prison Governor ex p. McKiernan* [1985] NILR Bulletin No. 6, p. 6. For the current disciplinary powers of governors see above, p. 75.

[99] Above, p. 496.

[1] *Leech* v. *Parkhurst Prison Deputy Governor* [1988] AC 533, a natural justice case.

[2] *Ezeh* v. *UK* (2003) 15 BHRC 145 discussed above, p. 75.

[3] *Williams* v. *Home Office* (No. 2) [1981] 1 All ER 1211 (hearing not required).

[4] *R.* v. *Home Secretary ex p. Herbage* (No. 2) [1987] QB 1077 (allegation that conditions of imprisonment were cruel and unusual punishment contrary to Bill of Rights 1688; leave to apply for judicial review granted).

[5] *Raymond* v. *Honey* [1983] 1 AC 1.

[6] *R.* v. *Home Secretary ex p. Wynne* [1993] 1 WLR 115 (HL).

[7] *R.* v. *Parole Board ex p. Wilson* [1992] QB 740; *R.* v. *Home Secretary ex p. Georghiades* (1992) 5 Admin. LR 457.

[8] *R.* v. *Home Secretary ex p. Gunnell*, [1985] Crim LR 105. Compare *State of South Australia* v. *O'Shea* (1987) 73 ALR 1 (no right to be heard by Governor rejecting parole board's recommendation for release) and contrast *Johns* v. *Release on Licence Board* (1987) 9 NSWLR 103 (prisoner entitled to full measure of procedural fairness before revocation of licence).

system defective in cases brought by British prisoners[9] provision was made by Parliament for new and improved procedures.[10]

Prisoners serving mandatory life sentences have been held entitled, as a matter of procedural fairness, to make written representations before the date of the first review of their period of imprisonment is set and to know the period recommended by the Lord Chief Justice and the trial judge,[11] and non-mandatory life prisoners are entitled to know the 'tariff period' which governs the date of the first review.[12]

EXCEPTIONS

Limitations and exceptions

Only an arbitrary boundary can be drawn between cases where the right to a fair hearing is excluded by the nature of the subject matter and cases where there is some special exception. It has already been explained how the right may be excluded by the very nature of the power, for instance where urgent action has to be taken to safeguard public health or safety,[13] by the absence of 'legitimate expectation'; by the dubious doctrine that a hearing would make no difference; by the refusal of remedies in discretion; and by the rule that employees can be dismissed at pleasure.[14] On rare occasions also, it may be excluded by express legislation.[15] Here we must consider such residual exceptions as remain.

In truth the lesson of the host of cases that have been brought before the courts is that exceptions are conspicuous by their absence wherever genuine administrative power has been exercised under statute with any serious effect on a person's property, liberty or livelihood. Where a right to be fairly heard has been denied, it is more probably a case of a bad decision than of a true exception. The rule must come close to deserving the judicial tributes quoted earlier: 'a principle of universal application', 'a duty lying upon every one who decides anything'.

[9] *Weeks* v. *United Kingdom* (1987) ECHR Series A, no. 114; *Thyme, Wilson and Gunnell* v. *United Kingdom* (1990) Series A, No. 190.

[10] Criminal Justice Act 1991, ss. 32–51 (above, p. 81). See also *R.* v. *Home Secretary ex p. Cox* (1993) 5 Admin. LR 17; *R.* v. *Home Secretary ex p. Singh*, [1993] COD 501.

[11] *R.* v. *Home Secretary ex p. Doody* [1994] 1 AC 531 (Home Secretary's decision quashed).

[12] *R.* v. *Home Secretary ex p. Walsh* (1993) 5 Admin. LR 138.

[13] Above, p. 496.

[14] Above, pp. 505, 506 and 539 respectively.

[15] See above, p. 460.

Legislation

There is no right to be heard before the making of legislation, whether primary or delegated, unless it is provided by statute.[16] Accordingly an association of practising solicitors could not insist on being consulted before the Lord Chancellor made an order abolishing scale fees in conveyancing for solicitors generally—nor did it make any difference that the Act in this case specifically required consultation with the Law Society.[17] The same exception was probably the determining factor in the refusal of a hearing to a local authority which wished to dispute the siting of runways at Stansted Airport, which the government had determined to authorise by a special development order, thus avoiding the procedure of an ordinary application for planning permission.[18] It was held that the power to make such an order was 'a purely administrative or legislative power fully exercisable discretionarily' for which the minister was responsible only to Parliament. Of the three different grounds comprised in these words, the most plausible may be that the power was legislative. But it is not convincing, since a special development order is limited to specified land and is no more general than, say, a slum-clearance scheme. In a case where regulations banned trading in oral snuff generally, but impinged almost exclusively on a single company which had been 'led up the garden path' and denied a fair opportunity to dispute the expert advice given to the government, the court quashed the regulations for unfairness, without mentioning the difficulty that they were legislation.[19] Similarly where a local authority's byelaw dealt with one specified site only, the Supreme Court of Canada held that the owner was entitled to notice and a fair hearing before it was made.[20] Orders of this kind ought to count as administrative rather than legislative[21] for the purposes of any rule which exempts general legislation from the principles of natural justice.

Cases where statute gives a right to be heard or consulted before regulations are made are explained elsewhere.[22]

[16] For the practice of consultation see below, p. 896.

[17] *Bates* v. *Lord Hailsham* [1972] 1 WLR 1373; below, p. 863. Contrast *R.* v. *The Lord Chancellor ex p. The Law Society*, (1994) 6 Admin. LR 833 (Law Society had legitimate expectation of consultation on legal aid regulations, but no relief given).

[18] *Essex County Council* v. *Ministry of Housing and Local Government* (1967) 66 LGR 23. Compare *CREEDNZ* v. *Governor-General* [1981] 1 NZLR 172, where it was held that a right to make representations would be inconsistent with the scheme of the legislation.

[19] *R.* v. *Secretary of State for Health ex p. United States Tobacco International Inc.* [1992] 1 QB 353. See also *South African Roads Board* v. *Johannesburg CC* 1991(4) SA 1.

[20] *Homex Realty Ltd.* v. *Village of Wyoming* (1980) 116 DLR (3d) 1, where however relief was refused in discretion on account of the applicant's conduct.

[21] For the difficulty of making this distinction see below, p. 857.

[22] Below, p. 896.

National security

The right to a fair hearing may have to yield to overriding considerations of national security. The House of Lords recognised this necessity where civil servants at the government communications headquarters, who had to handle secret information vital to national security, were abruptly put under new conditions of service which prohibited membership of national trade unions. Neither they nor their unions were consulted, in disregard of an established practice, and their complaint to the courts would have been upheld on grounds of natural justice, had there not been a threat to national security. The factor which ultimately prevailed was the danger that the process of consultation itself would have precipitated further strikes, walkouts, overtime bans and disruption generally of a kind which had plagued the communications headquarters shortly beforehand and which were a threat to national security. Since national security must be paramount, natural justice must then give way.[23]

The Crown must, however, satisfy the court that national security is at risk. Despite the constantly repeated dictum that 'those who are responsible for the national security must be the sole judges of what the national security requires',[24] the court will insist upon evidence that an issue of national security arises, and only then will it accept the opinion of the Crown that it should prevail over some legal right. There is also the proviso that the opinion of the Crown should not be one which no minister could reasonably have held. 'There is no abdication of the judicial function, but there is a common sense limitation recognised by the judges as to what is justiciable.'[25]

The legislature may also restrict procedural justice on national security grounds, as shown by the Anti-Terrorism, Crime and Security Act 2001 discussed below.

Aliens

The courts have shown a marked reluctance to extend to aliens the same principles of procedural protection and fair play that apply to citizens of this country. Public policy requires that the Home Secretary should have drastic powers of deportation, refusal of entry and so forth. But there is no necessary reason why these, like drastic powers over citizens generally, should not be required to be exercised fairly, particularly since the consequences for the alien are often extremely severe.

The best possible proof is that the need for fairness is recognised both by international treaty and by domestic legislation. In 1956 the European Convention on

[23] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 (declaratory relief against minister's instructions refused on application for judicial review).

[24] *The Zamora* [1916] 2 AC 77 at 107 (Lord Parker of Waddington).

[25] [1985] AC at 406 (Lord Scarman). The proviso as to reasonableness is the preceding sentence.

Establishment required a higher standard of justice than did our own law, so that the Home Secretary was obliged to arrange for judicial hearings in a wide class of deportation cases, though the hearings were extra-legal and merely advisory.[26] Under European Community law (adopted in 1972) alien nationals of member states must be afforded the same remedies against administrative acts as are available to United Kingdom nationals.[27] In 1969 Parliament enacted an elaborate system of tribunals and appeals, which was extended to aliens, giving procedural rights before immigration adjudicators and the Immigration Appeal Tribunal.[28] Aliens could then appeal against exclusion, deportation, non-renewal of residence permits, conditions of residence and other restrictions. But in 1971 the Home Secretary was given overriding powers to exclude, deport etc., without right of appeal, in cases where he certified that his action was 'conducive to the public good'.[29] Subject to this power of last resort, the appeal system continues. Parliament has therefore moved ahead of the courts in recognising that a civilised system of law must treat aliens fairly as well as citizens.

Prior to this legislation the law had in general declined to give aliens a right to be heard in such situations. In 1920 habeas corpus was refused to an alien resident against whom a deportation order had been made without any hearing and it was held that the Home Secretary's function was purely executive and in no way judicial since he was doing what he thought 'conducive to the public good'—though he in fact offered to hear representations after the order was made.[30] It was also said that a right to notice and hearing might induce the alien to evade apprehension. The hollowness of these reasons is shown by the legislation mentioned above. Lord Denning suggested that a hearing should at least be required before a deportation order is executed.[31] The Court of Appeal of New Zealand has held, without mention of the case of 1920, that the principles of natural justice must be observed in the statutory procedure for deporting an over-stayed immigrant.[32] The judgment of Cooke J firmly puts the subject into the general context of

[26] See 557 HC Deb. (WA) 174.

[27] Council Directive 64/221, Art. 8. This is directly applicable: *Van Duyn* v. *Home Office* [1965] 1 CMLR 1. Under Art. 6 there is a right to know the reasons for the decision: see *R.* v. *Home Secretary ex p. Dannenberg* [1984] QB 766 (deportation order quashed).

[28] Immigration Appeals Act 1969, extended to aliens by SI 1970 No. 151.

[29] Immigration Act 1971 (replacing the Act of 1969), ss. 13(5), 14(3), 15(4) (above, p. 84).

[30] *R.* v. *Leman Street Police Station Inspector ex p. Venicoff* [1920] 3 KB 72. See similarly *Pagliara* v. *A.-G.* [1974] 1 NZLR 86; *Tobias* v. *May* [1976] 1 NZLR 509; *Salemi* v. *Minister for Immigration* (No. 2) (1977) 14 ALR 1 (High Court of Australia equally divided); *R.* v. *Minister for Immigration ex p. Ratu* (1977) 14 ALR 317. See also *R.* v. *Home Secretary ex p. Hosenball* [1977] 1 WLR 766 at 799 (ruling of European Commission of Human Rights). In Australia deportation decisions are now reviewable by the Administrative Appeal Tribunal, which can recommend revocation of an order and judges policy for itself: *Re Georges and Minister for Immigration* [1979] 22 ALR 667; *Drake* v. *Minister for Immigration* (1979) 24 ALR 577.

[31] *R.* v. *Brixton Prison Governor ex p. Soblen* [1963] 2 QB 243. This was done in *Pagliara* v. *Attorney-General* (above) and in *Cesnovic* v. *Minister of Immigration* (1979) 27 ALR 423.

[32] *Daganayasi* v. *Minister of Immigration* [1980] 2 NZLR 130 (minister's decision invalidated for failure to disclose medical referee's report).

procedural fairness, instead of treating it in isolation—a lead which the High Court of Australia has followed in holding that an immigrant threatened with deportation on personal grounds is entitled to a fair opportunity to contest them as a matter of natural justice.[33] The Privy Council quashed a deportation order where an official undertaking gave rise to a legitimate expectation of a fair hearing, but they assumed, without deciding, that in the absence of such an undertaking there would be no right to be heard.[34] The High Court also quashed the Home Secretary's decisions refusing political asylum to immigrants who had not been given a fair opportunity to put forward their claims.[35]

It may be necessary to distinguish illegal immigrants from aliens lawfully in this country who are ordered to be deported on account of overstaying, criminal offences or other misconduct. It may be justifiable for an illegal entrant's exit to be as unceremonious as his entry, subject to his right to claim asylum and to judicial review of the illegality of his entry.[36]

The current attenuation of legal protection of aliens under anti-terrorist legislation may be noted. Where the Home Secretary certifies that he reasonably suspects that an alien is an international terrorist and a threat to national security, that alien may be detained indefinitely without trial.[37] The alien's only legal remedy is an appeal to the Special Immigration Appeal Tribunal[38] and he may be denied full legal representation or knowledge of the case he has to answer (although a 'special advocate' approved by a law officer may represent him in the part of the proceedings from which he is excluded).[39] The Court of Appeal has said that this places the alien under a 'grave disadvantage'.[40]

[33] *Kioa* v. *Minister for Immigration* (1985) 62 ALR 321 (deportation order quashed for breach of natural justice; previous decisions not followed). See likewise *Waniewska* v. *Minister for Immigration* (1986) 70 ALR 284; *Minister for Immigration* v. *Taveli* (1990) 94 ALR 177.

[34] *Attorney-General of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 AC 629; above, p. 500. See similarly *Haoucher* v. *Minister for Immigration* (1990) 93 ALR 51 (minister's policy statement raised legitimate expectation).

[35] *R.* v. *Home Secretary ex p. Thirukumar* [1989] COD 384; affirmed [1989] Imm AR 270 (CA).

[36] This is the practice in Britain but judicial authority is lacking.

[37] Anti-Terrorism, Crime and Security Act 2001, s. 21.

[38] Described above, p. 80.

[39] Special Immigration Appeals Act 1997, s. 6.

[40] *M* v. *The Home Secretary* [2004] EWCA 324; [2004] All ER (D) 367, para. 13 (leave to appeal from order to release M refused).

PART VII
REMEDIES AND LIABILITY

15

ORDINARY REMEDIES

RIGHTS AND REMEDIES

Rights depend upon remedies.[1] Legal history is rich in examples of rules of law which have been distilled from the system of remedies, as the remedies have been extended and adapted from one class of case to another. There is no better example than habeas corpus. This remedy, since the sixteenth century the chief cornerstone of personal liberty, grew out of a medieval writ which at first played an inconspicuous part in the law of procedure: it was used to secure the appearance of a party, in particular where he was in detention by some inferior court. It was later invoked to challenge detention by the king and by the Council; and finally it became the standard procedure by which the legality of any imprisonment could be tested. The right to personal freedom was almost a by-product of the procedural rules.

This tendency has both good and bad effects. It is good in that the emphasis falls on the practical methods of enforcing any right. Efficient remedies are of the utmost importance, and the remedies provided by English administrative law are notably efficient. But sometimes the remedy comes to be looked upon as a thing in itself, divorced from the legal policy to which it ought to give expression. In the past this has led to gaps and anomalies, and to a confusion of doctrine to which the courts have sometimes seemed strangely indifferent.

For a long time there were anomalies caused by the fact that the remedies employed in administrative law belong to two different families. There is the family of ordinary private law remedies such as damages, injunction and declaration; and there is a special family of public law remedies, principally certiorari, prohibition and mandamus, collectively known as the prerogative remedies. There is also a third family of statutory remedies for special situations, which may sometimes exclude all other remedies or which may extend the scope of ordinary remedies as does the Human Rights Act 1998.[2] Within the 'ordinary' and 'prerogative' families the various remedies could be sought against public authorities either separately or together or in the alternative. But each family had its own distinct procedure. Damages, injunctions and declarations were sought in an ordinary action, as in

[1] On remedies generally (Chapters 15–18) see Lewis, *Judicial Remedies in Public Law*, 3rd edn. (2004)

[2] Below, p. 727.

private law; but prerogative remedies had to be sought by a procedure of their own, which could not be combined with an ordinary action. It was not possible, for example, to seek certiorari and a declaratory judgment in the alternative, although this would often be a desirable course. This anomaly, though it gave rise to little difficulty in practice, was an obvious target for law reform; and in 1977 it was removed by the provision of a comprehensive procedure, the 'application for judicial review', under which remedies in both families became interchangeable.[3] But this reform, useful and innocent as it looked, was fated to cause serious complications. The courts held that there must now be a dichotomy between public and private law, with mutually exclusive procedures—a retrogressive step which substituted new anomalies for the old ones and which caused great uncertainty and cost much time and money to litigants.

All the remedies mentioned in this and the following chapters are remedies for obtaining judicial review, i.e. for challenging the legality of some public authority's action (or inaction). Appeals, though in some sense a form of remedy, are fundamentally different and are dealt with in Chapter 23. The present chapter is concerned with the remedies of private law which play a part in public law. First come the remedies related to powers (actions for damages, injunctions, declarations and relator actions). A final section contains such remedies as private law supplies for the enforcement of duties.

ACTIONS FOR DAMAGES

The possibilities of suing governmental authorities, including the Crown, for damages for unjustified tortious injury and for breach of contract are governed by the principles of official and personal liability, explained in Chapters 20 and 21. Damages as a remedy therefore need no more than a bare mention here.

Except in cases of personal injury, e.g. from highway and industrial accidents, actions for damages have in the past played a relatively small role in litigation against administrative authorities. But recently the courts have been called upon to investigate new possibilities of liability, sometimes with positive and sometimes with negative results. It is now clear that what might be called administrative torts are a subject of importance, and often of difficulty, in administrative law. As will be seen in due course, the remedy of damages, which has always been an essential element in the protection of the citizen against public authorities, is already gaining greater prominence as a means of ensuring that powers are exercised responsibly, in good faith and with due care.

An officer of a public authority may equally use this remedy, for instance if a

[3] Below, p. 650.

sanitary inspector is wrongfully assaulted. But if he attempts to enter premises in a case where he has no power, the owner is entitled to resist him by force as he may resist any other trespasser.[4]

INJUNCTIONS

General

The injunction is the standard remedy of private law for forbidding the commission of some unlawful act, e.g. a tort or breach of contract. Its sanction is imprisonment or fine for contempt of court, or attachment of property. Although now statutory,[5] historically it is an equitable remedy, since it derives from the former Court of Chancery, and accordingly it has a discretionary character. In administrative law the most important remedies are discretionary—injunctions, declarations and certiorari, for example—but this does not greatly affect their nature since the discretion must be exercised judicially and according to settled principles. The only marked effect is that there is some tendency for the court to refuse the remedy where the plaintiff has some other equally good remedy, or where he has been guilty of delay or in some other way he has forfeited the court's sympathy. This characteristic of remedies is explained later.[6]

It is also possible for the court to grant a mandatory injunction, i.e. a positive order to do some act rather than a negative order to refrain.[7] Mandatory injunctions play a restricted part in public law because there is a special procedure for enforcing the performance of a public duty in the prerogative remedy of mandamus, dealt with below. But where a public authority's duty is analogous to a private person's, e.g. in managing a housing estate, a mandatory injunction may be a suitable remedy.[8] There may also be more scope for mandatory injunctions now that there is a dichotomy between public and private law and some duties are assigned to the latter category.[9]

Injunctions are as readily available against ministers, officials and public authorities generally as they are against private persons, and they are quite often granted

[4] *Stroud* v. *Bradbury* [1952] 2 All ER 76.

[5] Supreme Court Act 1981, s. 37.

[6] Below, p. 700.

[7] In *R.* v. *Kensington and Chelsea Royal LBC ex p. Hammell* [1989] QB 518 the court granted an interlocutory mandatory injunction for the housing of a homeless person pending judicial review. A tenant's statutory right to buy is enforceable by mandatory injunction: Housing Act 1985, s. 138; *Taylor* v. *Newham LBC* [1993] 1 WLR 444.

[8] *Parker* v. *Camden LBC* [1986] Ch. 162, holding also that the court would not usurp the local authority's duty by appointing a receiver and manager.

[9] See *Cocks* v. *Thanet DC* [1983] 2 AC 286, discussed below, p. 665.

to prohibit wrongful or unlawful action. There are many cases where prevention is better than cure, and where either a perpetual injunction or an interim injunction will be awarded to restrain a threatened wrong before it has taken place. And the cure itself is specific, so that a final injunction puts an end to the wrong instead of merely assessing it in money. This remedy, therefore, provides a means both of testing the legal validity of some act which still lies in the future, and also of preventing the continuance of some wrong which has already begun.

Although primarily a remedy against tort and other actionable wrongs, the injunction is also used as a remedy in public law against unauthorised action by governmental and public bodies, even though the action in question would not be a tort or breach of contract. This appears most clearly in cases where the Attorney-General, as the nominal plaintiff in a relator action, as explained below, obtains an injunction to prohibit either some breach of the criminal law or else some ultra vires act by a public authority, such as illegal local government expenditure. Injunctions have been awarded to private individuals also merely on the ground that a public authority was proposing to act ultra vires.[10]

The courts are not deterred by the fact that an injunction against a public authority is a particularly drastic step, bringing the machinery of government to a halt. They do not lend a ready ear to pleas of administrative inconvenience. 'Even if chaos should result, still the law must be obeyed.'[11] With these defiant words the Court of Appeal granted an interim injunction against a local authority's reorganisation of eight existing schools into new comprehensive schools, already approved by the Secretary of State and on the point of taking effect, since the authority had not followed the statutory procedure which required public notice and opportunity for objection.[12] The court firmly disregarded the plea that it would cause excessive disruption to reverse all these completed plans.

The most drastic of all such interventions was when the House of Lords granted an interim injunction forbidding a minister from obeying an Act of Parliament because the Act was in conflict with European Community law.[13]

The necessary procedure for obtaining an injunction against a public authority is now an application for judicial review in any case assigned to the 'public law' area under the dichotomy imposed by the House of Lords. Many claims against public authorities may however fall into the 'private law' category, for example where an injunction is sought against a threatened tort such as a nuisance. The dichotomy is explained in Chapter 18.

Disobedience of an injunction is punishable by fine or imprisonment as a contempt of court, as to which the court has wide discretion.

[10] Below, p. 563.
[11] Lord Denning MR in the *Bradbury* case (below).
[12] *Bradbury* v. *Enfield London Borough Council* [1967] 1 WLR 1311.
[13] *R.* v. *Secretary of State for Transport ex p. Factortame Ltd.* (No. 2) [1991] 1 AC 603; above, p. 198.

Examples of injunctions

The injunction may be used to prevent the commission or continuance of any tort or breach of contract. Just as damages were awarded for trespass against the Wandsworth board of works when it pulled down a building without giving the owner a hearing, so in a case at Rotherham an injunction was granted to restrain the corporation from carrying out a demolition order without a proper hearing of the owner's appeal for exercise of the statutory power of postponement.[14] The only difference in the latter case was that the owner was able to act before the blow had fallen, and to prevent it from falling. The citizen is in a far stronger position if he can challenge the local authority before it has committed itself to action, and the value in this respect of the remedy by injunction need hardly be stressed. Similarly where a local authority threatened to pull down part of a school, but their byelaw was void for unreasonableness, the school governors were able to prevent this wrong by injunction.[15]

Cases of nuisance created by public authorities are suitably remedied by injunction, as illustrated in a later chapter.[16] In the Derwent pollution case, there mentioned,[17] it was argued that the corporation, since it was responsible for a vital public service, ought not to be prohibited by injunction from supplying it, but should be liable (if at all) only in damages. If this had been right, then the corporation could in effect have compulsorily expropriated the owners of the fishing rights subject to payment of damages by way of compensation. To say that the sewage-disposal arrangements were an urgent necessity for public health, while the fishing rights were of relatively minor importance, did not alter the case at all: for it still remains true that private rights can be expropriated only by statutory authority, and no such authority was to be found. Accordingly the corporation was ordered to cease from polluting the rivers within a specified time, and they were thus compelled to make new arrangements. Needless to say, a public authority can be relied upon to respect the court's order. But it is not unknown, where an authority has been tardy in its obedience, for the courts to fine or imprison its members or officers for contempt.[18]

Injunctions are commonly used along with declarations for the purpose of protecting the tenure of public office or statutory status or employment, such as that of schoolteachers. This is dealt with under the following title on declarations.

Confidential material may be protected by injunction. A public authority which obtains documents or information by compulsory power may use them only for the purposes for which the compulsory power was given, and use for other

[14] *Broadbent* v. *Rotherham Cpn.* [1917] 2 Ch. 31. For the *Wandsworth* case see above, p. 480.
[15] *Repton School Governors* v. *Repton Urban District Council* [1918] 2 KB 133.
[16] Below, p. 753.
[17] *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese Ltd.* [1953] Ch. 149; below, p. 756.
[18] Below, p. 616.

purposes may be restrained by injunction.[19] Detailed reports made by the Police Complaints Authority to the complainant and the police force in question are confidential and will be protected similarly.[20]

Injunctions against the world

The long-settled rule was that an injunction would be binding only against a specified party to a lawsuit. But a radical change has occurred since the introduction of the Human Rights Act 1998, which imposes on the court the obligation of acting compatibly with the Human Rights Convention and its European jurisprudence. Holding that 'we are entering a new era', the High Court held that it could (as it did) grant injunctions 'against the world' so as to forbid indefinitely the publication by newspapers or others of information disclosing the identity and whereabouts of two child murderers who were to be protected after their release from prison.[21]

Interim protection

Where there is imminent danger of irreparable injury and damages would not be an adequate remedy, the court may grant an interim injunction[22] so as to preserve the position of the parties pending trial. The court must assess the strength of the case and the balance of convenience, and its discretion is very wide.[23]

When an interim injunction is granted before trial, the party protected must normally give an undertaking in damages so that, if he loses at the trial, the party restrained is compensated for any loss suffered meanwhile. Formerly the court would grant an interim injunction to the Crown without any such undertaking, the doctrine being that 'the Crown does not undertake'. But the House of Lords has decided that this indulgence to the Crown is no longer justified, since the plain implication of the Crown Proceedings Act 1947 is that the Crown should so far as possible be treated like other litigants.[24] But in the case of the Crown, and also of

[19] *Marcel* v. *Metropolitan Police Commissioner* [1992] Ch. 225 (subject, however, to rights of third parties).

[20] *Police Complaints Authority* v. *Greater Manchester Police Authority* (1990) 3 Admin. LR 757 (police authority restrained from publishing report in its favour). See also *Dalgleish* v. *Lothian and Borders Police Board* 1992 SLT 721.

[21] *Venables* v. *News Group Newspapers Ltd.* [2001] Fam 430 (Butler-Sloss P).

[22] A *Mareva* injunction (to forbid dealing with assets generally) may be granted to a public authority: *Securities and Investments Board* v. *Pantell SA* [1990] Ch. 426.

[23] See *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] AC 396; *R.* v. *Secretary of State for Transport ex p. Factortame Ltd.* (No. 2) [1991] 1 AC 603.

[24] *Hoffmann–La Roche & Co.* v. *Secretary of State for Trade and Industry* [1975] AC 295. For this case see above, p. 296. For the Act see below, p. 820.

other public authorities charged with enforcing the law, the court in its discretion may dispense with the undertaking. Thus a local authority was able to obtain an interim injunction against shops opening unlawfully on Sundays without having to give an undertaking which, if its action proved to be contrary to European Community law, might have imposed heavy liability.[25]

The Crown and its servants

The Crown is immune from ordinary legal process but its servants are not.[26] No injunction can therefore be granted against the Crown itself, but a declaration in lieu of an injunction may be granted under the Crown Proceedings Act 1947 in cases where the Act applies, which are mostly actions in tort and contract and are actions against the Crown itself. After years of doubt it was settled that the Act did not prevent the grant of injunctions against servants of the Crown. But by an illogical distinction under two decisions of the House of Lords, it is held that the Act permits only declarations of a final character (thus ruling out interim relief) in proceedings against the Crown under the Act of 1947, whereas both interim and final injunctions are available against Crown servants in judicial review proceedings, which are governed by the Supreme Court Act 1981. It is a story of controversy and confusion which is best told in the context of the Act of 1947 in the chapter on Crown Proceedings. It is also a story of the highest constitutional importance as regards the relationship between the Crown, ministers and the courts.

Parliament

Injunctions may not be used to interfere with the processes of Parliament. As regards its proceedings within its own walls, Parliament is completely privileged from judicial intervention. Thus when the House of Commons ordered the exclusion of a member, an injunction against the Sergeant-at-Arms was refused.[27]

In extra-mural matters a line has to be drawn. The court follows the principle that it will not intervene to prevent some matter being brought before Parliament as a question of public policy, even though it may be a breach of contract to bring it forward. In one case the Wolverhampton Corporation had contracted with the Bilston Corporation that it would not oppose any application to Parliament by the Bilston Corporation for a local Act of Parliament for obtaining a water supply from any area outside the Wolverhampton Corporation's area. The Wolverhampton Corporation did oppose such an application and were held to be in breach of their contract. The court, however, refused to restrain them by injunction, because that

[25] *Kirkless MBC* v. *Wickes Building Supplies Ltd.* [1993] AC 227.
[26] *M.* v. *Home Office* [1994] AC 377.
[27] *Bradlaugh* v. *Gossett* (1884) 12 QBD 271.

would have prevented Parliament from hearing all sides of the question in determining whether, as a matter of public policy, the Wolverhampton Corporation ought to be released from their obligation by statute.[28] This was a strong case, since the contract itself had been confirmed and made binding by an earlier local Act. It is not, therefore, that such contracts are void as contrary to public policy. The judges have repeatedly held that they have jurisdiction to grant an injunction in such cases, but they have invariably refused to grant it.[29] But where the court makes it a rule to refuse the only effective remedy, it would be more candid to admit that no remedy exists.

Where, on the other hand, a body proposes to use its funds for promoting an Act of Parliament in which it has no legitimate interest it may be restrained by injunction at the suit of the Attorney-General.[30]

A dramatic case arose in 1954 which for a time seemed as if it might cause a clash between the courts and Parliament. The Boundary Commission, which had statutory powers to make schemes for the rearrangement of parliamentary constituencies, proposed some changes in the Manchester area which were opposed by local voters who would thereby be transferred. The Home Secretary had laid the Commission's report before Parliament and both Houses had approved draft Orders in Council for giving effect to it under the statutory procedure. It only remained, therefore, for the orders to be approved by the Queen in Council. The objectors, who claimed that the Commission had not complied with their statutory duties, asked for an interim injunction to restrain the Home Secretary from submitting the orders to the Queen in Council before a date which would give time for their legality to be determined. They were granted this injunction at first instance, but were deprived of it on appeal.[31] The Court of Appeal held that it could not be right for the court to intervene where the statutory procedure was subject to express parliamentary approval, and this approval had been given; and that grave constitutional questions would arise if the courts ordered ministers not to do what the two Houses of Parliament had said that they should do. But this argument has since been rejected by the House of Lords, so that the court may have jurisdiction to grant an injunction even against an order approved by both Houses.[32]

Injunctions for enforcement of statutes

An important use of the injunction, very different from those already described, is for the purpose of forbidding disobedience to statutes, for example in the case of

[28] *Bilston Cpn.* v. *Wolverhampton Cpn.* [1942] Ch. 391.
[29] Similarly with the remedy of prohibition: below, p. 605.
[30] *A.-G.* v. *London & Home Counties Joint Electricity Authority* [1929] 1 Ch. 513.
[31] *Harper* v. *Home Secretary* [1955] Ch. 238.
[32] *Hoffmann–La Roche & Co.* v. *Secretary of State for Trade and Industry* [1975] AC 295; above, p. 296.

constantly repeated offences where the statutory penalties are inadequate. Since only the Attorney-General may seek injunctions for this purpose, except where statute has provided otherwise, the practice is explained below, in the section on relator actions.[33]

Tenure of public office: injunction in nature of quo warranto

Since 1938 the injunction has been made available by statute to prohibit the usurpation of a public office, in place of the former proceedings known as quo warranto. Quo warranto was originally a prerogative writ which the Crown could use to inquire into the title to any office or franchise claimed by a subject. It fell out of use in the sixteenth century and was replaced by the information in the nature of quo warranto, which in form was a criminal proceeding instituted in the name of the Crown by the Attorney-General or by a private prosecutor.[34] These informations were abolished by the Administration of Justice (Miscellaneous Provisions) Act 1938[35] (now replaced by the Supreme Court Act 1981)[36] which provided that where any person acts in an office to which he is not entitled and an information would previously have lain against him, the High Court may restrain him by injunction and may declare the office to be vacant if need be; and that no such proceedings shall be taken by a person who would not previously have been entitled to apply for an information. Consequently the old law of quo warranto is still operative, but the remedy is now by injunction and declaration. The procedure is similar to that for prerogative remedies and must now be by 'application for judicial review'.[37] But there seems to be no record of its having been used.

The old procedure by information was available to private persons but subject to the discretion of the court. A private prosecutor brought the best-known modern case, in which it was unsuccessfully claimed that two foreign-born Privy Councillors were disqualified from membership, the courts holding that the Naturalisation Act 1870 had repealed the disqualification imposed by the Act of Settlement 1700.[38] The modern tendency has been to extend the remedy, subject to the discretion of the court to refuse it to a private prosecutor, for example if he has delayed unduly. A private prosecutor acting on public grounds may expect the assistance of the court.[39] He is sometimes called the relator, although he does not have to obtain the leave of the Attorney-General.

[33] Below, p. 585.
[34] Bl. Comm. iii. 263.
[35] s. 9.
[36] s. 30.
[37] Supreme Court Act 1981, s. 31: see below, p. 652. The pre-1938 practice, as with the prerogative remedies, was to obtain a rule nisi for the information.
[38] *R.* v. *Speyer*, *R.* v. *Cassel* [1916] 1 KB 595, affirmed [1916] 2 KB 858. For a short history of the procedure see the judgment of Lord Reading CJ at first instance.
[39] *R.* v. *Speyer* [1916] 1 KB at 613.

The remedy as now defined applies to usurpation of 'any substantive office of a public nature and permanent character which is held under the Crown or which has been created by any statutory provision or royal charter'.[40] But it must not be a case of 'merely the function or employment of a deputy or servant held at the will and pleasure of others'.[41] Here once again we meet the difference between office and mere contractual employment.[42] The procedure was typically used to challenge the right to such offices as those of freeman or burgess of a borough, mayor, town councillor, sheriff, justice of the peace, county court judge, chief constable or member of the General Medical Council.[43] But the alleged usurper had to be in possession of the office and to have acted in it.[44]

For challenging the qualifications of a member of a local authority there are special statutory provisions under the Local Government Act 1972.[45] Proceedings may be instituted in the High Court or a magistrates' court, but only by a local government elector for the area concerned, and only within six months of the defendant having acted as a member; if the defendant merely claims to be entitled to act, proceedings lie in the High Court only. The various remedies include declarations, injunctions and financial penalties.

DECLARATIONS

Development of this remedy

Declaratory judgments play a large part in private law and are a particularly valuable remedy for settling disputes before they reach the point where a right is infringed.[46] The essence of a declaratory judgment is that it states the rights or legal position of the parties as they stand, without changing them in any way; though it may be supplemented by other remedies in suitable cases. Typical applications are for finding the meaning of some provision in a will, or whether a statute applies to some particular case, or whether a contract has been properly performed. In administrative law there are additional advantages, as in cases where it is difficult to choose the right remedy or where the ordinary remedy is for some reason unsatisfactory.

The common law, with its insistence on compulsory remedies and its horror of maintenance and procedural abuse, long refused to countenance judgments that

[40] Supreme Court Act 1981, s. 30.
[41] *Darley* v. *R.* (1846) 12 Cl. & F 520 at 541 (Tindal CJ, advising the House of Lords).
[42] See above, p. 539.
[43] Halsbury's *Laws of England*, 4th edn., vol. i, para. 171.
[44] *R.* v. *Tidy* [1892] 2 QB 179; Administration of Justice (Miscellaneous Provisions) Act 1938, s. 9(2).
[45] s. 92, replacing s. 84 of the Act of 1933.
[46] See generally Woolf and Zamir, *The Declaratory Judgment*, 2nd edn.; P. W. Young, *Declaratory Orders* (1975).

were merely declaratory; and so did the Court of Chancery. But they were needed inevitably in proceedings against the Crown, since in that case there was no means of enforcement, so that they were in regular use in connection with petitions of right[47] and on the equity side of the Exchequer. Scots law had the action of declarator, which Lord Brougham attempted to import into England with only small success at first. Acts of 1850 and 1852 empowered the Court of Chancery to make declarations of right, but they were construed as narrowly as possible by a still mistrustful judiciary.[48] Even the Judicature Acts 1873–75 did not implant any such power generally in the remodelled judicial system. It arrived finally only with the rules of court of 1883. It must therefore be considered a statutory rather than an equitable remedy. The surprising thing is that this form of relief, indispensable in any modern system of law, should be so recent an invention.

The rules of court of 1883 provided that:

> No action or proceedings shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not.[49]

This is still the rule today,[50] and the courts have grown accustomed to using it very freely. A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court.[51] By enabling a party to discover what his legal position is, it opens the way to the use of other remedies for giving effect to it, if that should be necessary. But it cannot be used to resolve matters which are not justiciable in the courts, such as civil servants' superannuation allowances[52] or claims based upon the European Convention on Human Rights[53] (before it was incorporated) or perhaps (or perhaps not), the proceedings of Royal Commissions.[54]

[47] For the petition of right, now abolished, see below, p 817.

[48] Court of Chancery, England, Act 1850; Court of Chancery Procedure Act 1852. Section 50 of the latter Act was in nearly as wide a form as the later rule of court, but it was construed as allowing declaratory relief only where some other equitable relief could have been awarded: see *Dyson* v. *A.-G.* [1911] 1 KB 410 at 417 and 422.

[49] RSC Ord. 25 r. 5, upheld as intra vires in *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 KB 536.

[50] RSC 1965, Ord. 15 r. 16, now replaced by CPR sched. 1, 15.16.

[51] *Webster* v. *Southwark LBC* [1983] QB 698, where however the court approved the issue of a writ of sequestration against the property of councillors who in deliberate breach of statutory duty had refused the use of a hall for an election meeting of a National Front candidate. The court's order had been merely declaratory since it was assumed that it would be respected. Otherwise a compulsory order might have been granted. The contumaceous conduct of the defendants was a decisive factor. Nevertheless the decision seems questionable.

[52] *Nixon* v. *A.-G.* [1930] 1 Ch. 566. See also *Gouriet* v. *Union of Post Office Workers* [1978] AC 435. But the position may now be different: below, p. 572.

[53] *Malone* v. *Metropolitan Police Commissioner* [1979] Ch. 344 (telephone tapping).

[54] In Britain royal commissions have no statutory or other powers. In New Zealand they are statutory and have power to award costs, and so are subject to judicial review: *Mahon* v. *Air New Zealand Ltd.* [1984] AC 808; and likewise in Australia: *Ross* v. *Costigan* (1982) 41 ALR 319. See also *Peters* v. *Davison* [1999] 2 NZLR 164 (review for error of law).

The declaration is a discretionary remedy. This important characteristic probably derives not from the fact that the power to grant it was first conferred on the Court of Chancery, but from the discretionary power conferred by the rule of court. There is thus ample jurisdiction to prevent its abuse; and the court always has inherent powers to refuse relief to speculators and busybodies, those who ask hypothetical questions[55] or those who have no sufficient interest.[56] As was said by Lord Dunedin,[57]

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

In other words, there must be a genuine legal issue between proper parties.

Declarations against public authorities

In administrative law the great merit of the declaration is that it is an efficient remedy against ultra vires action by governmental authorities of all kinds, including ministers and servants of the Crown, and, in its latest development, the Crown itself. If the court will declare that some action, either taken or proposed, is unauthorised by law, that concludes the point as between the plaintiff and the authority. If then his property is taken, he has his ordinary legal remedies; if an order is made against him, he can ignore it with impunity; if he has been dismissed from an office, he can insist that he still holds it.[58] All these results flow from the mere fact that the rights of the parties have been declared. This is a particularly suitable way to settle disputes with governmental authorities, since it involves no immediate threat of compulsion, yet is none the less effective.

The landmark in this use of the declaration is the famous case of *Dyson* v. *Attorney-General* (1911–12).[59] It was one of the repercussions of Lloyd George's budget proposals for a tax on land values, which the House of Lords rejected in 1909 with results disastrous to themselves. Under the Act as finally passed in 1910 the Commissioners of Inland Revenue were empowered to demand from landowners, under threat of penalty, factual information which could be used in valuing their lands. But the demands sent out (more than eight million) required in addition a

[55] As in *Re Barnato* [1949] Ch. 258; *Harrison* v. *Croydon London Borough Council* [1968] Ch. 479.

[56] See below, p. 690.

[57] *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.* [1921] 2 AC 438 at 448, summarising Scots law applicable in England.

[58] As in *Ridge* v. *Baldwin* [1964] AC 40; above, p. 489.

[59] [1911] 1 KB 410, holding that the procedure was admissible: [1912] 1 Ch. 158, holding that the demand was ultra vires. For a recent parallel see *R.* v. *Customs and Excise Commissioners ex p. Hedges and Butler Ltd.* [1986] 2 All ER 164 (regulation allowing demand for all records of business held excessive and ultra vires; declaration granted).

statement of the annual value of the land, a demand not authorised by the Act. At the instance of a landowner, who brought proceedings against the Attorney-General, the Court of Appeal granted a declaration that the demands were wholly ineffective in law. By seeking a declaration the owner was able to take the initiative, and the court rejected the Crown's argument that his right course was to take no action and then dispute the demand when he was sued for the penalty. Fletcher Moulton LJ said:[60]

> So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty.

On the other hand, declarations cannot be granted merely because a party prefers to attack rather than defend. If that is his only motive, the court may say to him 'Wait until you are attacked and then raise your defence', and dismiss his action.[61] Nor, if a criminal prosecution has been instituted against him, can he ask for a declaration that he has committed no offence.[62] Everything therefore depends upon the merits of his motives for seeking this remedy. But *Dyson's* case gave a fair wind to the action for a declaration as a defensive weapon against the executive power.[63] As the quotation shows, the court considered that a question as to the legality of administrative action was in itself a good reason for asking for judicial intervention at the earliest possible moment. The decision is all the stronger for the fact that the Inland Revenue were not threatening any tort. They were merely making a demand which they had no power to make, and therefore no power to enforce.

Even where there is no immediate demand or threat, a declaration may be granted to settle some doubtful question of law on which an authoritative ruling is needed. One such case was where a company wished to know whether its quarrying operations required planning permission and obtained an emphatic judgment in their favour from the House of Lords.[64] In two other cases the House granted

[60] [1912] 1 Ch. at 168.

[61] [1911] 1 KB at 417 (Cozens-Hardy MR). And see *Smeeton* v. *A.-G.* [1920] 1 Ch. 85 at 96–98. This argument was rejected in *Ealing LBC* v. *Race Relations Board* [1972] AC 342, holding that the council need not wait for the board to start proceedings but could seek a declaration that their action was lawful.

[62] *Imperial Tobacco Ltd.* v. *A.-G.* [1981] AC 718.

[63] See the strong remarks of Farwell LJ, [1911] 1 KB at 424.

[64] *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] AC 260, for which see below, p. 709.

declarations to settle arguments about the legality of action recommended in circulars issued by government departments, which themselves had no direct legal force. One was where nurses were stated to be allowed to perform certain functions under the Abortion Act 1967.[65] The other was where doctors were said to be entitled to give contraceptive advice to girls aged under 16 in certain circumstances without informing their parents.[66] In both cases the official advice was upheld, as it was also where a local authority sought a declaration that a government circular about the community charge omitted essential details.[67] But a local authority's press release was declared unlawful when it conflicted with statutory provisions for consumer protection.[68] In none of these cases did the court object on the ground that the circulars had no legal force.

Thanks to its flexibility and convenience the declaratory judgment has flourished as a general remedy in administrative law and has been used as a primary technique for extending judicial review. Before the reforms of 1977 this remedy was also preferred because it had important procedural advantages as compared with certiorari, as explained later.[69] Since 1977 those advantages have disappeared, but the declaration has lost none of its popularity. Under the dichotomy ordained by the House of Lords in 1982, under which procedures in 'public law' and 'private law' have become mutually exclusive, the declaration is a primary remedy in both categories, though unfortunately it may now be difficult to know by which procedure it should be sought. This dilemma is discussed in Chapter 19.[70]

The Crown and its servants

Throughout the case of *Dyson* v. *Attorney-General* the Court of Appeal emphasised that the declaration was granted against the Attorney-General, as representing the Crown. In fact the Act had conferred the power upon the Commissioners of

[65] *Royal College of Nursing* v. *Department of Health and Social Security* [1981] AC 800.

[66] *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112. Lord Bridge there says (at 193) that the *Royal College of Nursing* case (above) effected 'a significant extension of the court's power of judicial review'; and the *Gillick* case is so treated by Sir John Donaldson MR in *R.* v. *Panel on Take-overs and Mergers ex p. Datafin Plc* [1987] QB 815. But on this there is no clear majority view in the House of Lords. Nor is it clear why the case was not within the previous rules. For comment see (1986) 102 *LQR* 173 and below, p. 665.

[67] *R.* v. *Secretary of State for the Environment ex p. Greenwich LBC*, [1989] COD 530. See also *R.* v. *Deputy Governor, Parkhurst Prison, ex p. Hague* [1992] 1 AC 58 (prisons department circular declared contrary to prison rules). Contrast *R.* v. *Home Secretary ex p. Westminster Press Ltd.* (1991) 4 Admin. LR 445. See (1992) 109 *LQR* at 462 (B. V. Harris).

[68] *R.* v. *Liverpool CC ex p. Baby Products Association*, [2000] COD 91 (warning against unsafe baby walkers). Contrast *R.* v. *Inland Revenue Commissioners ex p. Bishopp* (1999) 11 Admin LR 575 (no review of pre-transaction rulings).

[69] Below, p. 647.

[70] Below, p. 663.

Inland Revenue,[71] not upon the Crown itself, so that the decision conformed to the principle that officers of the Crown are subject to legal remedies whereas the Crown itself is immune.[72] Since statutory executive powers are almost always conferred on ministers in their own names, it is very common for a litigant to seek a declaration against a minister, with or without some other remedy, as a means of challenging some questionable act or order. If there is no obvious minister the Attorney-General may still be sued. Thus where a prince of Hanover wished to establish his claim to British nationality under the somewhat dubious authority of an Act of Queen Anne's reign, he obtained a declaration that he was a British subject by bringing an action against the Attorney-General.[73]

The immunity of the Crown itself is no longer intact, however, since the House of Lords has allowed at least some of the powers of the royal prerogative to be challenged in proceedings for declarations in judicial review.[74] Actions for declarations have been entertained against the responsible minister or agent, as if the power belonged to the minister or agent rather than to the Crown.[75] Civil servants have thus been able to dispute the legality of their restriction or dismissal in proceedings against the minister for the civil service[76] or the civil service appeal board even though their employer was the Crown itself;[77] and where the Crown was visitor to a university, a declaration could be sought against the Lord President of the Council as the relevant Crown agent.[78] In the expanding field of judicial review the declaration has proved to be a useful device for evading the shortcomings of traditional remedies such as certiorari and mandamus, which do not lie against the Crown; and since the government will respect the court's decision, it is in practice equally effective.

Crown immunity has also been abolished in wide areas of liability by the Crown Proceedings Act 1947, under which the declaration plays an important part, as explained elsewhere.[79]

[71] Today such an action would be brought against the Commissioners themselves.

[72] Below, p. 819.

[73] *A.-G.* v. *Prince Ernest Augustus of Hanover* [1957] AC 436.

[74] Above, p. 346.

[75] *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] AC 260 and *Congreve* v. *Home Office* [1976] QB 629 are notable examples.

[76] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 (prohibition of membership of trade unions).

[77] *R.* v. *Civil Service Appeal Board ex p. Bruce* [1989] ICR 171 (unsuccessfully in both cases).

[78] *R.* v. *Hull University Visitor ex p. Page* [1993] AC 682. See also *R.* v. *Committee of the Lords of the Judicial Committee of the Privy Council ex p. Vijayatunga* [1990] 2 QB 444, entitled in the Law Reports '*R.* v. *HM The Queen in Council* . . .'

[79] Below, p. 831.

Other authorities

Declarations are freely available against other authorities. A child's guardian may obtain a declaration that a county council is wrongly refusing to accept children in its schools,[80] a police officer may obtain a declaration that he has not been validly dismissed;[81] a dock worker may obtain a declaration that he has been wrongfully removed from the register, thereby preserving his right to employment under the dock labour scheme.[82] In principle, any act of a public authority may be challenged in declaratory proceedings claiming that it is ultra vires and void. Declarations have been granted against unlawful tax demands,[83] street works charges,[84] compulsory purchase orders,[85] conditions imposed on planning permission,[86] enforcement notices,[87] coast protection charges,[88] and threats of trespass under alleged rights of way.[89] The plaintiff must have the necessary standing to sue[90] and the case must not be one where the remedy is expressly or impliedly excluded by statute.[91] But otherwise there is no limit to the variety of ultra vires acts which can be challenged by the use of this flexible remedy. It has been held that the jurisdiction to grant it 'should receive as liberal a construction as possible'.[92] But the relief sought must always relate to 'rights and liabilities that are enforceable in the courts, and not merely moral, social or political rights or liabilities'.[93] There must be 'a serious justiciable issue' against a party with 'a true interest to oppose', or as the House of Lords has put it, 'a proper contradictor'.[94] Furthermore, there is 'no such order known to English law as an interim declaration', pending some decision of a court.[95]

Further useful applications of the declaration are for the determination of some disputed question of status;[96] for settling whether advice given in government circulars is correct in law;[97] for enabling a public authority to ascertain its own

[80] *Gateshead Union Guardians* v. *Durham CC* [1918] 1 Ch. 146.
[81] *Cooper* v. *Wilson* [1937] 2 KB 309; *Ridge* v. *Baldwin* [1964] AC 40.
[82] *Vine* v. *National Dock Labour Board* [1957] AC 488.
[83] *Bowles* v. *Bank of England* [1913] 1 Ch. 57; *Dyson* v. *A.-G.* [1912] 1 Ch. 159.
[84] *Elsdon* v. *Hampstead Borough Council* [1905] 2 Ch. 633.
[85] *Grice* v. *Dudley Cpn.* [1958] Ch. 329.
[86] *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240; and see *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] AC 260.
[87] *Francis* v. *Yiewsley & West Dayton Urban District Council* [1958] 1 QB 478.
[88] *Cullimore* v. *Lyme Regis Cpn.* [1962] 1 QB 718.
[89] *Thornhill* v. *Weeks* [1913] 1 Ch. 438.
[90] See below, p. 682.
[91] See below, p. 709.
[92] *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 KB 536 at 572 (Bankes LJ).
[93] *Malone* v. *Metropolitan Police Commissioner* [1979] Ch. 344 at 352 (Megarry V-C).
[94] *Re S* (below) citing the House of Lords.
[95] *Fox* v. *Riverside Health Trust* (1993) 6 Admin. LR 250. See also *R.* v. *Secretary of State for the Environment ex p. Royal Society for the Protection of Birds* (1995) 7 Admin. LR 434 (HL), rejecting an attempt to evade the rules about interim injunctions.
[96] *A.-G.* v. *Prince Ernest Augustus of Hanover* (above).
[97] As illustrated above, p. 572.

duties or powers;[98] and for the resolution of some dispute between two public authorities.[99] In a case where a friend, opposing a relative, was allowed to seek a declaration as to the right of custody of an incapacitated patient it was held that the cases 'appear to constitute the development of a new advisory declaratory jurisdiction'.[1] The Law Commission has in fact recommended that the High Court should be expressly empowered to grant advisory declarations.[2]

Non-statutory authorities of certain kinds are now subject to judicial review and therefore to declaratory court orders. This development is discussed at the end of the next chapter.

A declaration may also be sought against a statutory tribunal so as to challenge the validity of its decision—and, occasionally, to tell it positively what it ought to decide.[3] Although it has been suggested that, where the tribunal has merely to make a determination which it does not itself enforce, the proper defendant is not the tribunal but the person entitled to enforce the decision,[4] declarations have in several cases been granted against tribunals and similar bodies on account of decisions which were ultra vires.[5] There would seem to be no reason why this direct challenge should not be allowed, just as it is where the remedy is certiorari.

Offices and employments

As explained earlier, the law will not specifically enforce a contract of service between master and servant: the master always has power to dismiss the servant, even though in breach of contract, and the servant's remedy is to sue for damages.[6] In special circumstances the court may depart from this rule,[7] but

[98] *Wimbledon & Putney Conservators* v. *Tuely* [1931] Ch. 90.

[99] e.g. *Gateshead Union Guardians* v. *Durham County Council* (above); *Surrey County Council* v. *Ministry of Education* [1953] 1 WLR 516; *R.* v. *London Transport Executive ex p. Greater London Council* [1983] QB 484 (GLC's policy of subsidising London transport fares declared lawful).

[1] *Re S (Hospital Patient)* [1996] Fam. 1, citing Zamir and Woolf, *The Declaratory Judgment*, 2nd edn., 44 and fully discussing the law in a private law context.

[2] Law Com. No. 226, para. 8.12.

[3] As in *Barty-King* v. *Ministry of Defence* [1979] 2 All ER 80.

[4] *Anisminic Ltd.* v. *Foreign Compensation Commission* [1968] 2 QB 862 at 911 (Diplock LJ).

[5] *Taylor* v. *National Assistance Board* [1957] P 101 at 111, affirmed [1958] AC 532; *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147; and see *Lee* v. *Showmen's Guild* [1952] 2 QB 329 at 346; *Barnard* v. *National Dock Labour Board* [1953] 2 QB 18 at 41; *Punton* v. *Ministry of Pensions and National Insurance* (No. 1) [1963] 1 WLR 186; (No. 2) [1964] 1 WLR 226.

[6] Above, p. 539.

[7] As in *Hill* v. *Parsons* [1972] Ch. 305, where an injunction to enforce continuing employment was granted on the ground that damages were an inadequate remedy. The plaintiff had been dismissed under a closed shop policy, but might have been protected by the Industrial Relations Act 1971 coming into force within the period of notice to which he was entitled. See also *Taylor* v. *National Union of Seamen* [1976] 1 WLR 532; *Powell* v. *Brent LBC* [1988] ICR 176.

normally it is observed uniformly. Accordingly a dismissed employee cannot obtain a declaration that his dismissal was a nullity, for in that case his employment would still continue and the court would be enforcing the contract of employment specifically.[8] This does not mean that a declaration will never be granted to a dismissed employee: he may obtain a declaration that his dismissal was a breach of contract, thus establishing his right to damages.[9] But he cannot claim a declaration that will prolong his employment.

To this rule there now appears to be an exception in respect of dismissal procedures. Where a contract of employment provides rights of appeal or other procedural rights, the court may grant an injunction or declaration to prevent the employee being denied these rights.[10] This specific enforcement is akin to the enforcement of the principles of natural justice in such cases, as already explained.[11]

An office, as opposed to mere employment, may be protected specifically, as has also been seen above; and the same applies to a statutory status, such as that of a registered dock worker.[12] This is why police officers can be removed from their posts only by a valid exercise of the statutory power of dismissal.[13] On the same principle a declaration was granted against the dismissal of a schoolteacher on 'educational grounds' (as the Act required) when no such grounds existed,[14] and against the dismissal of schoolteachers who had refused to collect money for pupils' meals, since the Education Act provided (as the court held) that teachers could not be required to act as collectors.[15] A limited statutory power of dismissal is one of the marks of a protected office or status. The ambiguous position of many public employees has been explained in the context of natural justice.[16]

In these employment cases injunctions are commonly sought and granted together with declarations and according to the same rules.[17]

[8] *Barber* v. *Manchester Regional Hospital Board* [1958] 1 WLR 181 (doubted but corroborated as mentioned above, p. 541); *Francis* v. *Kuala Lumpur Councillors* [1962] 1 WLR 1411.

[9] This appears to be the explanation of *McClelland* v. *Northern Ireland General Health Services Board* [1957] 1 WLR 594, though it is only in the dissenting speech of Lord Keith (at 609) that the point appears clearly. The report is inadequate as to the relief sought.

[10] *R.* v. *British Broadcasting Corporation ex p. Lavelle* [1983] 1 WLR 23; *Irani* v. *Southampton Health Authority* [1985] ICR 590.

[11] Above, p. 541.

[12] *Barnard* v. *National Dock Labour Board* [1953] 2 QB 18; *Vine* v. *National Dock Labour Board* [1957] AC 488.

[13] *Cooper* v. *Wilson* [1937] 2 KB 309; *Ridge* v. *Baldwin* [1964] AC 40.

[14] *Martin* v. *Eccles Cpn.* [1919] 1 Ch. 387 (a touching story).

[15] *Price* v. *Sunderland Corporation* [1956] 1 WLR 1253; and see *Smith* v. *Macnally* [1912] 1 Ch. 816; *Sadler* v. *Sheffield Cpn.* [1924] 1 Ch. 483; *Gorse* v. *Durham County Council* [1971] 1 WLR 775; *Jones* v. *Lee* [1980] ICR 310.

[16] Above, p. 540.

[17] See cases in n. 14 above.

Declaration in relation to prerogative remedies

Since 1977 the remedies of declaration and injunction have become available interchangeably with the prerogative remedies of certiorari, prohibition and mandamus under the procedure of application for judicial review.[18] The scope of declaration and injunction is therefore now coextensive with that of those remedies as explained below under their respective titles. One example of this extended scope concerns non-statutory functions to which judicial review is now extended, as explained in a later place.[19] But it is no longer allowable to seek declarations against public authorities by the ordinary procedure of private law, as was freely allowed before 1977. They must be sought by the new procedure, which has created serious problems.[20]

It was formerly a defect of the declaratory judgment that it was useless in cases of mere error on the face of the record, where the disputed determination was held to be intra vires but nevertheless liable to be quashed by certiorari.[21] Merely to declare that a determination was intra vires, even though mistaken, effected nothing; whereas certiorari 'quashed' and positively removed the offending determination out of the way. This difficulty was eliminated by the doctrine,[22] that every error of law by a tribunal amounts to excess of jurisdiction which necessarily means that an erroneous determination must be ultra vires, and a declaration to that effect will, as usual, invalidate it.

Fitting the remedy to the case

In granting declarations, as they do so freely, the courts do not always observe that they may not fit the facts. An example was where a probationer police officer had resigned from the force under an unjustified threat of dismissal. The Court of Appeal granted him a declaration that the chief constable's decision to dismiss him was void, despite the fact that the chief constable's only legal power was to dismiss, which in fact he did not do, and he had no specific power to make a decision.[23] On appeal the House of Lords substituted a different declaration, recognising that the Court of Appeal's order could not effect the probationer's reinstatement, and that an order of mandamus was the only satisfactory remedy.[24] This case may be

[18] Below, p. 651.

[19] Below, p. 638.

[20] For which see below, p. 662.

[21] Above, p. 268. The defect was established in *Punton* v. *Ministry of Pensions and National Insurance* (No. 2) [1964] 1 WLR 226.

[22] See above, p. 264.

[23] *Chief Constable of North Wales Police* v. *Evans* [1982] 1 WLR 1155 (application for judicial review).

[24] See at 1165 (Lord Bridge) and 1176 (Lord Brightman). But mandamus was not awarded because 'it might border on usurpation of the powers of the chief constable' (at 1176, Lord Brightman). So the proper remedy was withheld in discretion.

classed with others, explained below,[25] where there has been a misfit between the remedy and the case because it was supposed that every administrative power was a power of decision.

Exclusive statutory remedy

A declaratory judgment may not be used as a substitute for an exclusive statutory remedy available from some specified court or tribunal—as for instance where a tax allowance can be claimed only by appeal to the Commissioners of Inland Revenue[26] or where a question affecting the assessment of compensation on a compulsory purchase is to be determined only by the Lands Tribunal.[27] This is a general doctrine, affecting other remedies, and is explained later.[28]

Discretionary remedy

Finally, the declaration is a discretionary remedy. The court may refuse it if it thinks fit, for example if persons who are directly interested in the proceedings are not joined as parties.[29] But this characteristic is best explained later, since injunction, declaration and the prerogative orders are all discretionary remedies, and the same principles govern them all.[30]

The court in the past would not normally grant a declaration in interlocutory proceedings, since this remedy is final in its nature.[31] However, CPR 25.1 (1)(b) now provides that the court may make an 'interim declaration' and may do so whether or not a declaration has been sought as final relief or not. The interim declaration will prove useful where an interim injunction is excluded by statute[32] and in other circumstances too where early guidance from the courts on the correct course of conduct is required.[33]

[25] Below, p. 611.
[26] *Argosam Finance Co. Ltd.* v. *Oxby* [1965] Ch. 390.
[27] *Harrison* v. *Croydon London Borough Council* [1968] Ch. 479.
[28] Below, p. 727.
[29] *London Passenger Transport Board* v. *Moscrop* [1942] AC 332.
[30] Below, p. 700.
[31] *Meade* v. *Haringey LBC* [1979] 1 WLR 637 at 648.
[32] For instance, under the Crown Proceedings Act 1947, s. 21. See above, p. 833.
[33] *Bank of Scotland* v. *A Ltd* [2001] EWCA Civ. 52; [2001] 1 WLR 751 (bank seeking guidance when client suspected of money laundering).

RELATOR ACTIONS

A hybrid procedure

A relator action is an action brought by the Attorney-General at the relation (i.e. at the instance) of some other person claiming an injunction or declaration, or both,[34] in order to prevent some breach of the law. By lending his name for this purpose the Attorney-General enabled the injunction and declaration, which were basically remedies for the protection of private rights,[35] to be converted into remedies of public law for the protection of the public interest. They thus acquired a hybrid character even before the reforms of 1977 discussed in Chapter 19.

The foundation of this procedure is the interest of the Crown, as parens patriae, in upholding the law for the general public benefit. The Crown is concerned to see that public bodies, public trusts and charities should not exceed or abuse their powers or their funds; to abate public nuisances; and to prevent the law being flouted. The court may always restrain such abuses at the Attorney-General's instance.[36] In other words, the Crown always has standing for this purpose, whereas a private plaintiff might be refused relief on the ground that he had no more interest in the matter than any other member of the public. But in many situations the Attorney-General is willing to act on a private plaintiff's behalf, at his 'relation', thus solving the problem of standing.[37] Just as the Crown will lend its name to applicants for prerogative remedies, so the Attorney-General will lend his name to the relator.

Attorney-General's role

The Attorney-General may if he prefers act independently, ex officio.[38] But in practice he acts at the instance of the relator, whom he requires to instruct solicitor

[34] Most commonly an injunction. An example of declaration is *A.-G. ex rel. Tilley* v. *Wandsworth LBC* [1981] 1 WLR 854.

[35] A plaintiff may sue in his own name where interference with a public right causes him special damage: *Boyce* v. *Paddington Borough Council* [1903] 1 Ch. 109.

[36] See generally Edwards, *The Law Officers of the Crown* (1964); *The Attorney General, Politics and the Public Interest* (1984). No damage or injury need be shown: *A.-G.* v. *Cockermouth Local Board* (1874) LR 18 Eq. 172.

[37] In some cases the Attorney-General requires the relator first to obtain a ruling from the court that he has no standing of his own: *Booth & Co. Ltd.* v. *National Enterprise Board* [1978] 3 All ER 624; *Barrs* v. *Bethell* [1982] Ch. 294. In the uncertain state of the law about standing this practice may require much additional litigation and its justification is not evident.

[38] The reason why this was not in practice done has been said to be that there was no satisfactory system for awarding costs prior to the Administration of Justice (Miscellaneous Provisions) Act 1933, s. 7: *Hoffmann–La Roche* v. *Secretary of State for Trade & Industry* [1975] AC 295 at 363 (Lord Diplock).

and counsel, who must certify that the statement of claim is proper for the Attorney-General's acceptance and that the relator will be responsible for costs.[39] Once the Attorney-General has accepted, 'he virtually drops out of the proceedings ... the actual conduct of the proceedings is entirely in the hands of the relator who is responsible for the costs of the action'.[40] Having conferred the necessary standing on the relator, therefore, the Attorney-General shows no further concern with the public interest, but leaves the case to proceed like private litigation.

It has long been axiomatic that it rests entirely in the discretion of the Attorney-General to decide whether or not he will lend his name. As was said in the House of Lords:[41]

> ... the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court.

But what rules, if any, the Attorney-General follows for this purpose are not known. There is no published information about his practice,[42] which can only be guessed from the reported cases in which he has consented to act. It seems that he will normally lend his name where the proceedings are against a local authority, and perhaps also where a local authority is the relator. It seems also that he never does so where the proceedings are against a minister or a department of the central government. The relator action is therefore a one-sided as well as an uncertain procedure: it is a weapon in the hands of the central government which is made available on unspecified grounds against local and other subordinate authorities, but not against the central government itself.

A relator action may be brought against a public authority that is acting, or threatening to act, ultra vires; and equally it may be brought against any private individual or body who is committing a public nuisance or otherwise violating public law.[43] The commonest defendants to relator actions are local authorities, particularly where ratepayers challenge the validity of their local authority's expenditure, suing under the Attorney-General's name. In New Zealand this procedure has been used to solve the problem of how a neighbour may challenge an

[39] *A.-G. ex rel. McWhirter* v. *Independent Broadcasting Authority* [1973] QB 629 at 647 (Lord Denning MR). The relator may be joined as a party in suitable cases.

[40] As preceding note.

[41] *London County Council* v. *A.-G.* [1902] AC 165 at 169 (Lord Halsbury LC). For a modern example see *R.* v. *Solicitor-General ex p. Taylor* [1995] COD 61.

[42] In the *McWhirter* case (above) at 656 Lawton LJ said: 'In the course of this hearing the Attorney-General gave the court information about the attitude which he and his predecessors in modern times have taken towards relator actions. ... Much of this information is not available, as far as I know, in any of the practitioners' textbooks.'

[43] But it is not available to a local authority against breach of contract or covenant by the other party, for which the local authority should sue in its own name: *Attorney-General ex rel. Scotland* v. *Barratt* (1990) 60 P & CR 475.

invalid grant of planning permission, although as explained later he is not entitled to a declaration in his own name:[44] the Attorney-General sued on the relation of the neighbour and obtained a declaration that the permission was void and an injunction against the unauthorised use of the land.[45]

Relator actions fall outside the Crown Proceedings Act 1947, so that their scope and procedure remain unchanged.[46]

Local authorities

There is a standardised practice by which a ratepayer may dispute the validity of the local authority's expenditure in a relator action, sometimes called a 'ratepayer's action'. A typical case was where the London County Council, being empowered by statute to purchase and operate tramways, purchased a tramway company and also carried on a bus service which the company had run. The proprietors of a rival bus service, who were also ratepayers, caused the Attorney-General to sue for an injunction against the operation of buses by the Council, which was duly granted.[47] The Attorney-General appears to allow actions against local authorities with a free hand. In one case a local authority, after there had been much fire and flood damage on its housing estates, made a contract with an insurance company for the collective insurance of its tenants' effects. The staff trade union of a rival insurance company, acting apparently merely in their own interests as its employees, were allowed to bring a relator action challenging the legality of the contract—which was in fact held lawful.[48] The Court of Appeal expressed some curiosity as to these proceedings, but held that they could not question the Attorney-General's practice or the relator's standing.

Whether it was necessary for ratepayers to resort to relator actions in such cases became uncertain when in 1954 the Court of Appeal awarded a declaration to a ratepayer suing in his own name.[49] But the Court made no mention of the question of standing, and it has since been held that the decision was inadvertent and not, on this question, a precedent to be followed.[50] A ratepayer may be able to proceed unassisted under the procedure of application for judicial review, explained later, provided that he can obtain the leave of the court.[51] But whether this new avenue is open to him has not yet been established.

[44] Below, p. 682.

[45] *A.-G.* v. *Codner* [1973] 1 NZLR 545.

[46] See s. 23(3).

[47] *London County Council* v. *A.-G.* [1902] AC 165. See similarly *A.-G.* v. *Fulham Cpn.* [1921] 1 Ch. 440 (expenditure on municipal laundry ultra vires).

[48] *A.-G.* v. *Crayford Urban District Council* [1962] Ch. 575.

[49] *Prescott* v. *Birmingham Cpn.* [1955] Ch. 210; above, p. 399. *Bradbury* v. *Enfield Borough Council* [1967] 1 WLR 1311 (see above, p. 562) appears to be a comparable case.

[50] *Barrs* v. *Bethell* [1982] Ch. 294 (Warner J). And see *Collins* v. *Lower Hutt City Cpn.* [1961] NZLR 250; *Cowan* v. *Canadian Broadcasting Cpn.* (1966) 56 DLR (2d) 578.

[51] Below, p. 652.

Local authorities have now been given a special statutory power to take action for the benefit of their areas. Formerly they could not bring proceedings for the general public benefit without the assistance of the Attorney-General, unless their own rights of property were in some way affected.[52] The courts rejected claims by local authorities, suing by themselves, for injunctions against public nuisances,[53] against obstruction of highways,[54] and against the withdrawal of bus services.[55] For such purposes local authorities therefore needed to use relator actions, despite the provisions of the Local Government Act 1933 as follows:[56]

> Where a local authority deem it expedient for the promotion or protection of the interests of the inhabitants of their area, they may prosecute or defend any legal proceedings.

The Local Government Act 1972 has substituted for the last eight words:[57]

> . . . they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name.

The 1933 formula, despite an opinion of Lord Denning MR to the contrary,[58] was held not to confer any new power to sue without the Attorney-General's name.[59] But the 1972 formula has been held to remove the difficulty, so that a local authority[60] is able to obtain an injunction against unlawful Sunday trading merely in its own name.[61] As a rule, therefore, the Attorney-General's consent will no longer be needed in such cases. Local authorities can also take proceedings against statutory nuisances in their own name under the Public Health Act 1936.[62]

As regards injunctions for enforcing obedience to statute, as explained below,[63] a local authority has been held to have no power to proceed in its own name, even to enforce its own byelaws.[64] But this also may now be permitted by the Act of 1972, assuming that the enforcement of the criminal law by injunction counts as 'civil proceedings'.

[52] *Thorne Rural District Council* v. *Bunting* [1972] Ch. 470.
[53] *Prestatyn Urban District Council* v. *Prestatyn Raceway Ltd.* [1970] 1 WLR 33.
[54] *Hampshire County Council* v. *Shonleigh Nominees Ltd.* [1970] 1 WLR 865.
[55] *Sinfield* v. *London Transport Executive* [1970] Ch. 550.
[56] s. 276.
[57] s. 222.
[58] *Warwickshire County Council* v. *British Railways Board* [1969] 1 WLR 1117 at 1122.
[59] See the *Prestatyn* and *Hampshire* cases (above).
[60] But not a local development corporation: *London Docklands Development Cpn.* v. *Rank Hovis Ltd.* (1985) 84 LGR 101.
[61] *Solihull Council* v. *Maxfern Ltd.* [1977] 1 WLR 127; *Stoke-on-Trent City Council* v. *B & Q (Retail) Ltd.* [1984] AC 754; *Barking and Dagenham LBC* v. *Essexplan Ltd.* (1982) 81 LGR 408. See likewise *Burnley BC* v. *England* (1978) 76 LGR 393 (breach of byelaw excluding dogs from parks); *Kent CC* v. *Batchelor* (No. 2) [1979] 1 WLR 213 (enforcement of tree preservation orders); *City of London Cpn.* v. *Bovis Construction Ltd.* [1992] 3 All ER 697 (injunction against noise nuisance while prosecution pending).
[62] s. 100.
[63] Below, p. 585.
[64] *Devonport Cpn.* v. *Tozer* [1903] 1 Ch. 759.

Where the Attorney-General declines to act

It has been laid down by decisions of the House of Lords that if the Attorney-General declines to consent to a relator action, the court cannot question his exercise of his discretion nor can it allow a private person to sue in his own name merely in the capacity of a member of the public. In 1977 the House had occasion to disapprove two dramatic decisions in which the Court of Appeal had attempted to throw open the door to the public-spirited citizen wishing to prevent a breach of the law by a public authority. In the first of these it was held that if the Attorney-General refused leave in a proper case, or his machinery worked too slowly, an offended or injured member of the public could in the last resort apply to the court himself. Lord Denning MR said that it was a matter of high constitutional principle that the court should thus assist to stop a government department or public authority transgressing the law. But these remarks were *obiter*, since before final judgment was given the Attorney-General intervened and lent his name to the proceedings. The relator's complaint was that the Independent Broadcasting Authority were about to allow the transmission of an indecent television programme, contrary to their statutory duty to see that programmes did not offend against good taste and decency.[65]

The second case was an attempt by a private citizen to restrain a threatened breach of the criminal law by trade unions, when unions of post office workers were planning to boycott communications with South Africa, despite the fact that improper interference with mails and telegrams is a statutory offence.[66] The Attorney-General declined to proceed, but Lord Denning MR held that an injunction could be granted at the suit of a private plaintiff and the other members of the court were willing to grant declaratory relief. The House of Lords reversed this decision and disapproved the remarks in the earlier case.[67] They held that to act in the public interest was the Attorney-General's exclusive right. His role was substantial and constitutional and he was free to consider the public interest generally and widely. He was therefore free to take account of any circumstances, political or otherwise. His decision was not subject to judicial review.[68]

This decision contained sweeping remarks about the Attorney-General's exclusive right to represent the public interest; and for a time it seemed that the House of Lords had administered a sharp check to the tendency towards liberality

[65] *A.-G. ex rel. McWhirter* v. *Independent Broadcasting Authority* [1973] QB 629. After viewing the programme the court refused relief. See also *Wilson* v. *Independent Broadcasting Authority* (below), an interesting Scots parallel.

[66] For injunctions in aid of the criminal law see below, p. 585.

[67] *Gouriet* v. *Union of Post Office Workers* [1978] AC 435. For discussion see Edwards, *The Attorney-General, Politics and the Public Interest*, 129 and 140.

[68] See at 478 (Lord Wilberforce). For a review of authorities see *R.* v. *Solicitor-General ex p. Taylor* (1995) 8 Admin. LR 206.

in allowing it to be vindicated by private citizens. But later events have shown otherwise. This must be explained in another place[69] as part of the law of standing, which the House of Lords has put upon a new and more generous basis, following procedural reforms in the law of remedies. Their above-mentioned decision, it now appears, ought to be confined to its peculiar subject matter, which is the use of civil proceedings for the purpose of enforcing the criminal law. That is a highly abnormal procedure and there may be good reasons for allowing only the Attorney-General to employ it.

Observations on the relator action

The relator action is one of the useful devices, like the prerogative remedies, by which the Crown's procedural privileges have been made available to the ordinary citizen, to the advantage not only of himself but of the public interest. It imposes a measure of control on situations where otherwise any number of members of the public might attempt to bring uncoordinated actions, resulting in general confusion. Basically it is a regulated form of *actio popularis*, available to all and sundry whom the Attorney-General is willing to assist; and his practice appears to be cooperative, save only where the complaint is against the central government or where he is unwilling to act for political reasons.

Nevertheless the situation is far from logical.[70] In effect, the Attorney-General himself determines the plaintiff's standing to sue. But this is a matter which should be determined by known rules of law, and not by the undisclosed practice of a minister of the Crown. Nor is there any logic in withholding this remedy against the central government, as seems to be the present practice. The use of the relator action has therefore been an impediment to the development of satisfactory rules of law as to the ability of citizens to litigate in the general public interest. There is no such system in Scots law, which allows individuals with very general interests (e.g. as voters or members of political bodies) to sue on their own account in order to prevent breach by a public body of a duty owed by that body to the public.[71]

Now, however, the House of Lords has provided a prospect of a more uniform and liberal system under the new procedure of application for judicial review, whereby the public-spirited citizen may be enabled 'to vindicate the rule of law' in his own name, unimpeded by 'outdated technical rules of locus standi'.[72] This

[69] Below, p. 679.

[70] See the criticisms of Ormrod LJ in *Gouriet* v. *Union of Post Office Workers* [1977] QB 729 at 776.

[71] *Wilson* v. *Independent Broadcasting Authority* 1979 SLT 279 (interdict granted against IBA to prevent broadcasting of one-sided political programmes). Contrast *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179.

[72] See below, p. 694.

generous judicial policy has much reduced the need for relator actions, which are now scarce items in the law reports.

Enforcement of obedience to statute

It remains to mention a very different use of the relator action, where it operates not as a defence against the abuse of authority, but as a weapon in the hands of authority to prevent the deliberate and flagrant disregard of statute. The Attorney-General, acting on the application of a local authority or other relator, may apply for an injunction to prevent contravention of statute, or abuse of statutory rights, by any offending person. Disobedience then becomes contempt of court, punishable by fine and imprisonment in the court's discretion. The typical situation is where there are repeated offences and the statutory penalties are not an adequate deterrent.[73]

In one case the defendant had often broken the provisions of the Town and Country Planning Act by using his land as a site for caravans without permission. He refused to pay fines, and was eventually sentenced to imprisonment for non-payment. But the local planning authority also moved the Attorney-General to apply for an injunction to prohibit illegal use of the land, and the injunction was granted.[74] It was held that there was jurisdiction to grant this additional remedy to prevent violation of the public policy enforced by the Act, and the fact that the Act contained its own provisions for enforcement did not fetter the Attorney-General's discretion, as an administrative matter, to ask for an injunction either as an alternative to or in addition to the statutory penalties. The Court of Appeal similarly granted an injunction to stop flagrant disobedience of enforcement notices served for the purpose of preventing the use of green belt land as a gipsy caravan site; and they held that it was not necessary for the local planning authority to launch criminal proceedings first.[75]

In another planning case the court went even further, and granted an injunction to prevent the use of land in a manner expressly permitted by the Act.[76] This was another caravan case where the offender moved the caravans from one site to another in the same neighbourhood, making a fresh application for permission in each case and appealing to the minister on each refusal, thus taking advantage of the manifold opportunities for delay which the planning machinery provided in

[73] See *A.-G.* v. *Harris* [1961] 1 QB 74, where a flower-seller with over a hundred convictions for obstruction, punishable only by fine, was restrained by injunction from offending again—and offended again and was committed for contempt of court. For an account of this case see Edwards, *The Law Officers of the Crown*, 290.

[74] *A.-G.* v. *Bastow* [1957] 1 QB 514.

[75] *Runnymede BC* v. *Ball* [1986] 1 WLR 353.

[76] *A.-G.* v. *Smith* [1958] 2 QB 173.

the days before the Caravan Sites and Control of Development Act 1960. The Attorney-General, on behalf of the local authority, was granted an injunction prohibiting this person from using any land in the neighbourhood as a caravan site without first obtaining permission. The injunction was thus used as a means of supplementing the imperfect remedies provided by Parliament in the Act.

On the other hand the court has declined to use its powers over wards of court to help a local authority to enforce school attendance orders which were persistently disobeyed by a parent, on the ground that it ought not to impose more severe sanctions than those which Parliament thought suitable.[77]

The Attorney-General, acting for a local authority, was granted an injunction to restrain the use of a hotel without a certificate of fire precautions.[78] The local authority were prosecuting the owner as the Act authorised in a magistrates' court, but were concerned at a serious fire risk during the period before the charge could be heard. Lord Denning MR said:

> Whenever Parliament has enacted a law and given a particular remedy for the breach of it, such remedy being in an inferior court, nevertheless the High Court always has reserve power to enforce the law so enacted by way of an injunction or declaration or other suitable remedy. The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient to do so.

It is therefore not only in the case of repeated offences that this jurisdiction may be invoked. But mere infringement of the criminal law is not enough: it must be shown that the offender is deliberately and flagrantly flouting it.[79]

Now that local authorities can bring proceedings in their own name they can dispense with the assistance of the Attorney-General, as already explained.[80]

Whether it is right to increase statutory penalties by the use of injunctions is a debatable question. The House of Lords have more than once emphasised that this remedy should be regarded as anomalous and exceptional, since it is not normally for the civil courts to enforce the criminal law, to increase statutory penalties, and to convict (in effect) on a civil standard of proof.[81] As Lord Templeman has said,[82]

> Where Parliament imposes a penalty for an offence, Parliament must consider that the penalty is adequate and Parliament can increase the penalty if it proves to be inadequate. It follows that a local authority should be reluctant to seek and the court should be reluctant

[77] *Re B (Infants)* [1962] Ch. 201. See also *Newport BC* v. *Khan* [1990] 1 WLR 1185 (tree preservation: injunction refused).

[78] *A.-G.* v. *Chaudry* [1971] 1 WLR 1614. And see *Stafford Borough Council* v. *Elkenford Ltd.* [1977] 1 WLR 324.

[79] *Stoke-on-Trent CC* v. *B & Q Ltd.* [1984] AC 754. See also *Nottingham City Council* v. *Zain* [2001] EWCA Civ. 1248; [2002] 1 WLR 607 (local authority seeking to restrain criminal activities which also constituted a public nuisance).

[80] Above, p. 581.

[81] *Gouriet* v. *Union of Post Office Workers* [1978] AC 435; *Stoke-on-Trent CC* v. *B & Q Ltd.* (above).

[82] In the *Stoke-on-Trent* case (above).

to grant an injunction which if disobeyed may involve the infringer in sanctions far more onerous than the penalty imposed for the offence.

The House of Lords have also emphasised that the procedure is one which only the Attorney-General can put into motion (save where statute provides otherwise). If he declines to act at the request of a private person, that person cannot be allowed to bring proceedings in his own name.[83] In view of the serious objections to which the whole procedure is open, it is clearly right to put it under the control of an officer of the Crown.

ENFORCEMENT OF DUTIES

Public duties

As well as illegal action, by excess or abuse of power, there may be illegal inaction, by neglect of duty.[84] Public authorities have a great many legal duties, under which they have an obligation to act, as opposed to their legal powers, which give them discretion whether to act or not. The remedies so far investigated deal with the control of powers. The remedies for the enforcement of duties are necessarily different. The most important of them, mandamus, belongs among the prerogative remedies in the next chapter. The 'ordinary' remedies noted here play only a minor part.

Criminal prosecution

The natural way for a statute to enforce a public duty in the case of a private person is to invoke the criminal law, for example by making it an offence to fail to make an income-tax return. The common law took the same approach to the problem of making public authorities carry out their duties. Wilful neglect of a public duty was held to be an indictable offence, punishable by fine or imprisonment.[85] It was impossible, of course, to indict the Crown.[86] But the inhabitants of counties, townships and parishes were often indicted for failure to repair highways and bridges. When these duties were transferred to statutory highway authorities, it was

[83] *Gouriet* v. *Union of Post Office Workers* (above).

[84] See Harding, *Public Duties and Public Law*.

[85] See *R.* v. *Hall* [1891] 1 QB 747, reviewing authorities; Holdsworth, *History of English Law*, x. 147.

[86] Nevertheless Dowdell, *A Hundred Years of Quarter Sessions*, 125, records an indictment against the King in 1670 for non-repair of Hampton Bridge; but it was 'not pressed'.

possible to indict them also. The legal basis of this procedure was that a public nuisance (a crime) had been perpetrated. But in 1959 it was abolished in favour of statutory proceedings which anyone may institute against the highway authority, with the ultimate sanction that the complainant may carry out the work himself and recover the cost from the defaulting authority.[87]

It was often laid down in the past that disobedience of a statute or neglect of the duties of a public office was a criminal offence unless Parliament had provided some other sanction or remedy.[88] This is illustrated by the decision that an indictment would lie against an overseer of the poor for not receiving a pauper under a justices' order;[89] and by the case of a magistrate who was indicted, but acquitted, for failing to take proper steps to suppress a riot.[90] Where the duty was statutory the offence was sometimes called contempt of statute. Indictment is obviously an unsatisfactory remedy, and has not often been used in recent times.[91] Modern statutes are not to be presumed to create criminal offences unless they do so clearly, and the doctrine of contempt of statute is regarded as obsolete.[92]

Private law remedies

The ordinary remedies of private law are sometimes effective in case of breach of duty by public authorities. Actions for damages play an important part where breach of statutory duty is held to be an actionable wrong, as explained in the chapter on liability of public authorities.[93]

Injunctions are in general not used. To enforce a duty requires a mandatory injunction, which the court will grant only where the duty is owed to the plaintiff personally, i.e. where he has a legal right to protect. Thus the court made a mandatory order against the police for the return of passports and other documents which were being detained unlawfully.[94] Although there is no reason in principle why a mandatory injunction should not be granted against a public authority, the prerogative remedy of mandamus is usually more suitable, particularly since the procedure is quicker and the rules as to standing are less strict. Where the duty is owed to the public generally and not to the plaintiff personally an injunction

[87] Highways Act 1959, s. 59, replaced by Highways Act 1980, s. 56.

[88] Co. Inst. ii. 163; Bl. Comm. iv. 122 and other authorities cited in *R.* v. *Horseferry Road Justices ex p. Independent Broadcasting Authority* [1987] QB 54.

[89] *R.* v. *Davis* (1754) Sayer 163.

[90] *R.* v. *Pinney* (1832) 3 B & Ad. 947.

[91] An example is *R.* v. *Dytham* [1979] QB 722 (alleged failure by police officer to stop fight).

[92] *R.* v. *Horseferry Road Justices* (above) where the court quashed a summons issued against the IBA for breach of statutory duty in respect of a television programme. The Law Commission have recommended the abolition of the doctrine (Law Com. No. 76 (1976), p. 142).

[93] Below, p. 773.

[94] *Ghani* v. *Jones* [1970] 1 QB 693.

to enforce performance of a duty will not be granted.[95] Formerly there was a statutory 'mandamus' which could be sought in an ordinary action and was the equivalent of a mandatory injunction, having nothing to do with the prerogative mandamus; but this redundant remedy no longer exists.[96]

In principle, also, there is no reason why the plaintiff should not seek a declaratory judgment, i.e. a declaration, that a public authority has some legal duty towards him personally. This has occasionally been done successfully.[97] But in accordance with the general rule that a declaration can only declare the legal position of the plaintiff, he will have to show that it is to himself particularly that the duty is owed.[98]

General and specific duties

A *power* enables an authority to do what would otherwise be illegal or ineffective. It is always subject to legal limits, and it is safe to assume that Parliament did not intend it to be exercised beyond those limits. A *duty*, on the other hand, may or may not be legally enforceable.[99] Parliament has become fond of imposing duties of a kind which, since they are of a general and indefinite character, are perhaps to be considered as political duties rather than as legal duties which a court could enforce. Many such duties may be found in statutes concerned with social services and nationalisation. Thus the opening words of the National Health Service Act 1977 are

> It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service. . . .

The Coal Industry Nationalisation Act 1946 charged the Coal Board with the duties of 'working and getting coal in Great Britain', 'making supplies of coal available', and so on. Current legislation furnishes an abundance of such examples.

[95] *Glossop* v. *Heston and Isleworth Local Board* (1879) 12 Ch. D 102; *Bradbury* v. *Enfield London Borough Council* (1967) 1 WLR 1311; *Wood* v. *Ealing London Borough Council* [1967] Ch. 364 (see under default powers, below).

[96] It was introduced by the Common Law Procedure Act 1854, s. 68, in 'an attempt to engraft upon the old common law remedy a right in the nature of specific performance': *Baxter* v. *London County Council* (1890) 63 LT 767 at 771. Although rendered redundant by the Judicature Acts 1873–75, it was reproduced in RSC 1883, Ord. 53. It did not appear in RSC 1965, since the mandatory injunction was sufficient. The statutory mandamus could be sought along with other remedies: see, e.g., *Wolstanton United Urban Council* v. *Tunstall Urban Council* [1910] 2 Ch. 347; *Watt* v. *Kesteven County Council* [1955] 1 QB 408; *Thorne* v. *University of London* [1966] 2 QB 237.

[97] As in *Gateshead Union* v. *Durham County Council* [1918] 1 Ch. 146.

[98] *Clark* v. *Epsom Rural District Council* [1929] 1 Ch. 287.

[99] The Post Office's general duties are expressly made unenforceable: Post Office Act 1969, s. 9(4): above, p. 143.

Only in the unlikely event of its making total default would any of the above-mentioned authorities be at risk of legal compulsion in respect of its general duties. But as soon as duties become sufficiently specific, the courts do not shrink from enforcing them. This was shown dramatically by the House of Lords and the Court of Appeal when they quashed the supplementary rate levied by the Greater London Council for the purpose of subsidising passenger transport in London.[1] The Council had power to subsidise the London Transport Executive, but they also had a duty to have regard to the Executive's own duties, which required it not to accumulate deficits and to operate with due regard to economy. The Council's general duty was to promote the provision of 'integrated, efficient and economic transport facilities' in London. But in calling upon the Executive to lower its fares, thereby accumulating a large deficit, the Council was in breach of its duty to have regard to the Executive's duties, as well as in breach of its fiduciary duty to its ratepayers.[2] The courts analysed the amalgam of general and specific duties and powers in the Transport (London) Act 1969, concluding that the Executive had a duty to minimise avoidable losses and the council a duty not to prevent them from doing so.

[1] *Bromley LBC* v. *Greater London Council* [1983] 1 AC 768.
[2] For the latter duty see above, p. 399.

16

PREROGATIVE REMEDIES

REMEDIES OF PUBLIC LAW

Nature of prerogative remedies

Entering now the realm of the prerogative remedies, we meet something like a system of public law. These are remedies which, if not always designed from the first for the control of governmental duties and powers, have long been in use for that purpose especially. Their hallmark is that they are granted at the suit of the Crown, as the title of every case indicates. They are 'prerogative' because they were originally available only to the Crown and not to the subject. By obtaining orders of the court in the form of mandamus, certiorari or prohibition, the Crown could ensure that public authorities carried out their duties, and that inferior tribunals kept within their proper jurisdiction. These were essentially remedies for ensuring efficiency and maintaining order in the hierarchy of courts, commissions and authorities of all kinds.

By the end of the sixteenth century these remedies had become generally available to ordinary litigants (some had done so much earlier), and an applicant could begin proceedings in the Crown's name without seeking any permission or authority.[1] The Crown lent its legal prerogatives to its subjects in order that they might collaborate to ensure good and lawful government. Habeas corpus would test the legality of any prisoner's detention at his own or some friend's instance. Certiorari and prohibition were designed for preventing the usurpation or abuse of power of inferior bodies, judicial and administrative alike. These three remedies played a most important part in the development of administrative law. By a process of evolution characteristic of our legal history, the Crown's prerogative powers have been converted into machinery for the protection of the subject.

Nowadays all these remedies issue from the High Court and they must still be sought by a special form of procedure.[2] They are all discretionary remedies, with the exception of habeas corpus. They used to be known as the prerogative writs,

[1] For the history of the prerogative remedies see Henderson, *Foundations of English Administrative Law*; de Smith, *Judicial Review of Administrative Action*, 4th edn., 584; de Smith, Woolf and Jowell, 14–001.

[2] For this see below, p. 647.

but since 1938 their name has been changed to prerogative orders[3]—again with the exception of habeas corpus, which was too sacred to be tampered with, and remains a writ. The procedural peculiarities of the prerogative remedies were formerly important since they entailed certain disadvantages as compared with the remedies of private law such as declaration and injunction.[4] The procedural reforms introduced by Civil Procedure Rules Part 54[5] changed the names of the specific prerogative orders most used in judicial review. Certiorari becomes a 'quashing order', prohibition a 'prohibiting order' and mandamus becomes a 'mandatory order'.[6] The writ of habeas corpus is untouched.

There were other prerogative writs which could be used at the instance of a subject, such as scire facias for rescinding royal charters and grants, and ne exeat regno for preventing a subject from leaving the realm. The latter writ seems now to be obsolete as a weapon of the Crown, but it is still in use by ordinary litigants as a remedy to prevent a debtor from absconding, if the applicant can show that the debtor's absence from the realm would materially prejudice him.[7] It has been suggested also that the writ might prove useful in public law as a means of preventing an immigrant being deported before his application to the court has been decided.[8] The modern use of the writ is yet another instance of the conversion of the Crown's legal armoury into remedies beneficial to the subject.

The remedies to be discussed first are habeas corpus (together with its human rights counterpart), certiorari and prohibition. These are grouped together since they are all remedies for the control of powers. Mandamus then follows, being the primary remedy for enforcing public duties.

HABEAS CORPUS

The historic writ

The writ of habeas corpus[9] plays a part in administrative law, since some administrative authorities and tribunals have powers of detention. The cases most likely to

[3] Administration of Justice (Miscellaneous Provisions) Act 1938, s. 7, replaced by Supreme Court Act 1981, s. 29.

[4] Below, p. 647.

[5] Discussed below, p. 653.

[6] Reading the decided cases will require, for some time to come, knowledge of both names and it would be anachronistic to use the new names in old contexts. Hence the old names have not been systematically excised from this book. See Appendix Two.

[7] *Felton* v. *Callis* [1969] 1 QB 200, where Megarry J explains the history and modern application of the writ. In *Parsons* v. *Burk* [1971] NZLR 244 the writ was refused to a private litigant who wished to prevent a New Zealand football team from visiting South Africa.

[8] *R.* v. *Home Secretary ex p. Muboyayi* [1992] 1 QB 244 at 258 (Lord Donaldson MR).

[9] See Sharpe, *Habeas Corpus*, (new edition with Zellick expected late 2004). There is remarkably little other specialist literature on the writ.

arise are those where some person is detained as an illegal immigrant or in order that he may be deported, or as being of unsound mind. A writ of habeas corpus challenging the legality of the detention is the traditional means of challenging the validity of the administrative order which caused it. If the court orders the applicant's release, that in effect quashes the order, an additional certiorari for this purpose being unnecessary.[10]

Prized and historic though it is, the remedy of habeas corpus, with its problems and technicalities as described in the following pages, may be destined to give place to the much simpler, more direct and more comprehensive provision for 'the right to liberty and security' conferred by Article 5 of the Human Rights Convention under the Human Rights Act 1998. Although those provisions have nothing to do with any prerogative writ, they are most conveniently explained alongside habeas corpus so that the remedies protecting personal liberty may be seen together. The text of Article 5 has already been given and it will be discussed at the end of this brief account of the ancient writ.

The procedural deficiencies of the prerogative remedies, to be noticed later, were particularly acute in the case of habeas corpus. No right of appeal used to exist against refusal of the writ in cases of imprisonment where there was a charge of a criminal nature—a grave and irrational defect which was not remedied until 1960.[11] Likewise there was no appeal against the issue of the writ, i.e. against the release of the prisoner. Here again the Act of 1960 provided for appeal and empowered the court, in a criminal case, to order the detention of the prisoner meanwhile;[12] but in a civil case the prisoner was to be released at once,[13] and the only use of the appeal was to allow the authorities to test the correctness of the decision.[14] The Act did not alter the old rule against disputing the facts stated in the gaoler's return to the writ,[15] but this was in practice allowed by admitting evidence of the facts before the writ was issued,[16] and in civil cases the rule was expressly abolished by the Habeas Corpus Act 1816.[17]

[10] Below, p. 597.

[11] Administration of Justice Act 1960, s. 15, amended by the Access to Justice Act 1999, s. 65.

[12] ss. 5, 15. In some Commonwealth countries there may still be no appeal, as in the case of the Trinidad rebellion: *A.-G. of Trinidad and Tobago* v. *Phillip* [1995] 1 AC 396.

[13] s. 15(4).

[14] See *R.* v. *Home Secretary ex p. Virk*, [1996] COD 134 ('only an academic right . . . in the realms of cloud cuckoo land', said Popplewell J). The Law Commission has recommended a review of the habeas corpus appeal system: Law Com. No. 226, para. 11.32.

[15] The theoretical remedy seems to have been an action for a false return: see Wilmot's *Opinion on Habeas Corpus*, Wilm. 77 at 106; *Rutty's* case (below) at 124. For such an action in an analogous case see *Brasyer* v. *Maclean* (1875) LR 6 PC 398; below, p. 774.

[16] See Sharpe (as above), 66.

[17] *R.* v. *Board of Control ex p. Rutty* [1956] 2 QB 109 at 124; *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74 at 110, where Lord Scarman quotes the Act. Even before the Act the court would sometimes admit affidavit evidence in the interests of justice: see *Goldswain's* case (1778) 2 W. Bl. 1207 at 1211. The Act may cut both ways, since the evidence may reveal good grounds for the detention which are not shown in the detention order: *Re Shahid Iqbal* [1979] QB 264, Boreham J forcefully dissenting.

The famous Habeas Corpus Act 1679, designed to prevent various abuses including prolonged imprisonment on criminal charges without bail, was drawn so specifically in terms of seventeenth-century procedure that some of its safeguards were probably ineffective in modern conditions.[18] But these are matters of little significance in practice. The courts can usually be relied upon to find their way round anachronistic obstacles. The writ may be applied for by any prisoner, or by anyone acting on his behalf, without regard to nationality, since 'every person within the jurisdiction enjoys the equal protection of our laws'.[19] It may be directed against the gaoler, often the appropriate prison governor, or against the authority ordering the detention, e.g. the Home Secretary.[20] It is not discretionary, and it cannot therefore be denied because there may be some alternative remedy.[21] Nor is leave of any kind required before it can be sought: it issues as of right.[22] There is no time limit. The defence will not always be statutory. There is a 'common law doctrine of necessity' which may justify detention of those who are a danger to themselves or others or incapable of consenting to medical treatment.[23]

It may be noted that the belief, previously held, that an applicant could renew his application for the writ on the same grounds before any number of judges successively has been rejected both by the courts[24] and by Act of Parliament;[25] that the writ will not issue to Northern Ireland[26] or to a colony or foreign dominion overseas where there is a court competent to grant the writ,[27] but may issue to a protectorate;[28] and that the authority detaining the applicant carries the burden of proof of every fact prescribed by statute as a condition of the power of detention.[29]

The procedure is governed by special rules of court,[30] which have not been affected by the rules for 'application for judicial review' introduced for other

[18] *R.* v. *Campbell* [1959] 1 WLR 646. Section 6 of the Habeas Corpus Act 1679, there discussed, was repealed by the Courts Act 1971, 11th sched., Pt. IV.

[19] *R.* v. *Home Secretary ex p. Khawaja* (above) at 112.

[20] As in cases cited below.

[21] *R.* v. *Pentonville Prison Governor ex p. Azam* [1974] AC 18 at 31 and 41. But see the *Muboyayi* and *Cawley* cases discussed below, p. 597.

[22] *R.* v. *Home Secretary ex p. Khawaja* (above) at 111.

[23] See *R.* v. *Bournewood Community and Mental Health NHS Trust ex p. L* [1999] 1 AC 458.

[24] *Re Hastings* (No. 2) [1959] 1 QB 358; *Re Hastings* (No. 3) [1959] Ch 368; and see *R.* v. *Brixton Prison Governor ex p. Osman* (No. 5), [1993] COD 219. For the question of res judicata see above, p. 249.

[25] Administration of Justice Act 1960, s. 14(2), banning repeated applications on the same grounds unless supported by fresh evidence (this means evidence which could not reasonably have been put forward previously: *R.* v. *Pentonville Prison Governor ex p. Tarling* [1979] 1 WLR 1417).

[26] *Re Keenan* [1972] 1 QB 533. It may issue to the Channel Islands and the Isle of Man: *Ex p. Brown* (1864) 5 B & S 280.

[27] Habeas Corpus Act 1862.

[28] *Ex p. Mwenya* [1960] 1 QB 241.

[29] *R.* v. *Governor of Brixton Prison ex p. Ahsan* [1969] 2 QB 222; see above, p. 294.

[30] RSC Ord. 54, reproduced in CPR 1998, sched. 1.

remedies in 1977. The writ may be applied for ex parte, i.e. without notice to the custodian, with the support of an affidavit made by or on behalf of the prisoner; the court will then normally adjourn the case for argument between the parties, with or without requiring the prisoner to be brought before it. The modern practice is not to require the production of the prisoner unless there are special circumstances, but to order his release if the imprisonment is found to be unlawful, whereupon the writ of habeas corpus is issued. The writ may also be issued at an earlier stage if there is a danger that the prisoner may be deported before the court can decide his case.[31] In that case he is not seeking release but is asking for continuance of his detention.

Ordinary cases of ultra vires do not call for detailed discussion. One such case was where a magistrate made an order for the detention of a mental defective, which he had power to do if she was 'found neglected'. Since the evidence showed that she had not been found neglected, within the proper meaning of those words, she was released on habeas corpus.[32] This appears to have been an ordinary case of error as to jurisdictional fact. Where a Nigerian chief was deported to another part of the country and the Crown did not show that the conditions which would have justified the deportation under the local Ordinance were fulfilled, the Privy Council held that habeas corpus would be granted if these were not duly established by the Crown before the Nigerian court, for otherwise the deportation would be ultra vires.[33] Where illegal entrants from Vietnam were imprisoned in Hong Kong under an ordinance authorising their detention 'pending removal' the Privy Council freed them by habeas corpus when it became clear that their removal was impracticable.[34] The celebrated Daisy Hopkins, committed by the Vice-Chancellor of Cambridge to the Spinning-house for her presumption in 'walking with a member of the University', was released on habeas corpus on the ground that this was not an offence known to the law.[35]

Review by means of habeas corpus is naturally available only where the tribunal which has made the order for detention is subject to review by the High Court. Habeas corpus will not therefore be granted on an allegation that an order for committal for contempt of court, made by one of the superior courts, was made on the authority of a judge with a disqualifying interest contrary to the principles of natural justice.[36]

Where there has been excessive delay in bringing a prisoner up for trial,[37] or in

[31] See *R.* v. *Home Secretary ex p. Muboyayi* [1992] 1 QB 244; [1993] *PL* 24 (M. Shrimpton).

[32] *R.* v. *Board of Control ex p. Rutty* [1956] 2 QB 109 (Hilbery and Devlin JJ, Lord Goddard CJ concurring but evidently on grounds of 'no evidence': see below, p. 598).

[33] *Eshugbayi Eleko* v. *Government of Nigeria* [1931] AC 662.

[34] *Tan Te Lam* v. *Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

[35] *Ex p. Hopkins* (1891) 61 LJ QB 240, 17 Cox CC 444. See [2000] *PL* 31 (Simon Brown LJ).

[36] *Ex p. Dimes* (1850) 14 QB 554 (committal for contempt for disobeying an injunction of the Court of Chancery). Compare above, p. 450.

[37] *R.* v. *Brixton Prison Governor ex p. Walsh* [1985] AC 154.

executing an order for his deportation,[38] he can use habeas corpus so as to bring himself before the court and the court will give suitable directions by declaration or otherwise. In the contrary situation, where the deportation may take place before the court has been able to decide his case, he may seek a habeas corpus quia timet, to protect him meanwhile.[39] But habeas corpus will not avail to challenge the conditions of detention, provided that the detention itself is lawful.[40] A prisoner retains all his personal rights and remedies, except in so far as the law deprives him of them.[41] In case of maltreatment he can use ordinary or prerogative remedies, including certiorari and mandamus.[42] If he claims the right to be moved to another prison,[43] or to be held under better conditions[44] he can apply for judicial review, but normally the court will not interfere with the management of a prison.[45] Non-observance of the prison rules will not normally entitle him to sue.[46]

While habeas corpus for the most part deserves its high reputation as a bulwark of personal liberty, it has several times been weakened by unfortunate decisions, particularly in wartime and immigration cases.[47] The case law is 'riddled with contradictions'.[48] It has also failed to measure up to the standards of the European Convention on Human Rights, which is likely to provide a better remedy in many cases, as explained below.

Habeas corpus and judicial review

Before it was established that all error of law is ultra vires[49] the House of Lords in the *Armah* case[50] indicated that the scope of review on habeas corpus was as wide

[38] *R.* v. *Durham Prison Governor ex p. Hardial Singh* [1984] 1 WLR 704.

[39] *R.* v. *Home Secretary ex p. Muboyayi* [1992] 1 QB 244, holding also that Immigration Act 1971, sched. 2, para. 18(4) (detained person to be 'deemed to be in legal custody') does not bar habeas corpus.

[40] *Ex p. Rogers* (1843) 7 Jur. 992; *R.* v. *Wandsworth Prison Governor ex p. Silverman* (1952) 96 Sol J 853. Contrast *R.* v. *Miller* (below).

[41] *Raymond* v. *Honey* [1983] 1 AC 1 at 10.

[42] As illustrated above, p. 518.

[43] *R.* v. *Home Secretary ex p. McAvoy* [1984] 1 WLR 1408 (application failed); *Thomson, Petitioner* 1989 SLT 907.

[44] *R.* v. *Home Secretary ex p. Herbage* (No. 2) [1987] QB 1077.

[45] *R.* v. *Home Secretary ex p. Herbage* [1986] QB 872. A change to stricter confinement, even though unjustified, gives no right to damages for false imprisonment: *R.* v. *Gartree Prison Visitors ex p. Sears*, The Times, 20 March 1985.

[46] See above, p. 73.

[47] See above, p. 433, also [1982] *PL* 89 (C. Newdick).

[48] Law Com. No. 226 (1994), para. 11.2.

[49] See above, p. 264.

[50] *R.* v. *Governor of Brixton Prison ex p. Armah* [1968] AC 192. In *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74 the House of Lords emphasised the common ground between habeas corpus and judicial review: see at 105 (Lord Wilberforce), 110 (Lord Scarman). This judicial review case contains much about habeas corpus.

as that on certiorari; and that, therefore, it extended to mere error on the face of the record, even though made (as was then supposed) within jurisdiction.[51] Evidently the court no longer confines itself to the grounds of detention stated in the return to the writ, but will examine the validity of preliminary steps, so that any legal flaw in those steps will invalidate the detention.[52]

Accordingly habeas corpus will be granted if it can be shown that the order of detention is ultra vires on any of the normal grounds, such as absence of a necessary condition or a wrong finding of jurisdictional fact; or if the order is vitiated by error of law; or if it is supported by no evidence. There is no logical reason for distinguishing habeas corpus cases from others, since all depend alike on legality. If the grounds of detention are flawed by any of these errors at any stage, the prisoner should be entitled to the writ when his liberty is at stake.[53]

Nevertheless the Court of Appeal has held that 'the evolution of the new and extended system of judicial review' justifies 'confining the ambit of the writ of habeas corpus' to cases where the challenge is to 'a precedent fact'[54] as opposed to 'a prior underlying administrative decision'; and that in the latter case the challenge can be made only by the procedure of judicial review.[55] The applicant, a rejected asylum-seeker detained pending deportation, wished to argue that the rejection of his claim was unlawful but this, it was held, could be argued only on judicial review since the rejection was 'a prior underlying administrative decision'. The refusal of habeas corpus was evidently correct on the facts,[56] but the court's general proposition conflicts with the decisions of the House of Lords just cited and with the principle that any element of illegality in the detention is a ground for habeas corpus. Otherwise there will be circuity and complexity of proceedings, even though the court will sometimes waive formalities and allow one procedure to be converted into another in the face of the court.[57] Since habeas corpus and

[51] See above, p. 268.

[52] At one time the prisoner would have had to obtain certiorari to quash the detention order at the same time as habeas corpus to secure his release, in order to succeed on this ground. But to insist upon a separate certiorari was pointless formalism, since the habeas corpus brought the whole question of the validity of the detention before the court. It therefore became the practice to receive the depositions of evidence as if there had been a certiorari and to treat them as part of the record, in the same way as used to be done in reviewing magistrates' decisions before 1848. If error of law then appeared, habeas corpus would be granted, thus in effect quashing the detention order. For this see Bacon's Abridgement (1768), iii, 6, cited in *ex p. Armah* (above) at 234 and 254.

[53] This reading of the authorities is supported by the Law Commission in their report *Administrative Law: Judicial Review and Statutory Appeals*, Law Com. No. 226 (1994), para. 11.19. For dissenting comment see [2000] *PL* 31 (Simon Brown LJ).

[54] For this (alias jurisdictional fact) see above, p. 250.

[55] *R.* v. *Home Secretary ex p. Muboyayi* [1992] QB 244.

[56] The applicant was seeking decision of his asylum application on its merits (as opposed to release), arguing that France was not a 'safe country' to which he could be deported summarily. His remedy should therefore have been mandamus on judicial review.

[57] As it did in *ex p. Muboyayi* (above).

judicial review may be sought in the same proceeding[58] the danger of a fatal mistake in choice of remedies can be eliminated by seeking them both. But unless this is done there is a procedural dichotomy similar to that made notorious by *O'Reilly* v. *Mackman*, discussed elsewhere.[59] The Court of Appeal's novel proposition was emphatically criticised by the Law Commission on a number of grounds, including the substitution of discretionary remedies for a remedy as of right, which 'could be seen as eroding ancient and vital constitutional liberties', and the unsuitability of the time limit and leave requirements of judicial review.[60] Yet in a later case, where magistrates had ignored mandatory conditions in issuing warrants of commitment for young offenders, a Divisional Court refused habeas corpus and elected to follow the Court of Appeal, though aware of the adverse authority and criticism.[61] When the new judicial review procedure was introduced in 1977 care was taken to leave habeas corpus wholly intact, and how the new procedure justifies 'confining the ambit' of that classic remedy, or enforcing the use of judicial review, is not apparent.[62] This is the latest unhappy event in a long and unfortunate judicial story.

Evidence and proof

The status of 'no evidence' as a ground of review has already been explained.[63] In habeas corpus cases, however, it was established earlier than elsewhere, indicating that personal liberty is entitled to the benefit of every doubt.[64] The House of Lords granted habeas corpus in the *Armah* case[65] to release a detainee whose return to Ghana had been requested by the Ghanaian government under the Fugitive Offenders Act 1881 on charges of corruption and extortion. This the magistrate was empowered to order on the production of evidence raising 'a strong or probable presumption that the fugitive committed the offence'. It was held that the

[58] See *R.* v. *Home Secretary ex p. Harshad Patel* (1994) 7 Admin. LR 56. Both remedies were sought and granted together in *ex p. Hopkins* (above).

[59] Discussed below, p. 663.

[60] Law Com. No. 226 (1994), Pt. XI, paras 5–20. For further discussion and criticism see [1992] *PL* 13 (Le Sueur): (1997) 113 *LQR* 55 (Wade); [2000] *PL* 31 (Simon Brown LJ).

[61] *R.* v. *Oldham JJ. ex p. Cawley* [1997] QB 1. Contrast *Re S-C (Mental Patient)* [1996] QB 599, where the Court of Appeal, though quoting from *Muboyayi* at length, granted habeas corpus on the ground that the detention of the patient was plainly ultra vires, being based on a false application by a social worker. See also *Re Barker*, The Times, 14 October 1998.

[62] In *Re Mulcahy* (1992) 6 Admin. LR 229 Laws J said that 'if all underlying processes could be gone into on habeas corpus the distinction between judicial review and habeas corpus would disappear altogether'. But the distinction between 'as of right' and discretion would remain; and the wide overlap was recognised by the House of Lords in the *Khawaja* case (above). For discretion as a shift from the rock to the sand see below, p. 700.

[63] Above, p. 272.

[64] See Sharpe, *Habeas Corpus*, 2nd edn., 78, 85, and in [1990] *CLJ* 422.

[65] Above. See also *R.* v. *Governor of Brixton Prison ex p. Schtraks* [1964] AC 556, recognising the same principle but refusing habeas corpus since the evidence before the magistrate was sufficient and the court would not review his finding on the merits.

court could investigate 'whether any magistrate, properly applying his mind to the question, could reasonably have come to the conclusion that a strong or probable presumption had been made out'.[66] It was further held that the depositions of evidence did not satisfy this test, and that there was therefore no evidence to support the magistrate's order. Since an order based on no evidence was erroneous in law, and the depositions were part of the record of the magistrate's proceedings, his order could have been quashed on certiorari and habeas corpus was therefore granted.

In earlier cases of this kind the courts had consistently held that they could review for 'no evidence', but they had not put forward any consistent explanation for doing so. The House of Lords in the *Armah* case relied upon error of law on the record, thus avoiding jurisdictional problems; and Lord Reid, in a perplexing passage which he had to explain away on a later occasion, held that no jurisdictional question could be involved.[67] But reasoning of this kind is now obsolete. In quashing a committal for trial ordered by magistrates on no admissible evidence the House of Lords has explained how it became irrelevant when all error of law was held to be jurisdictional. 'No evidence', being confirmed as error of law, is now a firm ground for both certiorari and habeas corpus alike.[68] But it may well be that where there are other regular procedures for its correction, the court will not allow habeas corpus to be used instead. Otherwise innumerable applications might be made by persons convicted on criminal charges and attempting to use habeas corpus as, in effect, an additional form of appeal.[69]

The law as to the burden of proof is of the greatest importance in habeas corpus cases. Although some of the decisions have created serious problems, the law is now in a more creditable state, thanks to the decision of the House of Lords in the *Khawaja* case.[70] This has been explained already in its general context,[71] dealing with the standard of proof as well as with the burden.

[66] These are the words of Lord Parker CJ in *R.* v. *Governor of Brixton Prison ex p. Mourat Mehmet* [1962] 2 QB 1 at 10, approved in the *Armah* case (above) by Lords Reid and Pearce. The Extradition Act 1989 no longer requires a 'strong or probable presumption' but requires evidence which would justify trial in this country.

[67] For this and its sequel in the *Anisminic* case see above, p. 262.

[68] *R.* v. *Bedwellty JJ. ex p. Williams* [1997] AC 225 (see above, p. 275). This was not a habeas corpus case, but Lord Cooke's observations on the habeas corpus cases are important, explaining how Lord Diplock's reservations in *R.* v. *Governor of Pentonville Prison ex p. Sotiriadis* [1975] AC 1 at 30 are superseded.

[69] The Court 'cannot grant writs of habeas corpus to persons . . . who are serving sentences passed by courts of competent jurisdiction': *Re Featherstone* (1953) 37 Cr. App. R. 146 at 147 (Lord Goddard CJ).

[70] *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74.

[71] Above, p. 294.

Personal liberty as a human right

A wide-ranging right to liberty and security of the person is conferred by Article 5 of the European Convention on Human Rights, enforced by the Human Rights Act 1998. As already mentioned, it may be predicted that the clear and concise provisions of this Article will supplant habeas corpus with its unhappy judicial history.

The full text of Article 5 has already been given.[72] In summary it provides that no one may be deprived of his liberty save in the specified cases and in accordance with a procedure prescribed by law. The specified cases include lawful conviction by a competent court; disobedience to a lawful court order or default on legal obligation; arrest for production in court on reasonable suspicion; prevention of infectious diseases, detention of persons of unsound mind, alcoholics, drug addicts or vagrants; illegal immigrants and persons awaiting deportation or extradition. Every person so arrested must be informed promptly and intelligibly of the reasons for his arrest and of any charge against him. Everyone arrested for production in court must be brought promptly before a judge or judicial officer and is entitled to trial within a reasonable time or to release on bail, conditionally or otherwise. Every detained person may take proceedings by which lawfulness of his detention shall be decided speedily by a court and shall be released if detention is unlawful. Everyone arrested or detained in contravention of this Article shall have an enforceable right to compensation.

Among the numerous claimants who have benefited from Article 5 have been particularly mental patients and prisoners. In a case where prisoners were detained pending proceedings for their extradition it was held that the lawfulness of their detention should be determined by the magistrates' court, the Article 5 jurisdiction being additional to the High Court's jurisdiction in habeas corpus; and that since under section 6 of the 1998 Act all courts must decide compatibly with the Convention and since the case would depend upon findings of fact, the magistrates' court was the more suitable forum to determine the question of committal for trial.[73] Questions of adequacy of evidence and fairness, on the other hand, would be best determined by the trial court. It is not clear how Article 5 allows jurisdiction to be divided in this way or why, in accordance with that Article, the magistrates' court should not make the initial determination of all question governing the lawfulness of the detention.

The express right to compensation contained in Article 5(5) is notable as being the only such right given specifically, the general right to an effective remedy under Article 13 having been omitted by the Human Rights Act 1998, as mentioned earlier.[74]

[72] Above, p. 187.

[73] *R. (Kashamu)* v. *Brixton Prison Governor* [2002] 2 WLR 907 (DC). Judicial review was granted to quash the direct judge's decision that habeas corpus was the only remedy and the case was remitted to him.

[74] Above, p. 163–4.

In a group of mental health cases damages (for undue delays) were awarded and the measure of damages was fully discussed.[75]

Undue delay has led to numerous violations of the right to a prompt trial. Where a mental health review tribunal adopted a practice of not listing for hearing detained patients' applications for discharge until eight weeks from the date of application, the Court of Appeal held the practice unlawful under Article 5.[76] So similarly was the practice of the Parole Board in imposing a delay of up to three months in considering a prisoner's application for release on licence after the expiry of his 'tariff period'; and lack of resources was no deference.[77]

Prison disciplinary procedures such as loss of remission for a drug offence[78] and recall to prison by the Parole Board for breach of conditions of release[79] have been held compatible with Article 5.

Two infringements of Article 5 led to declarations of incompatibility. In the first, the Act of Parliament had placed on a mental patient the burden of proof of his right to be discharged, and in due course the Act was amended by remedial order.[80] In the second case a discretionary life prisoner had been transferred to a mental hospital and he could obtain release only if the Home Secretary referred his case to the Parole Board. This discretionary barrier was held to be incompatible with his positive right to have the lawfulness of his detention decided speedily by a court under Article 5(4). No remedial order has yet been made.[81]

Detention of alien asylum seekers pending decision of their claims, not being unduly prolonged and not disproportionate, was held to be lawful under the provision of Article 5 about immigration.[82] After the terrorist outrages of September 2001 in the United States, and the derogation made by the United Kingdom in consequence, the Court of Appeal held that the Special Immigration Appeals Commission was entitled to conclude that there was an emergency threatening the life of the nation and that the detention of non-nationals whose presence was believed by the Home Secretary to be a risk to national security on objective, justifiable and relevant grounds was not incompatible with Article 5 (or with Articles 3 and 14).[83]

[75] *R. (KB)* v. *South London Mental Health Review Tribunal* [2003] 3 WLR 185. See below, p. 750.

[76] *R. (C)* v. *London South and West Region Mental Health Review Tribunal* [2002] 1 WLR 176. The remedial order SI 2001/3712 amends Mental Health Act 1983. See above, p. 180.

[77] *R. (Noorkaiv)* v. *Home Secretary* [2002] 1 WLR 3284; and see *R. (A)* v. *Home Secretary* [2003] 1 WLR 330.

[78] *R. (Greenfield)* v. *Home Secretary* [2001] 1 WLR 1731, [2002] 1 WLR 545.

[79] *R. (Sim)* v. *Parole Board* [2003] 2 WLR 1374.

[80] *R. (H)* v. *London North and East Region Mental Health Review Tribunal* [2001] 3 WLR 512.

[81] *R. (D)* v. *Home Secretary* [2003] 1 WLR 1315.

[82] *R. (Saadi)* v. *Home Secretary* [2002] 1 WLR 356 (CA) affirmed [2002] 1 WLR 3131 (HL).

[83] *A.* v. *Home Secretary* [2003] 2 WLR 564. For this see above, p. 173.

CERTIORARI (QUASHING ORDER) AND PROHIBITION (PROHIBITING ORDER)

Common principles

Certiorari and prohibition are complementary remedies, based upon common principles, so that they can be classed together. Certiorari issues to quash a decision which is ultra vires.[84] Prohibition issues to forbid some act or decision which would be ultra vires. Certiorari looks to the past, prohibition to the future. In this way they are respectively comparable to the declaration and injunction in the sphere of private law remedies. Like private law remedies, they may be sought separately or together. Unlike private law remedies, they have never been dependent on the applicant showing a specific personal right. Nominally they are granted to the Crown, and the Crown always has sufficient interest to call upon public bodies to act lawfully.

Certiorari and prohibition are discretionary remedies, and must be sought by the procedure of judicial review. Both these features are explained in the following chapters.[85]

Certiorari

Certiorari is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed—that is to say, it is declared completely invalid, so that no one need respect it.

The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. This is the concern of the Crown, for the sake of orderly administration of justice, but it is a private complaint which sets the Crown in motion. The Crown is the nominal plaintiff but is expressed to act on behalf of the applicant, so that an application by Smith to quash on order of (for instance) a rent tribunal would be entitled *R. v. The Rent Tribunal, ex parte Smith.* The court will then decide whether the tribunal's order was within its powers. There are normal rights of appeal both for the applicant and the tribunal.[86]

The form of the old writ was that of a royal demand to be informed (certiorari) of some matter, and in early times it was used for many different purposes.[87] It

[84] Or, formerly, vitiated by error on the face of the record.

[85] Below, pp. 650 and 700. See above p. 653 for discussion of the changing nomenclature of these remedies.

[86] See e.g. *R. v. Immigration Appeal Tribunal ex p. Alexander* [1982] 1 WLR 430.

[87] Originally it issued out of the Chancery or the King's Bench: Holdsworth, *History of English Law*, i. 228, 658.

became a general remedy to bring up for review in the Court of King's Bench any decision or order of an inferior tribunal or administrative body. Its great period of development as a means of controlling administrative authorities and tribunals began in the later half of the seventeenth century, and its wide modern application was promoted particularly by Holt CJ.[88] Something was needed to fill the vacuum left by the Star Chamber, which had exerted a considerable degree of central control over justices of the peace, both in their judicial and their administrative functions, but was abolished in 1640. There was also the problem of controlling special statutory bodies, which had begun to make their appearance. The Court of King's Bench addressed itself to these tasks, and became almost the only coordinating authority until the modern system of local government was devised in the nineteenth century. The most useful instruments which the Court found ready to hand were the prerogative writs. But not unnaturally the control exercised was strictly legal, and no longer political. Certiorari would issue to call up the records of justices of the peace and commissioners for examination in the King's Bench and for quashing if any legal defect was found. At first there was much quashing for defects of form on the record, i.e. for error on the face. Later, as the doctrine of ultra vires developed, that became the dominant principle of control.

Failure to return the record into the High Court was punishable as contempt; in the seventeenth century commissioners of sewers several times found themselves fined and incarcerated for disobedience.[89]

Prohibition

Prohibition developed alongside certiorari as part of the system of control imposed by the Court of King's Bench.[90] It was a similar remedy, but was prospective rather than retrospective. Primarily it lay to prohibit an inferior tribunal from doing something in excess of its jurisdiction. In what might be called the jurisdictional warfare of the seventeenth century it was an important weapon of the King's Bench when that court struck down the pretensions of competing jurisdictions such as those of the Court of Admiralty and the ecclesiastical courts. Later, like

[88] See the quotation below, p. 608. In *Groenvelt* v. *Burwell* (1700) 1 Ld. Raym. 454 at 469 Holt CJ said: 'for it is a consequence of all jurisdictions to have their proceedings returned here by certiorari, to be examined here . . . Where any court is erected by statute a certiorari lies to it; so that if they perform not their duty, the King's Bench will grant a mandamus.'

[89] See *Hetley* v. *Boyer* (1614) Cro. Jac. 336; *Smith's Case* (1670) 1 Vent. 66; Bacon's Abridgement, ii. 542.

[90] Formerly prohibition was commonly awarded on the direct application of the party rather than at the suit of the Crown: *London Corporation* v. *Cox* (1867) LR 2 HL 239 at 279. A modern example is *Turner* v. *Kingsbury Collieries Ltd.* [1921] 3 KB 169. The opinion of the judges delivered by Willes J in *London Corporation* v. *Cox* is a classic source of information on prohibition. See also Bl. Comm. iii. 113; Holdsworth, *History of English Law*, i. 228, 656. All the superior courts could grant the writ: Bl. Comm. iii. 112.

certiorari, it developed into part of the regular mechanism of judicial control both of inferior tribunals and of administrative authorities generally. In a much-cited case Atkin LJ said:[91]

> I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction.

Typical modern examples are its use to prevent an electricity authority from proceeding with a scheme which was outside its powers;[92] to prevent the execution of a decision vitiated by a breach of the principles of natural justice;[93] to prevent a housing authority from requiring the demolition of a house which was improperly condemned;[94] to prevent a rent tribunal from proceeding with a case outside its jurisdiction;[95] and to prevent a local authority from licensing indecent films.[96] In the last-mentioned case[97] Lord Denning MR said of prohibition:

> It is available to prohibit administrative authorities from exceeding their powers or misusing them. In particular, it can prohibit a licensing authority from making rules or granting licences which permit conduct which is contrary to law.

Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective, and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had some power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition.[98]

Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself. Where only prohibition is applied for to prevent the enforcement of an ultra vires decision, as happened in the last-cited case, the effect is the same as if certiorari had been granted to quash it; for the court necessarily declares its invalidity before prohibiting its enforcement. Prohibition is a remedy strictly concerned with excess of jurisdiction.[99]

[91] *R.* v. *Electricity Commissioners ex p. London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 KB 171 at 206.

[92] *R.* v. *Electricity Commissioners* (above).

[93] *R.* v. *North ex p. Oakey* [1927] 1 KB 491 (ecclesiastical court: no notice to vicar of order against him); *R.* v. *Liverpool Cpn. ex p. Taxi Fleet Operators' Association* [1972] 2 QB 299 (licensing authority not to act before giving fair hearing). Similarly a biased adjudicator may be prohibited from acting: *R.* v. *Kent Police Authority ex p. Godden* [1971] 2 QB 662.

[94] *Estate and Trust Agencies (1927) Ltd.* v. *Singapore Improvement Trust* [1937] AC 898.

[95] *R.* v. *Tottenham and District Tribunal ex p. Northfield (Highgate) Ltd.* [1957] 1 QB 103.

[96] *R.* v. *Greater London Council ex p. Blackburn* [1976] 1 WLR 550.

[97] At 559.

[98] See the *Estate and Trust Agencies* case (above).

[99] Rubinstein, *Jurisdiction and Illegality*, 94.

The court will not be disposed to issue prohibition if the effect will be to prevent Parliament from considering some proposal or report. If its presentation should be shown to be unlawful, the court will prefer to state the legal position by a declaratory judgment.[1]

Occasionally prohibition will lie where certiorari will not, e.g. to an ecclesiastical court. This is explained below.[2]

Disobedience of a prohibition is punishable as contempt of court.[3]

Scope of these remedies

Certiorari and prohibition are employed primarily for the control of inferior courts, tribunals and administrative authorities. Crown courts,[4] county courts, justices of the peace, coroners and all statutory tribunals[5] are liable to have their decisions quashed or their proceedings prohibited, except where Parliament provides otherwise—and sometimes even when it does.[6] So are all other public authorities, whether their functions are judicial or administrative.[7] Minsters' decisions are frequently quashed by certiorari.

In earlier times prohibition was often used to restrict the jurisdiction of tribunals existing by virtue of common law, such as the ecclesiastical and admiralty courts. But both certiorari and prohibition, in their modern applications for the control of administrative decisions, lie primarily only to statutory authorities. The reason for this is that nearly all public administrative power is statutory. Powers derived from contract are matters of private law and outside the scope of prerogative remedies.[8] In refusing to grant certiorari or prohibition against arbitrators appointed privately under a contract of apprenticeship Lord Goddard CJ said:[9]

> But the bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction.

[1] *R.* v. *Boundary Commission for England ex p. Foot* [1983] QB 600 (report of Boundary Commission: complaint not upheld).

[2] p. 633.

[3] Bl. Comm. iii. 113.

[4] See below, p. 634, for particulars affecting this and other courts.

[5] Including the Patents Appeal Tribunal, though consisting of a High Court judge: *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] AC 663; and an election court: *R.* v. *Cripps ex p. Muldoon* [1984] QB 68, affirmed [1984] QB 686.

[6] As in the *Anisminic* case, below, p. 718.

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

[8] See below, p. 635.

[9] *R.* v. *National Joint Council for Dental Technicians ex p. Neate* [1953] 1 QB 704 at 707.

But the existence of statutory power is no longer the sole touchstone, since judicial review has been extended to a number of non-statutory bodies.[10] The scope of review covers all varieties of ultra vires and unlawful action, including unreasonableness, breach of natural justice and error of law, as explained in Chapter 18.

Where the bad part of a decision is severable from the good, certiorari may be granted to quash the bad part only. Severability is discussed elsewhere.[11]

An authority or tribunal whose decision is quashed has failed to dispose of the case and may normally be called upon to begin again and do so properly.[12] It will not suffice merely to ratify the invalid decision.[13]

'Judicial' functions

Originally certiorari and prohibition lay to control the functions of inferior courts, i.e. judicial functions. But the notion of what is a 'court' and a 'judicial function' has been greatly stretched, so that these remedies have grown to be comprehensive remedies for the control of all kinds of administrative as well as judicial acts. This is because the judges very naturally saw no reason to abdicate the control which they achieved at the zenith of their power in the eighteenth century. In that age the chief organs of local government were the justices of the peace, who in addition to their regular judicial business had many administrative functions such as the upkeep of roads and bridges, the licensing of ale-houses and the administration of the poor law. These administrative duties were discharged in the most judicial style possible: not only were the justices themselves primarily judicial officers, whose proceedings naturally tended to follow legal patterns—they were almost completely free from central political control.[14] Maitland epitomised the position of 'the amphibious old justice who did administrative work under judicial forms':[15]

> Whatever the justice has had to do has soon become the exercise of a jurisdiction; whether he was refusing a licence or sentencing a thief, this was the exercise of jurisdiction, an application of the law to a particular case. Even if a discretionary power was allowed him, it was none the less to be exercised with a 'judicial discretion'; it was not expected of him that he should have any 'policy'; rather it was expected of him that he should not have any 'policy'.

[10] See below, p. 631.

[11] Above, p. 281.

[12] An example is *Kingswood DC* v. *Secretary of State for the Environment* (1987) 57 P & CR 153.

[13] *R.* v. *Rochester CC ex p. Hobday*, (1989) 58 P&CR 424.

[14] Thus when the government were in need of recruits under the Militia Acts during the Seven Years War they had to move the Court of King's Bench for writs of mandamus to the county authorities. This was the height of 'judicial' administration. See Holdsworth, introduction to Dowdell, *A Hundred Years of Quarter Sessions*, ix; *History of English Law*, x. 156.

[15] *Collected Papers*, i. 478.

Local administration thus had a strong judicial tradition. When, in the nineteenth century, most of the administrative functions of the justices were transferred to elected local councils or to new statutory authorities, they carried this tradition with them. Political control was imposed, but a judicial technique was inherited. The courts had fallen into the habit of calling many administrative acts 'judicial', meaning simply that the person wielding the power was required by law to keep within his jurisdiction and to observe the elements of fair procedure, such as the principles of natural justice. For a long time this abuse of language was masked by the mixture of functions which were performed by justices of the peace. When these functions were later sorted out, the label 'judicial' still stuck to administrative acts. Certiorari and prohibition were still described as remedies for the control of judicial functions, and for preventing excess of jurisdiction. But 'jurisdiction' had become synonymous with 'power', and in fact certiorari and prohibition were used to control all kinds of irregular administrative acts, from those of justices to those of ministers. Their scope expanded automatically with the development of the doctrine of ultra vires.

The 'Electricity Commissioners' *formula*

Discussion of the scope of the modern law begins with a classic statement made by Atkin LJ in 1923. The case concerned an electricity scheme for the London area, where the Electricity Commissioners had statutory power to make schemes for grouping electricity authorities into districts for the general improvement of the supply. Any scheme was subject to confirmation by the Minister of Transport and to approval by both Houses of Parliament; it was also subject to the usual public inquiry procedure in case of objection. There was a difference of opinion between the London County Council, which wanted one district for the whole area, and the electric supply companies, who wanted two districts. The Commissioners attempted to compromise by making a scheme under which there was only one district, but the district authority was to be required to delegate its powers to two committees, so that there would be a division of the kind that the companies wanted. The companies, however, challenged the legality of the scheme, and the Court of Appeal held it ultra vires on the ground that the Act did not permit the Commissioners to set up two authorities in the form of one.[16] A writ of prohibition was granted against the Commissioners at the instance of the companies, who had applied for it only a few days after the public inquiry had opened. It was objected that the function was not judicial but executive; that the application was premature as nothing decisive had yet happened; and that in any case the court should not intervene where the scheme had to be approved by Parliament.[17] All

[16] *R.* v. *Electricity Commissioners ex p. London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 KB 171.

[17] See above, pp. 26 and 379.

these objections were swept aside, and the court made it plain that any statutory authority acting ultra vires could be called to order by the prerogative writs—by prohibition, to prevent them proceeding further with an unauthorised scheme, and by certiorari, to declare that any decision already taken was ineffective. The judgments explained how this wide power had been exercised for centuries. It had been said in a case of 1700:[18]

> For this court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to incroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here.

This was restated in modern terms by Atkin LJ in the case of 1923 in what has become the definitive statement, approved in many later cases:

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.[19]

Canonical though these words are, they require much interpretation. Though they overstate the true position in one respect,[20] in almost every other respect they understate it, the scope of the remedies being in reality substantially wider. For instance, the requirement of 'legal authority' is no longer invariable, since extra-legal bodies are now sometimes subject to the remedies.[21] Nor, for the same reason, are the remedies concerned only with the 'rights' of subjects in the sense of legal rights. Nor are they limited to 'subjects', since aliens lawfully within the realm in time of peace have the same civil rights as British citizens.[22] Nor need the power be exercised by a 'body of persons' in the plural: the principle applies equally to an individual minister or official.[23]

[18] *R.* v. *Glamorganshire Inhabitants* (1700) 1 Ld. Raym. 580. The words are evidently those of Holt CJ. Certiorari was granted to bring up an order of justices for a rate for the repair of Cardiff bridge, despite the objection that 'it was a new jurisdiction erected by a new Act of Parliament, the trust and the execution of which is reposed in the justices, and this Court has nothing to intermeddle with it'.

[19] [1924] 1 KB at 205. Similar language was used by Brett LJ in *R.* v. *Local Government Board* (1882) 10 QBD 309 at 321; but since the Court of Appeal there declined to decide whether certiorari would lie to a central government department, they left a large area of doubt.

[20] Read literally they could include bodies having a contractual duty to act judicially (i.e. fairly) such as disciplinary committees of trade unions and clubs. But in their context they are confined to the area of public law. For this see below p. 621.

[21] See below, p. 638. Nor did this formula cover error of law on the face of the record, which at the time had been forgotten (above, p. 268).

[22] *Johnstone* v. *Pedlar* [1921] 2 AC 262.

[23] See below, p. 609.

Acting 'judicially'

The above quotations of 1700 and 1923, though separated by so long an interval of time, are essentially similar in meaning. But the former speaks of 'jurisdiction', the latter of persons 'having the duty to act judicially'. The former is the more accurate, since 'jurisdiction' can easily include all kinds of administrative power, whereas 'the duty to act judicially' suggests a judicial as opposed to an administrative function.[24] In reality nothing could be plainer than that the acts controlled, both in the cases themselves and in many other cases decided both before and since, were administrative acts.

In the *Electricity* case the Court of Appeal cited a long series of precedents where certiorari or prohibition, or both, had issued to administrative authorities such as the Board of Education, the Poor Law Commissioners, the Tithe Commissioners, inclosure commissioners, and licensing justices. Plenty of other authorities could be added to this list including ministers of the Crown. The truth was that certiorari and prohibition were general remedies for the judicial control of both judicial and administrative decisions, and could be invoked just as freely where a minister made an invalid clearance order[25] or a local authority wrongfully granted a licence[26] or planning permission,[27] as where justices of the peace convicted without jurisdiction. But the courts failed to give candid expression to this truth. At two different times they threw themselves into confusion by forgetting that in this context they had made 'judicial' a synonym for 'administrative', and by drawing the false inference that an act which was administrative could not be judicial in the sense required.

The first occasion was in the late nineteenth century, when it was suddenly held that the decisions of liquor licensing authorities, since they were administrative, were not subject to certiorari.[28] This fallacy was soon corrected,[29] and the House of Lords explained how licensing functions, though administrative in nature, are

[24] An administrative (or quasi-judicial) decision is a decision determined by the policy or expediency of the moment, as opposed to a judicial decision which is determined according to some rule or principle of law: see above, p. 40.

[25] As in *R.* v. *Minister of Health ex p. Davis* [1929] 1 KB 619 (prohibition); *R.* v. *Minister of Health ex p. Yaffé* [1930] 2 KB 98 (certiorari), reversed on other grounds [1931] AC 494. Whether certiorari lay to a minister or central government department was left open in *R.* v. *Local Government Board* (1882) 10 QBD 309; that it did so lie was accepted without argument in *Board of Education* v. *Rice* [1911] AC 179.

[26] As in *R.* v. *London County Council ex p. Entertainment Protection Association* [1931] 2 KB 215. See similarly *R.* v. *London County Council ex p. Commercial Gas Co.* (1895) 11 TLR 337 (breach of natural justice: certiorari granted); *R.* v. *Greater London Council ex p. Blackburn* [1976] 1 WLR 550 (licensing of indecent films: prohibition).

[27] *R.* v. *Hendon Rural District Council ex p. Chorley* [1933] 2 KB 696 (breach of natural justice); *R.* v. *Hillingdon London Borough Council ex p. Royco Homes Ltd.* [1974] QB 720 (permission vitiated by unreasonable conditions).

[28] *R.* v. *Sharman* [1898] 1 QB 578; *R.* v. *Bowman* [1898] 1 QB 663.

[29] *R.* v. *Woodhouse* [1906] 2 KB 501, reversed on other grounds, *Leeds Cpn.* v. *Ryder* [1907] AC 420.

subject to certiorari.[30] Nevertheless the aberration left a permanent mark, for it led to the use of mandamus as a substitute for certiorari in liquor licensing cases, which still lingers on illogically.[31]

Confusion again began to reign about 1950 in the erroneous decisions on natural justice discussed in an earlier chapter.[32] By overlooking the fact that these remedies had long been used to control administrative functions, the courts relapsed into a profound muddle. The Court of Appeal went so far as to suggest that certiorari might not lie in matters determined by policy and expediency.[33] Yet the *Electricity Commissioners* case itself arose out of a question of pure policy and expediency: how best to organise the electricity companies in London. Policy and expediency play a dominant role in licensing functions, but there is abundant authority for the control of licensing authorities by certiorari.[34]

The law was once again saved from its own backsliding in *Ridge* v. *Baldwin*,[35] where Lord Reid reinterpreted Atkin LJ's words about 'the duty to act judicially'. This was a case of a breach of natural justice remedied by a declaratory judgment, as has been seen. But Lord Reid perceived the close parallel with cases where certiorari and prohibition were applied for. He explained how 'judicial' had been made a stumbling-block in earlier cases which had treated it as a superadded condition.[36] In the correct analysis it was simply a corollary, the automatic consequence of the power 'to determine questions affecting the rights of subjects'. Where there is any such power, there must be the duty to act judicially. In the *Electricity Commissioners* case the Court of Appeal 'inferred the judicial element from the nature of the power'. Atkin LJ might therefore have said

> . . . and *accordingly* having the duty to act judicially . . .

Lord Reid explained how any other interpretation was impossible to reconcile with a long line of unquestionable authorities, including the *Electricity Commissioners* case itself,[37] and Lord Hodson criticised the fallacy of saying that 'the giver of the decision is acting in an executive or administrative capacity as if that was the antithesis of a judicial capacity'.[38] Thus the law was for the second time brought back on to its course. Certiorari and prohibition were once again recognised as

[30] *Frome United Breweries Co.* v. *Bath Justices* [1926] AC 586 (Lord Sumner). Counsel contesting this proposition in 1953 was told that he was about sixty years too late: *R.* v. *Brighton Borough Justices* [1954] 1 WLR 203.

[31] *R.* v. *Cotham* [1898] 1 QB 802; see below, p. 625.

[32] Above, p. 487.

[33] *R.* v. *Manchester Legal Aid Committee ex p. R. A. Brand & Co. Ltd.* [1952] 2 QB 413.

[34] As in the *Woodhouse* and *Frome* cases, above.

[35] [1964] AC 40; above, p. 489.

[36] Notably *R.* v. *Legislative Committee of the Church of England ex p. Haynes-Smith* [1928] 1 KB 411 at 415.

[37] [1964] AC at 75.

[38] [1964] AC at 130.

general remedies for the control of administrative decisions affecting rights, simply giving effect to the principle that powers of decision must be exercised lawfully.[39]

Certiorari thus performs a function not unlike that of a declaratory judgment: by quashing the court declares that some purported decision or determination is irregular or futile and therefore of no effect in law. The result is to establish that no one need take heed of it. The question at issue has not been lawfully determined, and the responsible authority must start again and determine it properly. The difference from a declaratory judgment is that quashing positively invalidates the offending decision or act, whereas a declaration of invalidity merely leaves it exposed to other remedies if required.

Decisions, determinations and acts

'It cannot be too clearly understood that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or a decision'.[40] This was said in a case where the court refused to grant the remedy to quash a mere report, being the report of the visitors of a hospital as to the need for continued detention of a mental defective. The power to order continued detention rested in another body, the board of control, who were required to consider the report of the visitors before deciding. Consequently the visitors had no power to make any decision affecting the rights of anyone: they could merely recommend, and their report was no more than a piece of evidence which the board of control were required to obtain.[41] Had they not obtained it, or had it not been a proper resort as required by the Act, certiorari would have issued to quash the decision of the board.

Certiorari was similarly refused against justices who had power to license cinemas but who made it their practice to approve or disapprove plans for building cinemas and then to grant or refuse licences accordingly.[42] The object was to save abortive expenditure, but the statute gave no power to approve plans. An applicant aggrieved at the refusal of his plans was therefore unable to have the refusal quashed by certiorari, nor for the same reason could he enforce consideration of his plans by mandamus.

As the law has developed, certiorari and prohibition have become general remedies which may be granted in respect of any decisive exercise of discretion by an authority having public functions, whether individual or collective.[43] The matter

[39] The Privy Council's disparaging reference to Lord Reid's analysis in *Durayappah* v. *Fernando* [1967] 2 AC 337 at 349 was marred by unfathomable reasoning and factual inaccuracy as noted above, p. 495. For the correct view see *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 279 (Lord Diplock).

[40] *R.* v. *St Lawrence's Hospital Statutory Visitors ex p. Pritchard* [1953] 1 WLR 1158 at 1166 (Parker J).

[41] See also *R.* v. *Macfarlane* (1923) 32 CLR 518 (immigration board's recommendation for deportation not subject to certiorari or prohibition).

[42] *R.* v. *Barnstaple Justices ex p. Carder* [1938] 1 KB 385.

[43] Despite the reference to 'any body of persons' in the classic formula (above, p. 608).

in question may be an act rather than a legal decision or determination, such as the grant or refusal of a licence,[44] the making of a rating list on wrong principles,[45] the taking over of a school,[46] the dismissal of employees who have statutory protection[47] or the issue of a search warrant.[48] They will lie where there is some preliminary decision, as opposed to a mere recommendation, which is a prescribed step in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affect rights itself. Where a telegraph operator was entitled to claim compensation for telegraphist's cramp on production of a medical certificate from a medical officer specified in the Act, the refusal of a certificate by a different and unauthorised medical officer was quashed as being 'so much waste paper'.[49] The court thus removed what would otherwise have been a legal obstacle to claiming a certificate from the proper officer. In the same way certiorari was granted to quash a medical certificate stating that a boy was an imbecile and incapable of benefiting from attendance at school, when one of the signatory doctors had not himself seen the boy and the question was, in any case, for determination by the Board of Education under the Act.[50] Even a report may be quashed if it is substantially a decision rather than a mere recommendation, e.g. where the Act provides that it shall be final.[51] There is no magic in the word 'report'. The question is whether some issue is being determined to some person's prejudice; and the court's ability to intervene has been increased by the new doctrine that decisions which are wholly non-statutory may nevertheless be reviewable wherever there is a 'public element'.[52]

The courts are accustomed to granting certiorari so freely that they sometimes do so, illogically, where it does not fit the facts and other remedies would be more suitable. In one such case, where a local authority had a statutory duty to provide

[44] Above, p. 361.

[45] *R.* v. *Paddington Valuation Officer ex p. Peachey Property Corporation Ltd.* [1966] 1 QB 380.

[46] *Maradana Mosque Trustees* v. *Mahmud* [1967] 1 AC 13.

[47] *R.* v. *British Coal Corporation ex p. Vardy* [1993] ICR 720.

[48] The Court of Appeal quashed search warrants in *R.* v. *Inland Revenue Commissioners ex p. Rossminster Ltd.* [1980] AC 952, though the House of Lords held that the warrants were lawful; and see *R.* v. *Tillett ex p. Newton* (1969) 14 FLR 101.

[49] *R.* v. *Postmaster-General ex p. Carmichael* [1928] 1 KB 291.

[50] *R.* v. *Boycott ex p. Keasley* [1939] 2 KB 651. The report confirming the certificate and the letter transmitting it were also quashed as being consequential to the certificate.

[51] As in *R.* v. *London County Council ex p. Commercial Gas Co.* (1895) 11 TLR 337 (gas tester's report made in breach of natural justice). But a mere statement of opinion, such as that a licence will be necessary, is not reviewable: *R.* v. *London Waste Regulation Authority ex p. Specialist Waste Management Ltd.*, [1989] COD 288. See also *R.* v. *Secretary of State for Employment ex p. Equal Opportunities Commission* (below).

[52] See below, p. 631. In *R.* v. *Ethical Committee of St Mary's Hospital ex p. H* [1988] 1 FLR 512 it was assumed that judicial review might lie to quash the advice of an informal and non-statutory committee as well as a consultant's decision to refuse fertilisation treatment to a woman; but relief was refused on the merits. In *R.* v. *Metropolitan Police Commissioner ex p. P.* (1995) 8 Admin. LR 6 a mere police caution, given contrary to guidelines, was quashed.

accommodation for a homeless person, the Court of Appeal quashed their decision to take no action.[53] Yet this 'decision' was not made under any specific power to decide any question. The local authority had merely stated its unwillingness to perform its duty, and the natural remedy was mandamus. Certiorari was also granted to quash a 'determination' of the Commission for Racial Equality to hold a formal investigation into alleged discrimination, when in fact there was no distinct power to make such a determination, but prohibition could have been granted to forbid an unauthorised investigation.[54] Cases of this kind are now common. So long as public authorities act in the spirit of the court's order, no problems arise. But it is obvious that to 'quash' a 'decision' that by itself has no legal effect must be an impotent remedy in case of disobedience unless some further order, such as mandamus or an injunction, will be granted if necessary.[55] If confusion and complication are to be avoided, judicial review must be accurately focused upon the actual exercise of power and not upon mere preliminaries. The House of Lords perhaps appreciated this point in refusing to review letters in which a minister refused to accept that legislation about unfair dismissal and redundancy pay was sexually discriminatory or contrary to European Community law.[56] That was a case of prematurity, where the issue was not ripe for review.[57] Other such examples have already been given in the context of natural justice.[58]

The emphasis now given to decisions, whether or not made under a legal power of decision, is greatly extending the scope of certiorari. It appears to derive from opinions of Lord Diplock. In a case where the Act provided that a tax officer, under a power of entry and search, 'may seize and remove' anything reasonably believed to be required as evidence of tax fraud, Lord Diplock said that the seizure 'involves a decision by the officer as to what documents he may seize', and said that 'Parliament has designated a public officer as decision-maker'.[59] He then discussed the question of 'setting aside his decision', either for error on the face of the record or else as being ultra vires. Yet the Act gave no power to decide anything: it gave power to seize evidence and it was the act of seizure, rather than any decision, which was

[53] *R.* v. *Hillingdon LBC ex p. Streeting* [1980] 1 WLR 1425. For criticism see (1985) 101 *LQR* 153. In contrast to the American 'certiorarified mandamus' (below, p. 649) this might be called 'mandamusified certiorari'.

[54] *R.* v. *Commission for Racial Equality ex p. Hillingdon LBC* [1982] QB 276. See also the Court of Appeal's order in the *North Wales Police* case (above, p. 577), which presents the same problem in the context of the declaration.

[55] In *Wheeler* v. *Leicester CC* [1985] AC 1054, where on judicial review the House of Lords upheld the quashing of the council's decision not to allow a club to use their football ground, instead of granting prohibition or an injunction; it was recognised (at 1079) that further relief might be needed.

[56] *R.* v. *Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] 1 AC 1, holding the minister wrong on both issues of substance, however.

[57] See J. Beatson, *Prematurity and Ripeness for Review* in Forsyth and Hare (eds.), *The Golden Metwand*, 221.

[58] Above, p. 547. See also *R.* v. *Inland Revenue Commissioners ex p. Bishopp* [1999] COD 354 (informal opinions of IRC not reviewable).

[59] The *Rossminster* case (above) at 1013.

in dispute. Then in a later case Lord Diplock said: 'The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the "decision-maker" or else a refusal by him to make a decision.'[60] Yet many cases of judicial review necessarily turn upon the legality of acts, as opposed to decisions.[61] When an order is quashed, for example, it is the legality of the order itself, and not of the decision to make it, with which the law is concerned. The attempt to extract a 'decision' out of every legal act led the House of Lords into an unsound dichotomy, as explained later.[62]

Certiorari to quash nullities

Over a century ago there was a short-lived fallacy that 'certiorari will not lie to quash nullities'.[63] It seems that the court would sometimes refuse certiorari to quash a patently ineffective act, for example where an inquisition was held by a coroner's clerk instead of by the coroner himself, since new proceedings would have to be taken and the void proceedings could simply be disregarded.[64] Yet the fact remained that the matter was brought before the court and the court held that the act was a nullity. This fallacy died a natural death, since certiorari was constantly in use for quashing acts which were ultra vires and nullities, as is shown by most of the cases cited in the foregoing discussion of this remedy.[65]

But in two modern cases Lord Denning said that in the case of an order which is a nullity there is 'no need for an order to quash it' and that it is 'automatically null and void without more ado'.[66] The difficulties of this proposition have already been pointed out.[67] However null and void a decision may be, there is no means by which its nullity can be established except by asking the court to say so.[68] Lord Denning's successor pointed this out very clearly in the case of the Take-over Panel, quoted below.[69] If for example a licensing authority refuses a licence for wrong reasons or in breach of natural justice, so that its decision is ultra vires and void, nothing will avail the applicant except a judicial decision quashing the refusal and

[60] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 at 408. See Appendix 1 for the context.

[61] In *West* v. *Secretary of State for Scotland* 1992 SLT 636 at 650. The Court of Session more accurately speaks of 'acts or decisions' as the subjects of judicial review.

[62] *Cocks* v. *Thanet DC* [1983] 2 AC 286, for which see below, p. 666.

[63] Rubinstein, *Jurisdiction and Illegality*, 83.

[64] *Re Daws* (1838) 8 Ad & E 936.

[65] A good example is *R.* v. *Postmaster-General ex p. Carmichael* [1928] 1 KB 291; above, p. 612.

[66] *Director of Public Prosecutions* v. *Head* [1959] AC 83 at 111; *R.* v. *Paddington Valuation Officer ex p. Peachey Property Corporation Ltd.* [1966] 1 QB 380 at 402. For comment see (1967) 83 *LQR* at 521.

[67] Above, p. 305.

[68] As to the presumption of validity see above, p. 296.

[69] Below, p. 640.

ordering a proper determination.[70] In other situations, such as that mentioned in the preceding paragraph, it is possible to ignore a void order only if the public authority makes no attempt to enforce it.

The Crown

Prerogative remedies do not lie against the Crown, since it is at the suit of the Crown that they are sought. But they lie against ministers and officials and since the practice is to give statutory powers to ministers or other government agencies as such rather than to the Crown, the Crown's immunity is of little consequence.[71] The correct remedy for use against the Crown itself, in the cases where such proceedings are allowed, is an action for a declaratory judgment against the responsible minister.[72] The same is true in matters which may concern Parliament for which a declaratory judgment is more suitable than prohibition.[73]

MANDAMUS (MANDATORY ORDER)

Nature of this remedy

The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds.[74] Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally well be used by one public authority against another. The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him. Certiorari and prohibition deal with wrongful action, mandamus deals with wrongful inaction. The prerogative remedies thus together cover the field of governmental powers and duties.

Mandamus reached the zenith of its utility in the eighteenth century, when as well as protecting the citizen it played a conspicuous part in the machinery of government. It proved to be one of the few effective instruments of public policy in the era between the abolition of the Star Chamber in 1640 and the creation of the

[70] See especially *London & Clydeside Estates Ltd.* v. *Aberdeen DC* [1980] 1 WLR 182 at 189, where Lord Hailsham LC emphasises the need to go to the court except in extreme situations where the position is obvious to all concerned.

[71] See above, pp. 46–47, and below, p. 815; *M.* v. *Home Office* [1994] AC 377 at 417.

[72] See above, p. 572.

[73] *R.* v. *Boundary Commission for England ex p. Foot* [1983] QB 600.

[74] See Harding, *Public Duties and Public Law*, ch. 3.

modern system of local government in the nineteenth century. During that interregnum the business of administration was mainly in the hands of local magistrates and other authorities who enjoyed an extraordinary measure of independence. A mandamus from the King's Bench was virtually the only effective means of forcing some such body to carry out its duties under common law or Acts of Parliament. We have already seen an example of its use in that heyday of the rule of law.[75]

The essence of mandamus is that it is a royal command, issued in the name of the Crown from the Court of King's Bench (now the Queen's Bench Division of the High Court), ordering the performance of a public legal duty. It is a discretionary remedy, and the Court has full discretion to withhold it in unsuitable cases. It has never lost the wide scope which the courts gave it in the eighteenth and early nineteenth centuries, when it was so vital a part of the mechanism of the state. But in the highly organised administrative system of the modern state it has no longer this prominent role to play. Governmental bodies today respond more naturally to the political stimulus, and the ultimate legal sanction has to be invoked only in a handful of stubborn cases.

Disobedience to a mandamus is a contempt of court, punishable by fine or imprisonment.[76] A mandamus is therefore very like a mandatory injunction: both are commands from the court that some legal duty be performed. But the two remedies have different spheres. The injunction is an equitable remedy, and it is rare to find mandatory injunctions outside private law. Mandamus is a common law remedy, based on royal authority, which is used only in public law.

Changing scope

Originally the writ of mandamus was merely an administrative order from the sovereign to his subordinates. But from early times it was made generally available through the Court of King's Bench, as was natural when the central government had little administrative machinery of its own. The writ would issue to enforce the terms of royal charters and by the seventeenth century it was in common use to compel the admission or restoration of freemen or burgesses to their offices or rights in borough corporations.[77] Another early use for it was to enforce the rights

[75] Above, p. 606, n. 14.

[76] As to officers of the Crown, see *M.* v. *Home Office* [1994] AC 377 (below, p. 629) (contempt of court by minister). As to other authorities, see *R.* v. *Poplar Borough Council ex p. London County Council* (No. 2) [1922] 1 KB 95, granting a mandamus under which members of the defaulting council were imprisoned. Enforcement against a corporate body is against its members personally as individuals. For the political background, a story of great interest, see [1962] *Public Law* 52 (B. Keith-Lucas).

[77] The landmark here was *Bagg's Case* (1615) 11 Co. Rep. 93b, recounted above, p. 478, but there were 15th- and 16th-century precedents: see *Middleton's Case* (1574) 3 Dyer 332b.

of members of universities;[78] and Lord Mansfield said that he had seen a report of a mandamus in the time of Edward III commanding the University of Oxford to restore a member who had been banished.[79] Lord Holt and Lord Mansfield favoured the free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporations which did not duly hold elections, meetings, courts and so forth. Lord Mansfield said in sweeping terms:[80]

> It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. . . . The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied. Writs of mandamus have been granted, to admit lecturers, clerks, sextons, and scavengers, &c., to restore an alderman to precedency, an attorney to practice in an inferior court, &c.

This was in a case where a writ issued for the admission of a presbyterian preacher whose only title was under a trust deed, showing that the duty enforced need be neither statutory nor under royal charter.[81] Furthermore, the duty was public only in the sense that it was a duty to execute a charitable trust. Mandamus used to be employed for enforcing the admission of copyholders in manors, where it was a matter of private duty only.[82]

An example of mandamus enforcing a duty existing at common law is *Bentley*'s case,[83] mentioned elsewhere, where the writ was granted to restore him to his degrees which had been unlawfully taken away by the Vice-Chancellor's court of Cambridge University. Where a university or college has a visitor, mandamus may be granted to require the visitor to act, and to hear the parties fairly,[84] but the court will not otherwise interfere with his exercise of his jurisdiction, provided that he keeps within it.[85] There was much litigation on such questions in the eighteenth century.

Although the older authorities have not been invalidated, mandamus has in practice acquired a more precise scope than that which Lord Mansfield advocated.

[78] As in *R.* v. *St John's College, Cambridge* (1693) 4 Mod. 233; *R.* v. *University of Cambridge* (1723) 1 Str. 557; *R.* v. *Vice-Chancellor of Cambridge* (1765) 3 Burr. 1647; *R.* v. *Chancellor of Cambridge* (1794) 6 TR 89; *Tapping on Mandamus* (1848) 267. But this is subject to the exclusive jurisdiction of any visitor: see below.

[79] *R.* v. *Askew* (1768) 4 Burr 2185 at 2189. Oxford University was ordered by mandamus in 1396 to expel Lollards: *Tapping on Mandamus*, 269.

[80] *R.* v. *Barker* (1762) 3 Burr. 1265 at 1267.

[81] It may also show Lord Mansfield's leaning towards incorporating equity into the common law.

[82] See *R.* v. *Powell* (1841) 1 QB 352; *R.* v. *Garland* (1879) LR 5 QB 269.

[83] *R.* v. *University of Cambridge* (1723) 1 Str. 557; above, p. 477. The University's charters had been confirmed by statute, but the duty to restore was evidently at common law. The court held that it could intervene because the University did not claim to have a visitor.

[84] *R.* v. *Bishop of Lincoln* (1785) 2 TR 338 n.

[85] For university visitors see above, p. 545, below p. 636.

Modern government is based almost exclusively on statutory powers and duties vested in public bodies, and mandamus is the regular method of enforcing the duties. The plethora of ancient and customary jurisdictions no longer exists. The introduction in the nineteenth century of the modern system of local government, and the provision by the state in the twentieth century of social services and benefits which were previously a matter for private charity, have sharpened the distinction between bodies and activities which are governmental and those which are not. As the picture has come into focus, the proper sphere of mandamus has become clearer. Mandamus now belongs essentially to public law. It seems safe to say that it would not be granted today to enforce the duties of trustees, even where these are statutory, since for this there are sufficient remedies in private law. Nor will it be granted to enforce the private rights of shareholders against companies,[86] though courts entertained such cases previously.[87] The distinction between public and private rights became easier to draw after the Judicature Acts 1873–75, since there was no longer the temptation to use mandamus in order to save resorting to proceedings in Chancery.[88]

Today the majority of applications for mandamus are made at the instance of private litigants complaining of some breach of duty by some public authority. But public authorities themselves may still use the remedy, as they did in the past, to enforce duties owed to them by subordinate authorities. When the borough council of Poplar refused to pay their statutory contribution to the London County Council for rates, the county council obtained a mandamus ordering the proper payments to be made;[89] and when they were not made, the county council obtained writs of attachment for the imprisonment of the disobedient councillors.[90] Statutes also may provide for mandamus as a remedy for one public authority against another, as observed later in the case of default powers.[91]

Within the field of public law the scope of mandamus is still wide and the court may use it freely to prevent breach of duty and injustice:

> Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable.[92]

For the sake of this principle technical difficulties may be overcome. The court can,

[86] *Davies* v. *Gas Light and Coke Co.* [1909] 1 Ch. 708, holding that the proper remedy was injunction.

[87] See *R.* v. *London and St Katherine's Docks Co.* (1874) 44 LJQB 4.

[88] For a case where it was pleaded that all beneficiaries would be dead before relief could be had in Chancery, see *Tapping on Mandamus*, 63–4. A mandatory order of the Court of Chancery was sometimes called a mandamus, and this must be distinguished from the prerogative mandamus in the Queen's Bench.

[89] *R.* v. *Poplar Borough Council ex p. London County Council* (No. 1) [1922] KB 72.

[90] Same (No. 2) [1922] 1 KB 95.

[91] Below, p. 739.

[92] *R.* v. *Hanley Revising Barrister* [1912] 3 KB 518 at 529 (Darling J).

for example, order the fulfilment of a duty even though a statutory time limit for its performance has expired;[93] and if the defaulting officer has been replaced by a successor, the latter may be ordered to make good his predecessor's default.[94]

Discretionary remedy

Like certiorari and prohibition, mandamus is a discretionary remedy.[95] What this means is explained later.[96] It may therefore be refused to an applicant who has been guilty of undue delay, as where nine years were allowed to elapse before claiming a refund of tax.[97] It may also be refused where a public authority has done all that it reasonably can to fulfil its duty,[98] or where the remedy is unnecessary, as where a tribunal undertakes to rehear the case according to law after its decision has been quashed.[99] In the case of the police, to whom mandamus may issue if they refuse to perform their duty, the court may prefer to explain their duty to them in general terms and leave them to act on their own responsibility in any particular situation.[1] The court always retains discretion to withhold the remedy where it would not be in the interests of justice to grant it.[2] But where no such question arises the remedy will be granted, and the court may even deny that discretion exists.[3]

Modern statutory duties

Typical applications of mandamus in modern cases are to enforce statutory duties of public authorities to make a rate,[4] to refer a complaint to a statutory committee,[5] to decide a dispute between education authorities on proper grounds,[6] to determine an application for a licence,[7] to reconsider an application for a licence

[93] *R.* v. *Farquhar* (1870) LR 9 QB 258; *R.* v. *Hanley Revising Barrister* (above); *R.* v. *Woodbury Licensing Justices* [1960] 1 WLR 461.
[94] *R.* v. *Hanley Revising Barrister* (above).
[95] *R.* v. *Churchwardens of All Saints, Wigan* (1876) 1 App. Cas. 611 at 622.
[96] Below, p. 700.
[97] *Broughton* v. *Commissioner of Stamp Duties* [1899] AC 251. An extreme case is *R.* v. *Leeds to Liverpool Canal Co.* (1840) 11 A & E 316 (sixty-five-year delay fatal).
[98] *R.* v. *Bristol Cpn. ex p. Hendy* [1974] 1 WLR at 503 (duty to rehouse tenant).
[99] *R.* v. *Northumberland Compensation Appeal Tribunal ex p. Shaw* [1952] 1 KB 338 at 357.
[1] *R.* v. *Metropolitan Police Cmr ex p. Blackburn* [1968] 2 QB 118; *R.* v. *Devon and Cornwall Chief Constable ex p. Central Electricity Generating Board* [1982] QB 458.
[2] As in *R.* v. *Garland* (1879) LR 5 QB 269.
[3] *R.* v. *Bishop of Sarum* [1916] 1 KB 466 at 470.
[4] *R.* v. *Poplar Borough Council* (No. 1) [1922] 1 KB 72.
[5] *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[6] *Board of Education* v. *Rice* [1911] AC 179.
[7] *R.* v. *Tower Hamlets London Borough Council ex p. Kayne-Levenson* [1975] QB 431.

on proper grounds,[8] to appoint an inspector of a company,[9] to adjudicate between landlord and tenant,[10] to approve building plans,[11] to pay college lecturers,[12] to pay a police pension,[13] to improve conditions of imprisonment[14] and to implement an employment scheme.[15] Where the duty is to reach a decision the order will usually be 'to hear and determine according to law', the law being indicated by the court.[16] In other cases the order will be to act according to law, with or without further details and instructions which the court may add. Occasionally mandamus may be sought to enforce a non-statutory duty, such as the duty of the police to prosecute offenders against the law,[17] or the duty of a local authority to produce documents which a councillor reasonably needs for the proper performance of his duties as such.[18]

A statutory duty must be performed without unreasonable delay, and this may be enforced by mandamus. Mandamus was granted on this ground against the Home Secretary when the Home Office insisted that a would-be immigrant who was legally entitled to enter the country 'without let or hindrance' should wait for over a year in the queue of applicants for entry certificates.[19]

Obligatory duties must be distinguished from discretionary powers. With the latter mandamus has nothing to do: it will not, for example, issue to compel a minister to promote legislation.[20] Statutory duties are by no means always imposed by mandatory language with words such as 'shall' or 'must'. Sometimes they will be the implied counterparts of rights, as where a person 'may appeal' to a tribunal and the tribunal has a correlative duty to hear and determine the appeal.[21] Sometimes also language which is apparently merely permissive is construed as imposing a duty, as where 'may' is interpreted to mean 'shall'.[22] Even though no compulsory words are used, the scheme of the Act may imply a duty.

Having developed from a piece of purely administrative machinery, mandamus was never subject to the misguided notion which at one time afflicted its less fortunate relative certiorari, that it could apply only to 'judicial' functions.

[8] *R.* v. *London County Council ex p. Corrie* [1918] 1 KB 68; and see the liquor licensing cases cited below, p. 625.

[9] *R.* v. *Board of Trade ex p. St. Martin's Preserving Co. Ltd.* [1965] 1 QB 603.

[10] *R.* v. *Pugh (Judge)* [1951] 2 KB 623 (mandamus to require county court to hear case).

[11] *R.* v. *Tynemouth Rural District Council* [1896] 2 QB 219 (the conditions for approval being satisfied).

[12] *R.* v. *Liverpool CC ex p. Coade*, The Times, 10 October 1986.

[13] *R.* v. *Leigh (Lord)* [1897] 1 QB 132.

[14] *R.* v. *Home Secretary ex p. Herbage* (No. 2) [1987] QB 1077.

[15] *R.* v. *Liverpool CC ex p. Secretary of State for Employment*, [1989] COD 404.

[16] As in (e.g.) *R.* v. *St Pancras Vestry* (1890) 24 QBD 371.

[17] See below, p. 359.

[18] See *R.* v. *Barnes Borough Council ex p. Conlan* [1938] 3 All ER 226 and cases there cited.

[19] *R.* v. *Home Secretary ex p. Phansopkar* [1976] QB 606; above, p. 413.

[20] *R.* v. *Secretary of State for Employment ex p. Equal Opportunities Commission* [1994] 1 AC 1.

[21] See below: 'Duty to exercise jurisdiction'.

[22] For this see above, p. 233.

Administrative or ministerial duties of every description could be enforced by mandamus. It was, indeed, sometimes said that this remedy did not apply to judicial functions,[23] meaning that where a public authority was given power to determine some matter, mandamus would not lie to compel it to reach some particular decision. The law as to this is explained below under 'Duty to exercise jurisdiction'.

The fact that the statutory duty is directory as opposed to mandatory, so that default will not invalidate some other action or decision,[24] is no reason for not enforcing it by mandamus.[25]

Considerations of public policy may render a statutory duty unenforceable, for example under the rule that no one may profit from his own crime. A widow convicted of killing her husband cannot therefore claim widow's benefit under the Social Security Act 1975,[26] and a woman who has committed perjury and forgery in the course of marrying a British subject cannot compel the Home Secretary to register her as a British subject also.[27] Mandamus was also refused in one exceptional case where compliance with a statutory duty might have endangered life.[28]

Contractual duties distinguished

A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies.[29] This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases.[30]

[23] As in *R.* v. *London Justices* [1895] 1 QB 214, 616.
[24] For this distinction see above, p. 213.
[25] *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 QB 303 at 313–14.
[26] *R.* v. *Chief National Insurance Commissioner ex p. Connor* [1981] QB 758.
[27] *R.* v. *Home Secretary ex p. Puttick* [1981] QB 767.
[28] *R.* v. *Registrar-General ex p. Smith* [1991] 2 QB 393 (copy of birth certificate refused because of danger to applicant's mother, whose name he did not know).
[29] See below, p. 626.
[30] As in the cases cited below, p. 635.

But occasionally the courts appear to have overlooked the distinction. Lord Campbell CJ once said that 'a legal obligation, which is the proper substratum of a mandamus, can arise only from common law, from statute, or from contract',[31] a loose dictum which need not necessarily mean that Lord Campbell thought that mandamus was a remedy for breach of contract. In a university disciplinary case, already mentioned, the High Court proceeded as if the rights of students to be treated in accordance with natural justice could be enforced by mandamus, although the university had no statutory powers and the rights of its student members were evidently contractual.[32] The authority of this case has been shaken as regards the appropriate remedies, which should have been injunction and declaration.[33] It is possible that mandamus would lie to enforce rights flowing directly from the charter of a university or college for which there was no other remedy.[34] But rights flowing merely from a contract of membership should not be within the scope of mandamus.

For similar reasons mandamus will not issue to a private arbitrator appointed under an arbitration clause in a contract, for such an arbitrator has no public function or statutory duty. This is equally true where a statutory tribunal is appointed as arbitrator if the appointment is made under the terms of a contract and the tribunal is used in the same way as a private arbitrator, acting voluntarily.[35] For here also there is no statutory duty.

Duty to exercise jurisdiction

A court or tribunal has a public duty to hear and decide any case within its jurisdiction which is properly brought before it. Mandamus is frequently granted to enforce this duty on the part of inferior courts and statutory tribunals, which will be ordered to hear and determine according to law. Thus magistrates, licensing justices, county courts, statutory tribunals, ministers, officials, university visitors[36] and other jurisdictions subject to the High Court can be prevented from refusing jurisdiction wrongfully. A county court judge, who mistakenly declined to hear an action for possession by mortgagees on the ground that the county court had no jurisdiction, was ordered to hear and determine the case on a mandamus from the

[31] *Ex p. Napier* (1852) 18 QB 692 at 695.
[32] *R.* v. *Aston University Senate ex p. Roffey* (1969) 2 QB 538; below, p. 637.
[33] *Herring* v. *Templeman* [1973] 3 All ER 569 at 585; below, p. 637.
[34] See above, p. 545.
[35] *R.* v. *Industrial Court ex p. ASSET* [1965] 1 QB 377 (complaint that supplier of spectacles to Ministry of Health was in breach of Fair Wages Resolution of House of Commons: matter referred by Ministry to Industrial Court under arbitration clause in contract). Compare *R.* v. *National Joint Council for Dental Technicians ex p. Neate* [1953] 1 QB 704 (certiorari and prohibition likewise inapplicable).
[36] *R.* v. *Dunsheath ex p. Meredith* [1951] 1 KB 127; *R.* v. *Hull University Visitor ex p. Page* [1993] AC 682.

Queen's Bench Division.[37] The same occurred where a county court judge refused to investigate the correctness of jurisdictional facts on which the validity of a rent tribunal's decision depended, and which were properly disputed before him,[38] and where a minister declined to decide an appeal about public rights of way.[39] Refusal to receive evidence on some relevant point may also amount to refusal of jurisdiction, so that mandamus will go to compel a magistrate to receive it; though this has to be distinguished from a decision by the magistrate, within the scope of his discretion, that the evidence is irrelevant.[40] Refusal to consider a party's case also has to be distinguished from refusal to accept his argument. As Lord Goddard CJ said:[41]

> . . . to allow an order of mandamus to go there must be a refusal to exercise the jurisdiction. The line may be a very fine one between a wrong decision and a declining to exercise jurisdiction; that is to say, between finding that a litigant has not made out a case, and refusing to consider whether there is a case.

If the inferior court or tribunal merely makes a wrong decision within its jurisdiction, as opposed to refusing to exercise it, mandamus cannot be employed to make it change its conclusion.[42] This is merely the familiar rule that the court cannot interfere with action which is intra vires.

An instance of mandamus to a statutory tribunal was where a housing appeal tribunal dismissed an appeal by a company wishing to build a picture house without giving them a hearing as required by law. This was a breach of an implied statutory duty; the decision was accordingly quashed by certiorari and mandamus issued to require the tribunal to exercise its jurisdiction properly.[43] The same remedies were likewise granted where an immigration tribunal wrongly refused leave to appeal.[44]

The basis of all such cases is that the court or tribunal has a legal duty to hear and determine the case which is correlative to a statutory right of some person to apply or appeal to it. But now that the courts will grant certiorari to quash decisions of non-statutory bodies, which can have no statutory duties, it seems that they will also grant mandamus to require the body to hear and determine—though it may be difficult to add the usual words 'according to law'.[45] Since this anomalous

[37] *R.* v. *Briant (Judge)* [1957] 2 QB 497.
[38] *R.* v. *Pugh (Judge)* [1951] 2 KB 623.
[39] *R.* v. *Secretary of State for the Environment ex p. Burrows* [1991] 2 QB 354.
[40] *R.* v. *Marsham* [1892] 1 QB 371 (mandamus granted). For this question see above, p. 278.
[41] *R.* v. *Goods Vehicles Licensing Authority ex p. Barnett Ltd.* [1949] 2 KB 17 at 22.
[42] *R.* v. *London Justices* [1895] 1 QB 616 at 637; *Smith* v. *Chorley Rural Council* [1897] 1 QB 678; *R.* v. *Goods Vehicles Licensing Authority* (above).
[43] *R.* v. *Housing Appeal Tribunal* [1920] 3 KB 334.
[44] *R.* v. *Immigration Appeal Tribunal ex p. Shezada* [1975] Imm. AR 26.
[45] Mandamus was granted in *R.* v. *Criminal Injuries Compensation Board ex p. Clowes* [1977] 1 WLR 1353 (the Board was then non-statutory).

jurisdiction[46] is already established, it is only logical to extend it to mandamus, thus completing the system of judicial review.

Mandamus has also been granted anomalously, as it would appear, to enforce what the court called 'a rule of practice'. Magistrates had refused to authorise legal aid by counsel for a man charged with murder; and though the statute gave them discretion as to the type of aid to be granted, it was held that there was a practice of allowing counsel in trials for murder, and that the practice was obligatory.[47] But perhaps this case ought to be regarded as one of an unreasonable decision, or of a duty implied in the statute, in which case certiorari and mandamus would be normal remedies.

The position where there is a duty to hear and determine, but discretion as to the correct determination, must be distinguished from that where there is a discretion not to act in the matter at all. The Parliamentary Commissioner for Administration, who 'may investigate' complaints of maladministration, and is expressly given discretion whether to initiate any investigation,[48] cannot therefore be ordered by mandamus to entertain a complaint, since this is a matter of discretion and not of duty.[49]

Mandamus and certiorari

Mandamus is often used as an adjunct to certiorari. If a tribunal or authority acts in a matter where it has no power to act at all, certiorari will quash the decision and prohibition will prevent further unlawful proceedings. If there is power to act, but the power is abused (as by breach of natural justice or error of law), certiorari will quash and mandamus may issue simultaneously to require a proper rehearing. An example is *Board of Education* v. *Rice*, cited elsewhere:[50] the Board's decision was ultra vires since they had addressed their minds to the wrong question; consequently it was quashed by certiorari and the Board were commanded by mandamus to determine the matter according to law, i.e. within the limits indicated by the House of Lords.

But either remedy may be used by itself. Defective decisions are frequently quashed by certiorari without any accompanying mandamus. Once the decision has thus been annulled, the deciding authority will recognise that it must begin again and in practice there will be no need for mandamus. If on the other hand mandamus is granted without certiorari, the necessary implication is that the defective decision is a nullity, for it is only on this assumption that the mandamus

[46] For review of non-statutory bodies see below, p. 638.

[47] *R.* v. *Derby Justices ex p. Kooner* [1971] 1 QB 147.

[48] Parliamentary Commissioner Act 1967, s. 5(1), (5). See above, p. 98.

[49] *Re Fletcher* [1970] 2 All ER 527. Compare *Environmental Defence Society Inc.* v. *Agricultural Chemicals Board* [1973] 2 NZLR 758 (power rather than duty).

[50] [1911] AC 179; above, p. 483.

can operate. A simple mandamus therefore does the work of certiorari automatically. Normally mandamus is not used by itself in this elliptical way. But, by a curious practice, this use of it has become habitual in liquor licensing cases, so that the standard remedy for judicial control of licensing justices' decisions is mandamus rather than certiorari.[51] This is because it was those cases which were first bedevilled by illogical doubts as to whether licensing was a judicial function for the purposes of certiorari;[52] and though the doubts were long ago swept away, the habit lives on.

In the *Paddington* rating case, where the validity of the whole rating list was attacked (though unsuccessfully), Lord Denning MR suggested that, in order to avoid administrative inconvenience, an invalid rating list might be kept in operation by withholding certiorari for the time being, and that meanwhile mandamus might issue against the rating authority to enforce the preparation of a valid list.[53] But this was on the hypothesis that an invalid list was voidable rather than void, a heresy criticised elsewhere.[54] As Salmon LJ more logically observed, mandamus could not be granted if there was a valid valuation list in being; it could be granted only on the footing that a legal list had never been made at all.[55] In an earlier case Lord Denning himself had said:[56]

> The cases on mandamus are clear enough: and if mandamus will go to a tribunal for such a cause, then it must follow that certiorari will go also: for when a mandamus is issued to the tribunal, it must hear and determine the case afresh, and it cannot well do this if its previous order is still standing. The previous order must either be quashed on certiorari or ignored: and it is better for it to be quashed.

Although both certiorari and mandamus are discretionary remedies, the court's discretion must be limited by the basic rules of judicial control. Unless the rating list disputed in the *Paddington* case had been void, the court would have had no power to intervene.

[51] Examples are *R.* v. *Weymouth Licensing Justices ex p. Sleep* [1942] 1 KB 465; *R.* v. *Flintshire County Licensing Committee ex p. Barrett* [1957] 1 QB 350 (licence refused on irrelevant grounds); *R.* v. *Birmingham Licensing Planning Committee ex p. Kennedy* [1972] 2 QB 140 (similar); *Fletcher* v. *London (Metropolis) Licensing Planning Committee* [1976] AC 150 (similar). The first such case was *R.* v. *Cotham* [1898] 1 QB 802. In some American States, where the fallacy over judicial functions persists, mandamus has taken the place of certiorari and is known as 'certiorarified mandamus'; see below, pp. 648–49.

[52] See above, p. 609.

[53] *R.* v. *Paddington Valuation Officer ex p. Peachey Property Co. Ltd.* [1966] 1 QB 380 at 402; below p. 627.

[54] Above, pp. 305–06.

[55] In the *Paddington* case (above) at 419.

[56] *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] AC 663 at 693–4.

Requirement of demand and refusal

It has been said to be an 'imperative rule' that an applicant for mandamus must have first made an express demand to the defaulting authority, calling upon it to perform its duty, and that the authority must have refused.[57] But these formalities are usually fulfilled by the conduct of the parties prior to the application, and refusal to perform the duty is readily implied from conduct.[58] The substantial requirement is that the public authority should have been clearly informed as to what the applicant expected it to do, so that it might decide at its own option whether to act or not.[59]

The court does not insist upon this condition where it is unsuitable. As Channell J said:[60]

> The requirement that before the court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable to all possible cases. Obviously it cannot apply where a person has by inadvertence omitted to do some act which he was under a duty to do and where the time within which he can do it has passed.

An obvious case where no demand need be made is where mandamus is used as a substitute for certiorari to quash a decision, as explained in the preceding section.

Effect of alternative remedies

The prerogative order of mandamus is not to be granted where the law provides some other adequate remedy. At one time this rule was very strictly applied, in conformity with the doctrine that mandamus was a supplementary remedy, to be invoked where there was no specific remedy for enforcing some right.[61] Mandamus was thus refused where there was a possibility of obtaining a tax refund by way of petition of right.[62] An extreme instance, criticised later, was where the House of Lords held that ministerial default powers were an adequate remedy for an individual aggrieved by the failure of a local authority to provide sewers as required by law.[63] This view of mandamus was expounded by Bowen LJ:[64]

[57] *Tapping on Mandamus*, 282.

[58] See *The State (Modern Homes Ltd.)* v. *Dublin Corporation* [1953] IR 202.

[59] *R.* v. *Brecknock & Abergavenny Canal Co.* (1835) 3 Ad. & E217 (mandamus refused on this ground); *R.* v. *Commissioners of Public Utilities ex p. Halifax Transit Corpn.* (1970) 15 DLR (3d) 720.

[60] *R.* v. *Hanley Revising Barrister* [1912] 3 KB 518 at 531.

[61] Above, p. 619. See e.g. *R.* v. *Gamble* (1839) 11 A & E 69.

[62] *Re Nathan* (1884) 12 QBD 461 (but it was also held that no duty to the applicant existed).

[63] *Pasmore* v. *Oswaldtwistle Urban District Council* [1898] AC 387; below, p. 741.

[64] *Re Nathan* (above) at 478.

> A writ of mandamus, as everybody knows, is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done. The proceeding, however, by mandamus, is most cumbrous and most expensive; and from time immemorial accordingly the courts have never granted the writ of mandamus where there was another more convenient, or feasible remedy within the reach of the subject.

Mandamus may therefore be refused where there is an adequate right of appeal. Where the statute provides a right of appeal or other remedy, it may well be held that the statutory remedy is intended to be exclusive, so that mandamus is inapplicable.[65] But where licensing justices had rejected an application without giving reasons as the statute required, with the consequence that the applicant could not tell upon what grounds he might appeal, mandamus was granted to require the justices to hear and determine according to law.[66] The Court of Appeal has held that ratepayers may challenge the validity of the local authority's rating list as a whole, despite the existence of a right of appeal against any particular assessment.[67] This once again illustrates that the court will not require an applicant to exercise a right of appeal on the merits when his complaint is of lack of jurisdiction or ultra vires.

Today mandamus has largely lost the character of a residual remedy. As noted earlier, it has become the regular remedy for enforcing the statutory duties of public authorities, and its procedure is no longer 'cumbrous and expensive'. Accordingly the courts have grown accustomed to awarding it more freely, even where some other remedy exists. Thus the Local Government Board obtained mandamus against a local authority which refused to appoint a vaccination officer, even though the Act empowered the board, in case of default, to make the appointment themselves.[68] Similarly the London County Council were granted mandamus to compel the Poplar Borough Council to pay a precept for rates, even though the Act provided that they might enforce their claim by levying distress—a wholly inadequate remedy, as the court held.[69]

It is expressly provided that the new remedies introduced by the Crown Proceedings Act 1947 shall not limit the discretion of the court to grant mandamus.[70]

[65] *R.* v. *City of London Assessment Committee* [1907] 2 KB 764; *R.* v. *Thomas* [1892] 1 QB 426 at 429; *Stepney Borough* v. *Walker & Sons Ltd.* [1934] AC 365.

[66] *R.* v. *Thomas* [1892] 1 QB 426.

[67] *R.* v. *Paddington Valuation Officer ex p. Peachey Property Corporation Ltd.* [1966] 1 QB 380.

[68] *R.* v. *Leicester Guardians* [1899] 2 QB 632; see below, p. 741.

[69] *R.* v. *Poplar Borough Council ex p. London County Council* (No. 1) [1922] 1 KB 72.

[70] Crown Proceedings Act 1947, s. 40(5).

Statutory protection

Mandamus has been given the same protection as certiorari against statutes passed before 1 August 1958 which purport to exclude the powers of the High Court to question orders or determinations.[71] This provision must be explained later.

The Crown and its servants

It is inherent in the nature of the prerogative remedies that, since they emanate from the Crown, they cannot lie against the Crown itself.

> That there can be no mandamus to the Sovereign, there can be no doubt, both because there would be an incongruity in the Queen commanding herself to do an act, and also because disobedience to the writ of mandamus is to be enforced by attachment.[72]

This is no impediment in the case of certiorari and prohibition, since they lie to control inferior jurisdictions and they apply to all the ministers of the Crown and other public authorities upon whom powers are conferred by Parliament in their own names. But it is serious in the case of mandamus, since the Crown itself has public duties. How is their performance to be enforced?

There is a clear distinction as to the duties of Crown servants. Where the Crown servant is merely the instrument selected by the Crown for the discharge of the Crown's duty, any complaint of default must be made against the Crown and not against the servant. No mandamus can then lie. For example, an army officer disputed the terms of his retiring pay and compensation, which had to be determined under the terms of a royal warrant (a prerogative instrument making regulations as to terms of service in the army), and sought a mandamus against the Secretary of State for War in order to enforce what he thought were his rights under the royal warrant. In fact the royal warrant imposed no legal obligation on the Crown. But even if it did, the action could not succeed, since the Secretary of State was merely one of the Crown's servants who owed no legal duty as such to any individual affected by the warrant.[73] Similarly no mandamus will issue to the Treasury to pay monies appropriated by Parliament for a given purpose, since the money is granted to the Crown, and even though it is in the hands of the Treasury, they are merely the instrument of the Crown for handling the money.[74]

On the other hand, where Parliament has imposed a duty on particular persons acting in some particular capacity, mandamus will issue notwithstanding that those persons are servants of the Crown and acting on the Crown's behalf. This is because the legal duty is cast upon them personally, and no orders given to them by

[71] Tribunals and Inquiries Act 1992, s. 12, replacing earlier Acts; below, p. 723.
[72] *R.* v. *Powell* (1841) 1 QB 352 at 361.
[73] *R.* v. *Secretary of State for War* [1891] 2 QB 326.
[74] *R.* v. *Lords Commissioners of the Treasury* (1872) LR 7 QB 387.

the Crown will be any defence. If therefore the Act requires 'the Minister' to do something, mandamus will lie to compel the minister to act.[75] Similarly mandamus was granted against the Special Commissioners of Income Tax, acting as servants of the Crown, commanding them to authorise repayment to a taxpayer where the Act said that 'the . . . Commissioners shall issue an order for the repayment, etc.'[76] The Crown Proceedings Act 1947 does nothing to impede this use of mandamus as in the past.[77]

Nevertheless it should make no difference in principle whether the duty is cast upon the Crown as such or upon some government department or other agency of the Crown. It is a pity that this untidy situation was left unaltered by the Crown Proceedings Act 1947, which in other respects put the Crown effectively onto the same footing as a private person. Logically the Act ought to have empowered the court to make a declaratory order against the Crown in lieu of mandamus. There would seem to be no reason why the court should not itself fill this lacuna by exercising its ordinary jurisdiction to grant declaratory relief. The reason why the question has not arisen is probably that the statutory duties of the Crown, as opposed to those of specific ministers and government departments, are very few. If they were numerous and important, some remedy for their enforcement would be indispensable.

The Privy Council have suggested another solution to this problem of royal immunity, saying that mandamus could be awarded against cabinet ministers requiring them to advise the Crown to perform its duty. This was in the context of the proclamation of a security area in Malaysia which the Crown had power to revoke and also, according to the Privy Council, a duty to revoke if its continuance could no longer be considered necessary, i.e. if failure to revoke it would be an abuse of discretion.[78] But the facts of the case provided no occasion for applying this interesting theory.

The Crown or a government department may itself be granted mandamus, for example for compelling a local authority to levy a rate to finance a payment due to the Treasury.[79]

[75] As in *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] AC 997; *R.* v. *Home Secretary ex p. Phansopkar* [1976] QB 606. In the case of 'the Secretary of State' the mandamus will evidently issue to the person responsible in practice. For doubts suggested by the *Town Investments* case see above, p. 46.

[76] *R.* v. *Special Commissioners of Income Tax* (1888) 21 QBD 313. See similarly *R.* v. *Special Commissioners of Income Tax ex p. Dr. Barnardo's Homes* [1920] 1 KB 26; *R.* v. *Commissioners of Customs and Excise ex p. Cook* [1970] 1 WLR 450 at 455.

[77] See below, p. 822.

[78] *Teh Cheng Poh* v. *Public Prosecutor* [1980] AC 458. The Constitution of Malaysia (Art. 40) requires the Yang di-Pertuan Agong to act in accordance with ministerial advice in most matters.

[79] *R.* v. *Maidenhead Cpn.* (1882) 9 QBD 494.

Procedure

Mandamus must be sought by 'application for judicial review' in the same way as certiorari and prohibition, as described in the next chapter. Leave to apply for the order must therefore be obtained before the application itself can be heard, and evidence is normally taken by affidavit. Undue delay is a ground for withholding the remedy in discretion, subject to the same qualifications as regards hardship, prejudice to rights, and detriment to good administration as apply in the case of certiorari and prohibition.[80] No action may be instituted against anyone in respect of anything done in obedience to a mandamus.[81] Disobedience to a mandamus is punishable as a contempt of court, by fine or imprisonment.[82] Without prejudice to its power to punish disobedience as contempt, the court may direct that the default be made good by the party who obtained the mandamus at the cost of the disobedient party.[83]

[80] See below, p. 658.

[81] Ord. 53 r. 10. No directly analogous provision exists in CPR 54, however.

[82] *R.* v. *Poplar Borough Council ex p. London County Council* (No. 2) [1922] 1 KB 95; above, p. 616. In the case of a corporation, which cannot be imprisoned, the members responsible should be named in the writs of attachment; but in the *Poplar* case this requirement was held to be waived by members who appeared and persisted in disobedience.

[83] Ord. 45 r. 8 (reproduced as above), applying also to other mandatory orders.

17

BOUNDARIES OF JUDICIAL REVIEW

MARGINAL SITUATIONS

Reviewable functions

Although judges often speak as if judicial review were itself a remedy, it must be remembered that it is merely a procedure for obtaining the remedies specified in the Supreme Court Act 1981, namely certiorari, prohibition and mandamus and (in suitable circumstances) declaration and injunction. The scope of judicial review, therefore, is the same as the scope of these remedies, both as explained in this and the previous chapter and also in the new non-statutory area discussed below. Their boundaries, as set out already, are fairly clear (despite the wide range of declaratory relief), but in the non-statutory area they are highly uncertain. The leading case is the *Datafin* decision, which excludes cases based on contract (as was already established) and holds that possibly the only other requirement is 'what can be described as a public element, which can take many different forms'.[1] In the absence of any more positive guidance the outer limits of judicial review can only be inferred from the catalogue of the borderline cases which have so far been reported.[2]

Faced with such an ill-defined field, it is not surprising that judges have preferred to evade the problem rather than confront it. When the Referendum Party complained that the television authorities (BBC, ITVA and ITC) had allowed it too little broadcasting time before the 1997 general election, the Divisional Court preferred to reject the complaint on its merits.[3] But the Court of Appeal has since treated the BBC as fully reviewable,[4] and it was held that the ITVA and the ITC, being statutory, were clearly reviewable. Yet it would seem self-evident that, compared with the non-statutory cases discussed below, a strong 'public element' was present. That is, indeed, implied by the court's decision about the ITVA and the ITC, since statutory status without the public element is not by itself conclusive. Statutory powers and duties are possessed by many bodies, for example commercial

[1] See below, p. 641.

[2] On the scope of review see [1987] *PL* 356 (Forsyth); [1992] *PL* 1 (D. Pannick); [1993] *PL* 239 (N. Bamforth).

[3] *R.* v. *British Broadcasting Corporation ex p. Referendum Party* (1997) 9 Admin. LR 553. See also *Scottish National Party* v. *Scottish Television Plc* 1998 SLT 1395 (operation under statutory licence may make corporation reviewable).

[4] *R. (Prolife Alliance)* v. *BBC* [2002] 3 WLR 1080.

companies and trustees, which, having no public element, are quite outside the range of judicial review. Nor will judicial review normally be granted where there is a suitable alternative remedy such as a statutory appeal procedure.[5]

Judicial review therefore covers a very wide range of tribunals and public authorities. Its remedies may equally be granted against public corporations where their constitutions and functions are suitable. This was the case with the licensing decisions of the Independent Television Commission[6] and in one case,[7] but not in another,[8] with a decision of British Coal to close collieries. The status of the National Trust (statutory),[9] has been left open, although prima facie it has the public element mentioned below; and so has that of the Press Complaints Commission (non-statutory).[10] The Independent Broadcasting Authority was held to be subject to judicial review in exercising statutory powers but not in exercising its voting powers in the applicant company.[11] Reviewable 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 held it to be reviewable and observed that the tests for an HRA public authority and for amenability to judicial review were for practical purposes the same.[12]

Where, on the other hand, a public authority delegates its statutory powers to a private body, that body will probably be held to be unreviewable. Decisions on this difficult question have been discussed earlier, since the same criteria apply.

The court has granted review of a decision to prosecute[13] or not to prosecute,[14]

[5] *R. (Sivasubramaniam)* v. *Wandsworth County Court* [2003] 1 WLR 475; and see below, p. 711.

[6] *R.* v. *Independent Television Commission ex p. TSW Ltd.*, [1996] EMLR 291 (application unsuccessful).

[7] *R.* v. *British Coal Cpn ex p. Vardy* [1993] ICR 720. State-owned enterprises in New Zealand may be reviewable: *Mercury Energy Ltd.* v. *Electricity Corporation of New Zealand* [1994] 1 WLR 521.

[8] *R.* v. *National Coal Board ex p. National Union of Mineworkers* [1986] ICR 791 (commercial decision not reviewable).

[9] *Ex p. Scott* [1998] 1 WLR 226 (claim failed since it should have been brought under Charities Act 1993).

[10] *R.* v. *Press Complaints Commission ex p. Stewart-Brady* (1997). 9 Admin. LR 274. See *R.* v. *Criminal Cases Review Commission ex p. Pearson* [1999] 3 All ER 498 (Commission reviewable).

[11] *R.* v. *Independent Broadcasting Authority ex p. Rank Organisation Plc*, The Times, 14 March 1986. See similarly as to sale of land: *R.* v. *Bolsover DC ex p. Pepper*, The Times, 15 November 2000.

[12] *R. (Beer trading as Hammer Trout Farm)* v. *Hampshire Farmers Markets Ld* [2004] 1 WLR 233. See above, p. 174.

[13] *R.* v. *Chief Constable of Kent ex p. L* (1991) 93 Cr. App. R 416; *R.* v. *Croydon Justices ex p. Dean* [1993] QB 769 (breach of undertaking not to prosecute: committal quashed); and see *R.* v. *Inland Revenue Commissioners ex p. Mead* [1993] 1 All ER 772.

[14] *R.* v. *Director of Public Prosecutions ex p. Camelot plc* (refusal to prosecute rival lottery company; the reasoning seems questionable); *R.* v. *DPP ex p. Duckenfield* (1999) 11 Admin. LR 611.

or to continue or discontinue a prosecution, but not of a law officer's refusal to cite a newspaper for contempt of court.[15] The House of Lords has however held that decisions about prosecutions are not amenable to judicial review where the complaint could equally well be made in the course of trial, since otherwise trials would be unacceptably delayed by collateral proceedings.[16] Where the accused has been unlawfully repatriated from a foreign country the court may stay the prosecution on the ground of abuse of process.[17]

Prisoners may be awarded judicial review and have applied for it successfully against disciplinary decisions of prison visitors, for example where there has been a failure of natural justice.[18] The House of Lords has now abolished the former exception under which the court would not intervene against decisions of prison governors in their day-to-day management of prisons.[19] Such a departure from principle, it is held, could only be made by legislation.[20] Relief may also be granted where the governor is claimed to have infringed a fundamental right, such as the right not to be subjected to 'cruel and unusual punishment' contrary to the Bill of Rights 1688.[21] Decisions of the Legal Aid Board are reviewable.[22] So are statutory functions of independent schools.[23] No success has attended attempts to challenge the assignment of particular judges for the trial of particular cases.[24]

Special jurisdictions

Ecclesiastical courts are not subject to review by certiorari, since ecclesiastical law is a different system from the common law on which the ordinary courts will not sit in judgment.[25] But prohibition will lie, not only to restrain the ecclesiastical court from exceeding its jurisdiction,[26] but also to prevent it from executing decisions marred by error of law, provided that the error is one which the court is competent

[15] *R.* v. *Solicitor-General ex p. Taylor*, [1996] COD 61.

[16] *R.* v. *DPP ex p. Kebilene* [1999] 3 WLR 972. Exception is made for bad faith or exceptional circumstances.

[17] *R.* v. *Horseferry Road Magistrates' Court ex p. Bennett* [1994] AC 42 (decided on assumed facts).

[18] See above, p. 549.

[19] *Leech* v. *Parkhurst Prison Deputy Governor* [1988] AC 533.

[20] Same case at 568.

[21] *R.* v. *Home Secretary ex p. Herbage* (No. 2) [1987] QB 1077 (allegation of cruel conditions of imprisonment: leave to apply for mandamus granted).

[22] *R.* v. *Legal Aid Board ex p. Donn & Co.* [1996] 3 All ER 1.

[23] *R.* v. *Cobham Hall School ex p. S*, [1998] ELR 389.

[24] *R.* v. *Lord Chancellor ex p. Maxwell* [1997] COD 22; *R.* v. *Lord Chancellor ex p. Stockler* [1997] COD 24.

[25] *R.* v. *St Edmundsbury and Ipswich Diocese (Chancellor) ex p. White* [1948] 1 KB 195. See also *R.* v. *Chancellor of Chichester Consistory Court ex p. News Group Newspapers Ltd.* [1992] COD 48; *R.* v. *Provincial Court of the Church in Wales ex p. Williams* [1999] COD 163.

[26] e.g. *R.* v. *North* [1927] 1 KB 491 (prohibition to Consistory Court for decision contrary to natural justice).

to correct.[27] Historical reasons lie behind this distinction. It is devoid of logic, since if the court is prepared to assert control by prohibition it might as well do so by certiorari. Normally prohibition was used only in case of excess of jurisdiction, certiorari being the remedy for error of law.[28] But in this context, having disclaimed the power to issue certiorari, the court extended the range of prohibition, thus remedying one anomaly by another.

It seems probable that the law used to be similar for other special jurisdictions such as those of visitors of universities, colleges and charities who have jurisdiction to determine internal disputes within those bodies;[29] but visitorial jurisdiction has now been held to be subject to judicial review in the ordinary way,[30] save only in respect of error of fact or law, for which visitors enjoy an ancient immunity.[31] The same immunity is enjoyed by the judges of the High Court when acting as visitors to the Inns of Court, though in other respects they are subject to judicial review.[32]

Where there is a breakdown of law and order and the ordinary courts cannot operate, and martial law is imposed by force of arms, the court cannot interfere with the actions of the military or with the proceedings of courts-martial set up in such a situation. Courts-martial of this kind are not judicial tribunals in any legal sense, but merely part of the methods used to repel force by force where ordinary law is in suspense. Certiorari and prohibition, like other legal remedies, are therefore inoperative.[33] The ordinary courts-martial regularly established under military law in normal conditions are subject to certiorari and prohibition and to judicial review generally.[34]

The High Court and other superior courts are beyond the scope of these remedies, not being subject to judicial review.[35] But a judge of a superior court, when acting as a statutory tribunal, has no such immunity.[36] The Courts-Martial Appeal Court is by statute a superior court.[37] The Crown Court counts for this purpose as

[27] Bl. Comm. iii. 112, giving examples; *Veley* v. *Burder* (1841) 12 Ad. & E 265, esp. at 311 (prohibition to prevent ecclesiastical court enforcing irregular church rate); Rubinstein, *Jurisdiction and Illegality*, 98. See also the *Chichester* case, above.

[28] Above, p. 604.

[29] Bl. Comm. iii. 112 applies this doctrine to numerous jurisdictions; and see (1970) 86 *LQR* 531 at 544 (J. W. Bridge).

[30] *Thomas* v. *University of Bradford* [1987] AC 795; *R.* v. *Committee of the Lords of the Judicial Committee of the Privy Council ex p. Vijayatunga* [1990] 2 QB 444. See above, p. 545.

[31] *R.* v. *Hull University Visitor ex p. Page* [1993] AC 682. See below, p. 637.

[32] *R.* v. *Visitors to the Inns of Court ex p. Calder* [1994] QB 1.

[33] *Re Clifford and O'Sullivan* [1921] 2 AC 570 (prohibition refused).

[34] *R.* v. *Wormwood Scrubs Prison Governor ex p. Boydell* [1948] 2 KB 193 (habeas corpus and certiorari granted). The Courts-Martial Appeal Court is an exception, as noted below.

[35] *Re Racal Communications Ltd.* [1981] AC 374.

[36] *R.* v. *Master of the Rolls ex p. McKinnell* [1993] 1 WLR 88 (appeal under Solicitors Act 1974).

[37] Courts-Martial (Appeals) Act 1968, s. 1.

an inferior court, but is by statute exempt from review 'in matters relating to trial on indictment'.[38]

Contractual bodies, domestic tribunals, universities, etc.

Tribunals whose jurisdiction is confined to the internal affairs of some profession or association, and which are commonly called domestic tribunals, have not until recently appeared among the numerous tribunals against which certiorari and prohibition have been granted. Where their powers are statutory, as in the case of the Disciplinary Committee of the General Medical Council[39] and the Disciplinary Committee of the Law Society,[40] there is no apparent difficulty in fitting them into Atkin LJ's formula as bodies having legal authority to determine questions affecting rights. Nevertheless in practice their decisions were reviewed by ordinary actions for injunctions and declarations until the new procedure for judicial review was introduced in 1977. Since then an application for prerogative remedies has been allowed against the General Medical Council,[41] and there have been other comparable cases.[42] Even non-statutory bodies have been brought within the scope of judicial review, so that statutory powers are no longer an indispensable requirement for prerogative remedies. These exceptional cases are explained separately below.[43]

Where a disciplinary body has no statutory powers its jurisdiction will normally be based upon contract. Members of trade unions, business associations and social clubs and also students in universities and colleges have, as we have seen, contractual rights based on their contracts of membership, with implied terms which protect them from unfair expulsion.[44] The same applies to religious bodies outside the established church.[45] In these cases declaration and injunction are the appropriate remedies. Certiorari and prohibition are quite out of place, since the Crown's supervisory powers over public authorities are not concerned with private contracts. Certiorari will therefore not issue where all the rights asserted are

[38] Supreme Court Act 1981, s. 29(3). The purpose is to avoid delay: see the *Kebilene* case (above). The exemption has caused much difficulty: see *Re Smalley* [1985] AC 622; *Re Ashton* [1994] 1 AC 9; and see [1990] *PL* 50 (R. Ward).

[39] Medical Acts, 1956–78.

[40] Solicitors Act 1974, pt. II.

[41] *R.* v. *General Medical Council ex p. Gee* [1986] 1 WLR 226 at 237, also [1986] 1 WLR 1247 (CA) and [1987] 1 WLR 564 (HL); *R.* v. *General Medical Council ex p. Colman* [1990] 1 All ER 489.

[42] *R.* v. *Committee of Lloyds ex p. Posgate*, The Times, 12 January 1983; *R.* v. *Pharmaceutical Society of Great Britain ex p. Sokoh*, The Times, 4 December 1986; *R.* v. *Code of Practice Committee of the British Pharmaceutical Industry* (1990) 3 Admin. LR 697.

[43] Above, p. 638.

[44] Above, pp. 444 and 545.

[45] See *R.* v. *Chief Rabbi ex p. Wachmann* [1992] 1 WLR 1036; *R.* v. *Imam of Bury Park Jami Masjid Luton ex p. Sulaiman Ali* [1994] COD 142; *R.* v. *Provincial Court of the Church in Wales ex p. Williams* [1999] COD 163; above, p. 633.

contractual.[46] Nor will it issue to a contractual arbitrator, though it may to a statutory arbitrator.[47] As Lord Parker CJ said:[48]

> Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned.

On the same principle, contracts of employment are equally beyond the scope of certiorari and prohibition. Thus where a university in Ceylon dismissed a lecturer from his post, it was held that his position was merely that of an employee under an ordinary contract of master and servant, and that in such a case certiorari would not lie.[49] There have been similar rulings on applications made by employees of the Crown Prosecution Service[50] and of a district health authority[51] and of the BBC.[52] Here again a distinction is to be drawn between a mere contract of employment and tenure of a public office. An office-holder unlawfully dismissed may have his dismissal quashed by certiorari, so that he remains in office.[53] In the past, nevertheless, public offices were in practice protected by ordinary actions for declaration and injunction.[54]

Universities and colleges may or may not have statutory powers. If they have, the court may treat them as statutory public authorities which are subject to certiorari and prohibition as well as to declaration and injunction.[55] But the mere fact that the university is established by statute does not necessarily make its powers statutory: it may engage its employees under ordinary contracts of service.[56] If there is no statutory constitution, but merely incorporation by charter, there is no basis for

[46] *Law* v. *National Greyhound Racing Club Ltd.* [1983] 1 WLR 1302; *R.* v. *Corporation of Lloyds ex p. Briggs* [1993] 1 Lloyd's Rep. 176 (relations between Lloyd's and 'names' held to be contractual only); *R.* v. *Panel of the Federation of Communication Services Ltd. ex p. Kubis* (1999) 11 Admin. LR 43. See also the *Datafin* case, below, p. 640.

[47] See the *Dental Technicians* case [1953] 1 QB 704, quoted above, p. 605.

[48] *R.* v. *Criminal Injuries Compensation Board ex p. Lain* [1967] 2 QB 864 at 882. See similarly *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 QB 329 at 346 (Denning LJ).

[49] *Vidyodaya University Council* v. *Silva* [1965] 1 WLR 77. See similarly *R.* v. *Post Office ex p. Byrne* [1975] ICR 221.

[50] *R.* v. *Crown Prosecution Service ex p. Hogg* (1994) 6 Admin. LR 778.

[51] *R.* v. *East Berkshire Health Authority ex p. Walsh* [1985] QB 152.

[52] *R.* v. *British Broadcasting Corporation ex p. Lavelle* [1983] 1 WLR 23. See below, p. 669.

[53] As in *R.* v. *Home Secretary ex p. Benwell* [1985] QB 554 (prison officer).

[54] As in *Cooper* v. *Wilson* [1937] 2 KB 309 and *Ridge* v. *Baldwin* [1964] AC 40 (police officers: declarations).

[55] As in the case of city technology colleges, constituted by ministerial order: *R.* v. *Governors of Haberdashers' Aske's Hatcham College Trust ex p. Tyrell* [1995] COD 399 (college's refusal to admit pupil held reviewable but relief refused). The court may have a choice where, as in that case, there are both statutory and contractual functions. See also *Naik* v. *University of Stirling* 1994 SLT 449 (royal grant of powers: judicial review for student competent); *King* v. *University of Saskatchewan* (1969) 6 DLR (3d) 120.

[56] As in the *Vidyodaya* case (above); and see *Fekete* v. *Royal Institution for the Advancement of Learning* [1969] BR 1 (Quebec), affirmed (1969) 2 DLR (3d) 129. The Universities of Oxford and Cambridge are ancient universities by prescription but have statutory power to make their own statutes. How they should be classified is uncertain.

disciplinary rules other than contract. As Lord Devlin said in a published report about misconduct by students:[57]

> Contract is the foundation of most domestic or internal systems of discipline . . . The power to discipline should be derived from the acceptance of it by the student in the contract of matriculation.

Non-statutory discipline may therefore be controlled by the ordinary remedies for breach of contract such as injunction, declaration or damages, but not by certiorari or prohibition. But it must be remembered that any dispute over the interpretation and administration of the university's internal rules comes within the exclusive jurisdiction of the visitor, if there is one, even where there is a relationship of contract.[58] A visitor is subject to certiorari and prohibition if he had no power to adjudicate or if he abused his power or violated the rules of natural justice. But, by a special exception, his decision is not reviewable for mere error of fact or law. If he refuses to act he is compellable mandamus.[59]

The courts will, in any case, be reluctant to enter into 'issues of academic or pastoral judgment which the university was equipped to consider in breadth and in depth but on which any judgment of the courts would be jejune and inappropriate. That undoubtedly included such questions as what mark or class a student ought to be awarded or whether an aegrotat was justified.'[60]

The contractual basis of the rights of students appears to have been overlooked by the High Court in one case, where it was held that the student complainants had not been treated in accordance with natural justice but that they had delayed too long to be entitled to certiorari and mandamus.[61] It has since been made clear once again that contractual rights are outside the scope of certiorari altogether, so that this remedy was not available to a Post Office employee alleging that he was dismissed in breach of his terms of employment.[62] But if the dismissal was in breach of statutory restrictions certiorari will lie to quash it.[63]

The contrast between contractual and non-contractual situations has been sharpened by the divorce of public and private law, discussed in the following chapter with further examples of employments, offices and other heads of

[57] Report on the Cambridge Sit-in, 1973, para. 154.

[58] Above, p. 545.

[59] For all these propositions see *R.* v *Hull University Visitor ex p. Page* [1993] AC 682. Judges acting as visitors to the Inns of Court are a tribunal of appeal, not of review, in disciplinary cases but are themselves liable to limited judicial review as stated above, p. 634. See also *R.* v. *Council of Legal Education ex p. Eddis* (1994) 7 Admin. LR 357.

[60] *Clark* v. *University of Lincolnshire and Humberside*, [2000] 1 WLR 1988 (Sedley LJ). As to academic judgment see also above, p. 525.

[61] *R.* v. *Aston University Senate ex p. Roffey* [1969] 2 QB 538, criticised in *Herring* v. *Templeman* [1973] 3 All ER 569 at 585. See also *R.* v. *Fernhill Manor School ex p. Brown* (1993) 5 Admin. LR 159 (expulsion from school: remedy in contract only).

[62] *R.* v. *Post Office ex p. Byrne* [1975] ICR 221, repeating the above criticism.

[63] *R.* v. *British Coal Corporation ex p. Vardy* [1993] ICR 720.

liability.[64] If contract is made into a rigid barrier against judicial review, victims of abuse of power may be left without remedy where they are not themselves parties to a contract under which some public service is administered. 'Government by contract' is now so extensive that the case for controlling it may become irresistible.[65]

REALMS BEYOND THE LAW

Non-statutory action

Judicial review is designed to prevent the excess and abuse of power and the neglect of duty by public authorities. In the past there was a clear test for determining the limits of the court's jurisdiction: 'power' meant legal power conferred by Act of Parliament. Subject to the special rules governing individual remedies, it was only necessary to ascertain that the power was statutory before invoking the aid of the court. Nor was it difficult to distinguish public authorities from other recipients of statutory powers such as commercial companies and trustees. If the power was granted for governmental purposes, its exercise was controllable by the remedies of administrative law. The same could likewise be said of duties. The scope of judicial review was defined by the classic formula of the *Electricity Commissioners* case which, at least after *Ridge* v. *Baldwin*, was well understood.[66]

The law has been driven from these familiar moorings by the impetus of expanding judicial review, which has been extended to two kinds of non-statutory action. One is where bodies which are unquestionably governmental do things for which no statutory power is necessary, such as issuing circulars or other forms of information. Examples have already been given to show how the courts will entertain actions disputing statements of law, and even of policy, in government statements and circulars, although mere statements and circulars in themselves have no legal effect.[67] The other category is where judicial review is extended to bodies which, by the traditional test, would not be subject to judicial review and which, in some cases, fall outside the sphere of government altogether. A variety of commercial, professional, sporting and other activities are regulated by powerful bodies which are devoid of statutory status and may yet have an effective monopoly. In their willingness to 'recognise the realities of executive power'[68] and in their desire to prevent its abuse the courts have undertaken to review the decisions of a number

[64] Below, p. 668.
[65] See below, p. 793.
[66] Above, p. 610.
[67] Above, p. 571.
[68] See the *Take-over Panel* case, below. See also D. Oliver in Forsyth (ed.) *Judicial Review and the Constitution*, ch. 14.

of such bodies, while in other cases they have refused. The limits of this new jurisdiction have been explored in a series of judgments and they are by no means certain. At the present stage they are best discussed case by case, as in the paragraphs below. The first in order of time, and by a long interval, was the case of the Criminal Injuries Compensation Board.

These judicial forays into areas beyond the law have constitutional implications. The rule of law now operates in territory previously supposed to be beyond its reach. Where the court undertakes, as illustrated below, to enforce the self-made rules of a non-statutory (and non-contractual) body, those rules become in effect legislation, though in no way authorised by Parliament.[69] Other novel phenomena are likely to reveal themselves. Although the House of Lords has not expressly approved this novel jurisdiction, it has recognised it indirectly.[70]

For obvious constitutional reasons there can be no judicial review of Parliamentary proceedings of any kind.[71]

The Crown and the public service

Powers of the Crown which are treated as within the royal prerogative are now, at least in some instances, within the scope of judicial review, as already explained.[72] These include decisions of the Civil Service Appeal Board,[73] whose powers derive from prerogative Orders in Council without any statutory basis, though the Board carries the Secretary of State's statutory approval for the purposes of the law of unfair dismissal. The court has declined to extend its control beyond the Appeal Board into day-to-day discipline, so that the removal of an offending civil servant to another department with loss of seniority is not reviewable.[74] But review may be granted where civil service regulations are not observed.[75] The grant or refusal of passports, which remains a non-statutory function, is another example of the extended range of judicial review.[76]

[69] A point noted by Popplewell J in the *Pharmaceutical Industry* case (below, p. 644).

[70] In *ex p. Walker*, below.

[71] *R.* v. *Parliamentary Commissioner for Standards ex p. Al Fayed* [1998] 1 WLR 669 (relief refused). But this does not apply to the Parliamentary Commissioner for Administration: see above, p. 100.

[72] Above, p. 47.

[73] *R.* v. *Civil Service Appeal Board ex p. Bruce* [1989] 2 All ER 907 (claim failed); *R.* v. *Civil Service Appeal Board ex p. Cunningham* [1991] 4 All ER 310 (Board's decision quashed); *R.* v. *Civil Service Appeal Board ex p. Chance* [1993] COD 116 (Board's decision quashed).

[74] *R.* v. *Lord Chancellor's Department ex p. Nangle* [1992] 1 All ER 897.

[75] *Jackson* v. *Secretary of State for Scotland* 1992 SLT 572 (rule concerning retirement on health grounds disregarded).

[76] See above, p. 347.

The (former) Criminal Injuries Compensation Board

The function of this Board was to adjudicate claims and award compensation to victims of violent crime. It was constituted merely administratively as a non-statutory body, which it remained until reconstituted by Parliament in 1995.[77] There was a published scheme which was debated in Parliament, but not enacted, so that in law the rules of the scheme were mere administrative instructions from the Home Secretary to the Board. Funds for the Board were voted annually by Parliament, as for other administrative expenses, but the rules of the scheme remained informal. Nevertheless the court would grant certiorari to quash a decision of the Board which was not in accordance with the rules or with the principles of reasonableness and fairness.[78] Two successful claims concerned the meaning of the provision for compensation for 'personal injury directly attributable to a crime of violence . . . or to an arrest or attempted arrest of an offender', which the Board was held to have misinterpreted. The courts have reviewed the Board's decisions just as strictly as those of statutory authorities, and have quashed them even where there was room for doubt.[79]

In the initial case of 1967 Lord Parker CJ said that 'the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined' and that they had been 'extended to meet changing conditions'. The extension did not at the time seem far-reaching, since the Board was clearly part of the machinery of government, was under Parliamentary and ministerial control, and was analogous with many statutory tribunals. But a breach had been made in the logical boundaries of judicial review and twenty years later the breach was exploited in a way which opened up entirely new vistas.

The Panel on Take-overs and Mergers

This unincorporated association in the City of London monitors a code of rules, promulgated by itself, governing company take-overs and mergers. It is 'without

[77] Criminal Injuries Compensation Act 1995, replacing the Board by a panel of adjudicators. For the failure of the Home Secretary's attempt to introduce another non-statutory scheme see above, p. 391. See also *R.* v. *Ministry of Defence ex p. Walker* [2000] 1 WLR 806 (HL) (non-legal compensation scheme for armed forces overseas).

[78] *R.* v. *Criminal Injuries Compensation Board ex p. Lain* [1967] 2 QB 864 (claim failed). Examples of successful claims are *R.* v. *Criminal Injuries Compensation Board ex p. Schofield* [1971] 1 WLR 926; *ex p. Tong* [1976] 1 WLR 1237 (CA); *ex p. Clowes* [1977] 1 WLR 1353 (mandamus also granted); *ex p. Cummings* (1992) 4 Admin. LR 747 (reasons inadequate). A duty of fairness and reasonableness was to be inferred from the voting of funds by Parliament: *R.* v. *Criminal Injuries Compensation Board ex p. P* [1995] 1 WLR 845.

[79] As in the *Schofield* case (above). In *R.* v. *Criminal Injuries Compensation Board ex p. Webb* [1987] QB 74 the Court of Appeal suggests a more tolerant policy.

visible means of legal support', having neither statutory nor contractual powers.[80] Yet it wields 'immense power de facto', since violations of the code, adjudged by itself, may lead to exclusion from the stock exchange or investigation by the Department of Trade and Industry or other sanctions. The Court of Appeal has held that it must 'recognise the realities of executive power ... in defence of the citizenry', and be prepared to grant judicial review of the panel's rulings so as to prevent abuse of 'the enormously wide discretion which it arrogates to itself'.[81] But, except in case of violation of natural justice, declaration will usually be a more suitable remedy than certiorari or mandamus; and even then, in view of the disruptive effect of legal proceedings on urgent commercial transactions, review may be 'historic rather than contemporaneous', so as to prevent future error and relieve against unjust penalties, but otherwise to let the instant decision stand. This illustrates 'a very special feature of public law decisions, such as those of the panel, namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction'.[82] It also illustrates the flexible use of discretionary remedies to meet novel legal situations.

Although the function of the take-over panel was, as a matter of law, outside the machinery of government, the court emphasised that, as a matter of fact, the panel performed an important public duty and the Secretary of State deliberately relied upon it 'as the centrepiece of his regulation of that market' in conjunction with the statutory regulation of investment business. Lloyd LJ held this to be 'an implied devolution of power' and held the panel to be established 'under authority of the Government', despite the lack of legal connection. The courts are evidently determined not to allow any powerful quasi-governmental body to opt out of the legal system, even where there may be good reasons for avoiding the law's delays and uncertainties. The court's criteria, furthermore, are extremely wide. 'Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to their jurisdiction'.[83] This generous formula invites litigants to assert a 'public element' in many situations where

[80] Now, however, the rules will probably be made statutory by endorsement under the Financial Services and Markets Act 2000, s. 143.

[81] *R.* v. *Panel on Take-overs and Mergers ex p. Datafin Plc* [1987] QB 815. The application failed on the merits. The quotations are from Sir John Donaldson MR. The decision expressly follows *R.* v. *Criminal Injuries Compensation Board ex p. Lain* (above). For comment see (1987) 103 *LQR* 323 (Wade): [1987] *PL* 356 (Forsyth).

[82] The same point is made above, p. 305, on 'void or voidable'.

[83] Sir John Donaldson MR (at 838). In *R.* v. *Spens* [1991] 4 All ER 421 it is said that relations with the Panel are consensual, but this probably means 'voluntary' rather than 'contractual'.

otherwise they could find no legal foothold.[84] It is now the source of great uncertainty. It seems that it may be used as a substitute, and a much less precise one, for the classic formula of Atkin LJ, 'any body of persons having legal authority to determine questions affecting the rights of subjects',[85] even in cases which clearly fall within that formula.[86]

In the cases so far reported the complaints against the Panel were not made good,[87] so that there is as yet no example to show how the court might give effect to its imaginative propositions about adapting remedies to financial transactions. The court evidently contemplated some form of 'prospective overruling' as can be found elsewhere in the law, as is noted later.[88]

'Consensual submission' may not necessarily mean the acceptance of specific contractual obligations, as opposed to voluntary participation or activity.[89] Contractual obligations belong to private law, so that where the only rights asserted are covered by such obligations, judicial review will be refused.[90] For this reason many commercial, social and sporting associations will lie outside the field of public law.

Recognised self-regulatory organisations

Bodies such as IMRO, FIMBRA and LAUTRO, which were officially recognised under the Financial Services Act 1986 for regulating sectors of financial markets, were part of a statutory system and amenable to judicial review, although their own powers were not statutory.[91] Decisions of the Stock Exchange are likewise reviewable.[92]

[84] Unsuccessful examples are *R.* v. *Fernhill Manor School ex p. Brown* (1992) 5 Admin. LR 159 (expulsion of pupil from independent school); *R.* v. *The Lord Chancellor ex p. Hibbit and Saunders* [1993] COD 326 (unfair treatment of firm tendering for court services); *R.* v. *Ethical Committee of St Mary's Hospital ex p. H* [1988] 1 FLR 512 (above, p. 612). But a city technology college constituted by statutory order is reviewable: *R.* v. *Governor of Haberdashers' Aske's Hatcham College Trust ex p. Tyrell* [1995] COD 399, discussing the *Datafin* and other non-statutory cases.

[85] Above, p. 608.

[86] As for example in *R.* v. *Visitors to Lincoln's Inn ex p. Calder* [1994] QB 1, where reviewability is attributed to the 'public element' rather than to the classic formula.

[87] *R.* v. *Panel on Take-overs and Mergers ex p. Guinness Plc* [1990] 1 QB 146 (Panel's refusal to grant adjournments criticised but upheld); *R.* v. *Panel on Take-overs and Mergers ex p. Al Fayed* (1992) 5 Admin. LR 337 (refusal to adjourn disciplinary proceedings upheld).

[88] Below, p. 703. See also above, p. 298 (retrospectivity).

[89] In rejecting a claim against the Press Complaints Commission the court left the question of its reviewability open: *R.* v. *Press Complaints Commission ex p. Stewart-Brady* [1997] COD 93.

[90] See above, pp. 605 and 635.

[91] *Bank of Scotland* v. *Investment Management Regulatory Organisation Ltd.* 1989 SLT 432; *R.* v. *Financial Intermediaries Managers and Brokers Regulatory Association ex p. Cochrane* [1990] COD 33; *R.* v. *Life Assurance Unit Trust Regulatory Organisation Ltd. ex p. Ross* [1993] QB 17.

[92] *R.* v. *International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd. ex p. Else (1982) Ltd.* [1993] QB 534.

A statutory basis is now provided by the Financial Services and Markets Act 2000 (if enacted as proposed), described elsewhere.

The Advertising Standards Authority

This authority was set up by the advertising industry for voluntary self-regulation, charged with maintaining respectable standards in advertising. Its only sanction is that it can call upon newspapers and other 'media', which have undertaken to cooperate, to refuse advertising from offending firms. Complaints are adjudicated by its council under its published rules, with no right of appeal. It has no legal basis of any kind. Yet when the council upheld a complaint against an advertiser the High Court quashed its decision for violation of natural justice, since they had not themselves seen all the material submitted by the defence.[93] The court found the 'public element' in the fact that the practice of the Director of Fair Trading was to intervene under the statutory regulations about misleading advertisements only if the ASA had failed to deal properly with the complaint. If the ASA had not existed, said the court, the Director-General would no doubt have acted. Like the Take-over Panel, the ASA played a part, at one remove, in a system of governmental control.

The Press Complaints Commission

This commission was established by the newspaper and magazine industry in 1991, replacing the former Press Council. It is wholly non-statutory. It publishes a code of practice and adjudicates complaints, frequently for invasion of privacy. Its only sanctions are reprimand and publicity. In a case where the Commission had rejected a complaint of photography of a patient in a hospital without his consent, in apparent breach of the code, the Court of Appeal held that the Commission need not consider the question of a breach if they were clearly of the view that no censure was required. Dismissing the application for leave to apply for judicial review, the court in fact reviewed the decision, while at the same time holding, paradoxically, that the question of the amenability of the Commission to judicial review should await a decision after full argument on a more suitable occasion.[94]

The Bar Council

The General Council of the Bar deals with complaints against barristers through its professional conduct committee, which can bring charges before a disciplinary

[93] *R.* v. *Advertising Standards Authority ex p. Insurance Service Plc* (1990) 2 Admin. LR 77. See also *R.* v. *Advertising Standards Authority ex p. Vernons Organisation Ltd.* [1992] 1 WLR 1289 (order restraining publication of decision pending judicial review refused as inconsistent with freedom of speech); *R.* v. *Advertising Standards Authority ex p. Direct Line Financial Services Ltd.* [1997] COD 20 (leave to apply granted).

[94] *R.* v. *Press Complaints Commission ex p. Stewart-Brady* (1997) 9 Admin. LR 274.

tribunal. After a quarrel between two Queen's Counsel, one of whom accused the other of mishandling money, the committee put forward a charge of breach of proper professional standards. The complainant, arguing that this was too mild a charge, sought declaratory relief by judicial review. The High Court upheld the committee's decision on its merits, without questioning the availability of review.[95] Yet the Bar Council and its committees have no statutory or other legal power in such a case.

The pharmaceutical industry

The pharmaceutical industry has a code of practice committee which advises on the commercial products which can be recommended to doctors. It has no statutory status or powers, but an adverse recommendation will mean that there may be no market for the product. On an application for judicial review by an aggrieved manufacturer the High Court held that the committee's decisions were reviewable, though the complaint failed on its merits.[96] The judge expressed great reluctance to add to the range of cases which might swamp the courts with what were essentially domestic issues of private law; but he felt compelled to follow the authorities mentioned above.

Regulation of sport

Sport is regulated on a national basis by a number of powerful bodies such as the Jockey Club, the Football Association, the National Greyhound Racing Club and the British Boxing Board of Control. They have no statutory basis or authority, but in practice they may operate a monopoly so that all participants in the sport must accept their control or else be excluded; and their disciplinary powers may have very serious consequences for trainers, coaches, organisers and so forth. Where membership of such a body is contractual there may be express or implied terms about fair treatment which the member can enforce in private law. But where there is no such membership private law offers no protection against abuse of the controlling body's power, despite occasional indications to the contrary.[97] Here there is a vacuum of justice which the law ought to fill.

[95] *R.* v. *General Council of the Bar ex p. Percival* (1990) 2 Admin. LR 711.

[96] *R.* v. *Code of Practice Committee of the British Pharmaceutical Industry ex p. Professional Counselling Aids Ltd.* (1990) 3 Admin. LR 697.

[97] See the decision of Sir Robert Megarry V-C in *McInnes* v. *Onslow-Fane* [1978] 1 WLR 1520, favouring limited review of the (non-statutory) British Boxing Board of Control's decisions on applications for licences. See also *Nagle* v. *Fielden* [1966] 2 QB 633 where the question was whether the Jockey Club's refusal to grant a trainer's licence to a woman might be unlawful as being arbitrary and unreasonable and also contrary to public policy and to 'the right to work'; it was no more than a decision that the statement of claim should not be struck out, no further proceedings being reported.

The courts, however, have almost uniformly declined to regard bodies controlling sport as coming within public law. In one case, where the disciplinary committee of the Jockey Club had disqualified a steward from acting as chairman of boards of inquiry, the High Court was sympathetic to judicial review but held that it was bound by authority rejecting review of the National Greyhound Racing Club.[98] In a later decision the Court of Appeal refused review of a decision of the disciplinary committee of the Jockey Club disqualifying a racehorse and fining its trainer, when both owner and trainer were in contractual relationship with the Club.[99] The decisive factor was that the powers of the Jockey Club were 'in no sense governmental', but derived from the consent of racehorse owners to be bound by its rules. A complaint of unfair procedure could not therefore be remedied by judicial review, though it might still be remediable by an action for breach of contract. The High Court similarly declined to review a decision of the Football Association to establish a premier league for football, holding that the Association was a domestic body existing in private law only and that it would be a 'quantum leap' to bring it within the law for controlling government organs.[1] But Scots law has made that leap without difficulty[2] and so, it seems, has the law in New Zealand[3] and in Canada.[4] And in one English case, where a rugby football disciplinary committee had suspended a player for fighting, the High Court granted an interim injunction to lift the suspension until it could be determined whether the proceedings lacked basic fairness, the judge observing that sport was now big business and that it was naive to pretend that it could be conducted as it was not many years ago.[5] This decision, though out of line with the authorities, is surely likely to outlive them.

[98] *R.* v. *Jockey Club ex p. Massingberd-Mundy* [1993] 2 All ER 207, following *Law* v. *National Greyhound Racing Club Ltd.* [1983] 1 WLR 1302. See the similarly sympathetic but negative decision in *R.* v. *Jockey Club ex p. RAM Racecourses Ltd.* [1993] 2 All ER 207, where the proprietors of a new racecourse were allotted no race meetings and a claim based on legitimate expectation failed. Had the court not been bound by *Law* these decisions might have been different. For discussion see [1989] *PL* 95 (M. J. Beloff).

[99] *R.* v. *Disciplinary Committee of the Jockey Club ex p. Aga Khan* [1993] 1 WLR 909.

[1] *R.* v. *Football Association Ltd. ex p. Football League Ltd.* [1993] 2 All ER 833.

[2] *St Johnston Football Club Ltd.* v. *Scottish Football Association* 1965 SLT 171 (breach of natural justice, relief granted); and see *West* v. *Secretary of State for Scotland* (below).

[3] *Finnigan* v. *New Zealand Rugby Football Union Inc.* (No. 2) [1985] 2 NZLR 181 (interim injunction granted against football union's decision to send a team to South Africa; the proceedings were discontinued: (No. 3) [1985] 2 NZLR 190).

[4] *Re Parks and B.C. School Sports* (1997) 145 DLR (4th) 174.

[5] *Jones* v. *Welsh Football Union*, The Times, 6 March 1997 (Ebsworth J), affirmed by CA The Times, 6 January 1998. The complaint was that the player had not been allowed to challenge adverse evidence. It is not clear whether it was based on contract, tort or judicial review.

Contrasting policies

In drawing the line as explained above the courts have set limits to the use of judicial review, which is essentially a mechanism for enforcing legality in government, as a means of remedying the shortcomings of private law. In many spheres of life, whether commercial, social, sporting or religious,[6] a great deal of power is exercised in matters which have nothing to do with government, and particularly in the case of monopolies the law should be able to prevent unfairness and abuse.[7] An element of this appeared in the ancient common law rule that tradesmen in 'common callings' such as innkeepers, common carriers and ferrymen might make only reasonable charges and might not discriminate between customers;[8] and the same principle is seen in modern legislation against monopolies, unfair contracts and discrimination. Such a system would lie beyond administrative law, but would draw strength from it. New laws and new remedies would be needed, while judicial review remained confined to the sphere of government and to the upholding of the rule of law.

In Scots law, by contrast, the distinction between public and private law is rejected and the supervisory jurisdiction of the Court of Session is available wherever a decision-making power is conferred on some body, whether by statute or private contract or some other instrument,[9] and that body exceeds or abuses its power or fails in its duty.[10] The court may intervene if any such body violates its own constitution or rules or errs in law or infringes natural justice, even if it is the governing body of a private association. Judicial review may extend to the decisions of religious[11] and sporting[12] bodies if they act irregularly, oppressively or unfairly. Justice can thus be done in cases which lie beyond the reach of the rigid English system with its misguided public and private law dichotomy, and procedural obstacles and dilemmas are avoided.

[6] Judicial review has predictably been refused against religious authorities: *R.* v. *Chief Rabbi ex p. Wachmann* [1992] 1 WLR 1036; *R.* v. *Imam of Bury Park Jami Masjid ex p. Sulaiman Ali* [1992] COD 132.

[7] See Hoffmann LJ in the *Aga Khan* case (above) at 932 and the suggestions of Sir Harry Woolf [1986] *PL* 220 at 224 and Sir Gordon Borrie [1989] *PL* 552.

[8] See M. Taggart in Joseph (ed.), *Essays on the Constitution*, 214 (a full survey); [1991] *PL* 538 (P. Craig); P. Craig, 'Public Law and Control over Private Power' in Taggart (ed.), *The Province of Administrative Law*, 196; [1997] *PL* 630 (D. Oliver).

[9] Emphasis is put upon the 'tripartite relationship' between the body conferring the jurisdiction, the body exercising it and the citizen affected by it. But this may not be an inflexible requirement: *Naik* v. *University of Stirling* 1994 SLT 449; *Jobaen* v. *University of Stirling* 1995 SLT 120.

[10] *West* v. *Secretary of State for Scotland* 1992 SLT 636, where the law is fully expounded by Lord President Hope. Grounds of review are held to be the same as in England but procedure is different and problem-free: see below, p. 662. See also *Boyle* v. *Castlemilk East Housing Co-operative Ltd.* 1998 SLT 56.

[11] As in *M'Donald* v. *Burns* 1940 SLT 325 (sisters expelled from Roman Catholic convent; action held competent).

[12] As in *St Johnston Football Club Ltd.* v. *Scottish Football Association Ltd.* (above).

18

PROCEDURE OF JUDICIAL REVIEW

DEFECTS OF PREROGATIVE REMEDIES

Procedural peculiarities

For a long time the prerogative remedies as a body suffered from hereditary procedural defects. They had escaped the radical reforms of the nineteenth century in which the old forms of action, with their exclusive character and their multifarious peculiarities, were swept away. The prerogative remedies were left on one side, so that they remained as isolated survivors from the old era. They thus retained their own special procedure, which was of a summary and limited character and could not be combined with applications for other remedies.

In 1933 a new system was introduced[1] for certiorari, prohibition and mandamus which required a motion to be made to the High Court asking for leave to apply for the remedy. The motion was made ex parte, i.e. without notice to the respondent public authority. Refusal was subject to appeal, and the Court of Appeal might then dispose of the whole case itself.[2] The rules of court prescribed a time-limit of six months for seeking certiorari, though the court had discretion to extend it.[3] And even within this time limit the remedy might be refused if the applicant had been guilty of delay and so caused hardship to the other party.[4] In 1938 formalities were simplified by replacing the 'writs' of certiorari, prohibition and mandamus by 'orders' of similar title and scope.[5]

None of these changes cured the two major deficiencies. The first of these was the procedural incompatibility which made it impossible to seek certiorari and a

[1] Administration of Justice (Miscellaneous Provisions) Act 1933, s. 5.

[2] *R.* v. *Industrial Injuries Commissioner ex p. Amalgamated Engineering Union* [1966] 2 QB 21.

[3] There is also a wide inherent jurisdiction to extend time limits: *R.* v. *Bloomsbury County Court ex p. Villerwest Ltd.* [1976] 1 WLR 362. The time limit derived historically from an Act of 1740 (13 Geo. 2, c. 18, s. 5) which provided that no certiorari should issue for the removal of orders of justices after six months. The court had no discretion to extend this time: *R.* v. *Anglesea Justices* (1846) 10 Jur. 817. For a discussion of the Act see *R.* v. *Tillett ex p. Newton* (1969) 14 FLR 101. It was repealed by the Statute Law Revision Act 1888.

[4] See below, p. 658.

[5] Administration of Justice (Miscellaneous Provisions) Act 1938, s. 7, replaced by Supreme Court Act 1981, s. 29.

declaration (for example) in one proceeding.[6] The second deficiency was the lack of interlocutory facilities: prerogative remedy procedure made no provision for obtaining discovery of relevant documents by the other side[7] or for serving interrogatories, which were normal facilities in an ordinary action and were therefore available in ordinary proceedings for injunctions or declarations. These incongruities were unjustifiable survivals, especially when judicial review was developing so rapidly after about 1960.

A feature of prerogative remedy procedure which remains unaltered is that evidence is taken on affidavit, i.e. by sworn statements in writing rather than orally. It is possible, but exceptional, for the court to allow cross-examination on the affidavits.[8] If the case turns upon a conflict of evidence,[9] certiorari and prohibition may therefore involve difficulties. It was said of them[10] that they

> afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal. But they are not designed to raise issues of fact for the High Court to determine *de novo* . . . Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it there and then. 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.

The Crown has a privileged position for obtaining its own prerogative remedies. Where the Attorney-General applies for certiorari on the Crown's behalf, he does not require leave to apply, and there is no time limit.[11] But the court retains all its normal control over the merits of the case.[12] Likewise the Crown may obtain prohibition in case of an excess of jurisdiction, even though the party affected cannot do so because his conduct has disentitled him to the remedy.[13]

Certiorari versus declaratory judgment

One result of these procedural handicaps and incompatibilities was that a kind of rivalry developed between certiorari (and prohibition) on the one hand and the

[6] For attempts to mitigate this by allowing amendment of the proceedings see *Metropolitan Properties Ltd.* v. *Lannon* [1968] 1 WLR 815, reversed [1969] 1 QB 577; *Chapman* v. *Earl* [1968] 1 WLR 1315.

[7] *Barnard* v. *National Dock Labour Board* [1953] 2 QB 18 at 43 (Denning LJ). In practice there was no discovery in prerogative order procedure.

[8] When this was allowed for special reasons in *R.* v. *Stokesley, Yorkshire, Justices ex p. Bartram* [1956] 1 WLR 254 Lord Goddard CJ said that it was probably 'the first case in recent history,' and that no one knew of a precedent. See also *George* v. *Secretary of State for the Environment* (1979) 77 LGR 689.

[9] As it may well do in a case of jurisdictional fact or breach of natural justice.

[10] *R.* v. *Fulham etc. Rent Tribunal ex p. Zerek* [1951] 2 KB 1 at 11 (Devlin J). See likewise *R.* v. *Pugh (Judge)* [1951] 2 KB 623; above, p. 261.

[11] *R.* v. *Amendt* [1915] 2 KB 276; *Re Application for Certiorari* [1965] NI 67. The Act of 1740 (above, p. 647) did not bind the Crown, and presumably the Supreme Court Act 1981 (below, p. 658) does not do so either.

[12] *R.* v. *Amendt* (above).

[13] *Board* v. *Perkins* (1888) 21 QBD 533 at 535.

declaratory judgment on the other. This is worth brief notice because it formed the background to the subsequent reforms.

The story goes back about forty years, to a time when it seemed that certiorari and prohibition might almost be put out of business by the rapidly developing remedy of declaration, aided where necessary by injunction. In legal history a shift of this kind from inferior to superior remedies is a familiar method of progress.

The advantages of the declaration were brought into prominence in 1953 in *Barnard* v. *National Dock Labour Board*.[14] Dock workers in London had been dismissed for refusing to operate a new system for the unloading of raw sugar, and began actions for declarations that their dismissal was illegal. When they obtained discovery of documents they found that the vital order had been made not by the local board but by the port manager, who had no power to make it. Thus they won their case. But had they applied for certiorari they would probably have been unable to discover the irregularity[15] and they would have been out of time, more than six months having expired. The Court of Appeal observed that certiorari was 'hedged round by limitations' and that it was right to grant declarations and injunctions in order to prevent statutory tribunals from disregarding the law.

This policy of encouraging litigants to circumvent the limitations of certiorari was twice approved by the House of Lords in later cases. One concerned a dock worker who had been invalidly dismissed, to whom the House granted a declaration which had been refused by the Court of Appeal.[16] In the other case the question was whether planning permission was needed for quarrying operations in the Malvern Hills, and, if so, whether conditions imposed by the minister were valid.[17] The time limit for certiorari had expired and the quarrying company asked instead for declarations as to its rights. These were granted by the House of Lords, and the minister's argument that the right remedy, if any, was certiorari was rejected on the ground that the two remedies are in no way mutually exclusive.

But then it was found that the declaration had its own deficiencies. It lacked the 'public' character of the prerogative remedies, so that it might be refused to a plaintiff on the ground that he had not the necessary personal standing. It also had the serious (at that time) weakness that it was useless in cases of error on the face of the record. It began to be realised that the prerogative remedies represented the nucleus of a system of public law, operating in the name of the Crown, whose importance might be as great in the future as it had been in the past. Two contrasting statements by Lord Denning will illustrate the swing of opinion. In 1949 he said in a public lecture:[18]

[14] [1953] 2 QB 18.

[15] This was true also of *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 as related by Lord Diplock in *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 278.

[16] *Vine* v. *National Dock Labour Board* [1957] AC 488.

[17] *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] AC 260.

[18] *Freedom under the Law*, 126.

Just as the pick and shovel is no longer suitable for the winning of coal, so the procedure of mandamus, certiorari and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions and actions for negligence . . . The courts must do this. Of all the great tasks that lie ahead, this is the greatest.

But in 1959 he said judicially:[19]

There is nothing more important, to my mind, than that the vast number of tribunals now in being should be subject to the supervision of the Queen's courts. This can only be done if the remedy by certiorari is maintained in the full scope which the great judges of the past gave to it . . . this historic remedy has still a valuable part to play: or at any rate, it should have, if we wish any longer to ensure that the rights of the people are determined according to law.

The solution, then, was evidently to be found by preserving all the various remedies but making them interchangeable under a unified system of procedure, the 'application for judicial review'.

THE REFORMS OF 1977–1981 AND SUBSEQUENT DEVELOPMENTS

Proposals and reforms

By about 1970 it had become obvious that the dilemmas and anomalies which disfigured the law of remedies could be eliminated by simple procedural reforms under which the virtues of each separate remedy could be preserved. The pioneering measures were enacted in Ontario in 1971[20] and in New Zealand in 1972.[21] Their central feature was to provide for a single form of application to the court under which the court might award any one or more of the remedies of certiorari, prohibition, mandamus, declaration or injunction. There was supplementary provision for a uniform interlocutory process by which discovery of documents, interrogatories, etc., were available, regardless of the remedies sought. Later legislation has gone still further: the Administrative Decisions (Judicial Review) Act 1977 of Australia not only provided these procedural facilities but also enumerated the grounds of judicial review and strengthened it in various ways.[22]

[19] *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] AC 663 at 697.

[20] Judicial Review Procedure Act 1971. This was recommended by a Royal Commission (the McRuer Commission) whose report (5 vols., 1968–71) resulted also in the Statutory Powers Procedure Act 1971 and the Public Inquiries Act 1971.

[21] Judicature Amendment Act 1972.

[22] Compare also the Administrative Law Act 1979 of Victoria.

For England the Law Commission in 1971 tentatively proposed a much more drastic plan.[23] Here again there was to be a new procedure called 'application for review', under which the court could award any of the remedies of private or public law and which would have full procedural facilities. But this was to be 'an exclusive remedy not only where an administrative act or order is challenged directly, but also where it is challenged collaterally in an action for tort or contract and in other cases which essentially involve the exercise of public powers'. To establish an exclusive remedy for the purposes of administrative law would have required a statutory definition of its scope, probably in terms of the bodies against which it would lie. Any such definition would certainly have been imperfect, and would probably have presented litigants with more problems than before. It was criticised[24] for aiming to create a dichotomy between public and private law, despite the fact that in the British system these are closely interlocked. Any attempt to unscramble them would have run counter to the whole trend of modern procedural development, as it has evolved since the first Common Law Procedure Act of 1852. The policy has been, and should always be, to eliminate exclusive forms of action, since clear and simple dividing lines are usually impossible to draw, with the inevitable risk of good cases being lost by choice of the wrong procedure.

In 1976, however, the Law Commission put forward a much simpler and less problematical scheme,[25] basically similar to the Ontario and New Zealand reforms. All proposals for exclusive remedies were dropped—and, ironically, no one foresaw that the House of Lords would later enforce the very policy that the Law Commission for good reason abandoned. It was recommended simply that by an 'application for judicial review', made in accordance with rules of court, an applicant might seek any one or more of the five remedies of mandamus, certiorari, prohibition, declaration or injunction. This and accompanying proposals as to interlocutory procedure and other matters were incorporated in a draft Bill, but it proved possible to put them into effect without an Act of Parliament, since changes in 'practice and procedure' can be made by the Rule Committee of the Supreme Court. The Commission's Bill accordingly provided the basis of the rules of court adopted in 1977, some of which have since been incorporated in the Supreme Court Act 1981. Analogous reforms were made in Scotland in 1985.[26]

The reforms of 1977 were effected by amendment of Order 53 of the Rules of the

[23] Remedies in Administrative Law (published Working Paper No. 40, 1971).

[24] By the senior author in an unpublished memorandum of December 1971, expressing fears which were largely fulfilled by *O'Reilly* v. *Mackman* (below).

[25] Report on Remedies in Administrative Law (Law Com. No. 73), 1976, Cmnd. 6407.

[26] Act of Sederunt (Rules of Court Amendment No. 2) (Judicial Review) 1985, SI No. 500 (as amended by SI 1990 No. 705), requiring 'application for judicial review' to be used in any application for 'the supervisory jurisdiction of the court', thus establishing an exclusive procedure. See *The Laws of Scotland* (Stair Memorial Encyclopedia) vol. i, para. 345; [1987] *PL* 313 (A. W. Bradley). The Encyclopedia contains a valuable account of administrative law in Scotland by Professor Bradley. See also *Judicial Review in Scotland* (C. M. G. Himsworth) in Supperstone and Goudie (eds.), *Judicial Review*, 2nd edn., and also above, p. 646.

Supreme Court.[27] The Act of 1981 gave statutory force to a number of the primary provisions, so removing any doubt that they might have been beyond the powers of the Rule Committee. The replacement of Order 53 by Civil Procedure Rules, Part 54 is described below.

Application for judicial review

The basis of the reformed procedure is laid down in section 31 of the Supreme Court Act 1981 in the two following subsections.[27a]

(1) An application to the High Court for one or more of the following forms of relief, namely—

(a) an order of mandamus, prohibition or certiorari;
(b) a declaration or injunction under subsection (2); or
(c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,[28]

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—

(a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;
(b) the nature of the persons and bodies against whom relief may be granted by such orders; and
(c) all the circumstances of the case,

it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

The object of the 'having regard' provisions is to confine the new procedure to the sphere of judicial review, i.e. the control of governmental powers and duties. That is the sphere within which the prerogative remedies themselves operate. 'The purpose of section 31 is to regulate procedure in relation to judicial review, not to extend the jurisdiction of the court.'[29] It would be just as unsuitable, for example, to apply for judicial review in seeking an injunction against a tort or breach of

[27] SI 1977 No. 1955. For a statistical survey and comment on the procedure see (1987) 50 *MLR* 432 (M. Sunkin).

[27a] Now amended as described in Appendix Two.

[28] For this see above. p. 567.

[29] *Law* v. *National Greyhound Racing Club Ltd.* [1983] 1 WLR 1302 (Lawton LJ); and see *R.* v. *Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617 at 639 and 648; *R.* v. *British Broadcasting Corporation ex p. Lavelle* [1983] 1 WLR 23; *Davy* v. *Spelthorne BC* [1984] AC 262 at 278.

contract by a public authority as it would be to seek prohibition for the same purpose.

The 'claim for judicial review' and the Civil Procedure Rules, Part 54

The application for judicial review, just described, with its foundation in section 31 of the Supreme Court Act 1981 supplemented by the provisions of RSC, Order 53 has been further reformed as part of Lord Woolf's far-reaching Civil Justice Reforms.[30] Although Lord Woolf's Report made important recommendations about judicial review,[31] changes were only made after a further report, the Bowman Report into the Crown Office.[32] These reforms are now implemented through Part 54 of the Civil Procedure Rules which takes the place of RSC Order 53.[33]

The most obvious changes have been in nomenclature, Latin being generally avoided. Certioriari becomes a 'quashing order', prohibition becomes a 'prohibiting order' and mandamus becomes a 'mandatory order'.[34] And the application for judicial review which has to be proceeded by an application for leave has become a 'claim for judicial review'[35] for which 'permission'[36] must be obtained. The Crown Office List has been renamed the 'Administrative Court'.[37] For some time to come lawyers will need to be familiar with both sets of names. Practice will require use of the new names, while reading other than the most recent decided cases and other materials will require knowledge of the earlier names.

While the new procedure under CPR, Part 54 is similar in its essential features to the RSC Order 53 procedure, the changes that have been made are significant in several areas.[38] The changes are noted below.[39] Furthermore, claims under Part 54 are subject to the 'overriding objective' of CPR, Part 1, viz., 'of enabling the court

[30] See Lord Woolf, *Access to Justice: The Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1997).

[31] *Access to Justice*, above, Chapter 18.

[32] *Review of the Crown Office List* (LCD, 2000). Bowman was asked to 'put forward costed recommendations for improving the efficiency of the Crown Office List . . . [that do] not compromise the fairness or probity of proceedings, the quality of decisions, or the independence of the judiciary'.

[33] Part 54 is subordinate legislation made under the Civil Procedure Act 1997, s. 2 by the Civil Procedure Rules Committee. See SI 2000 No. 2092 (Schedule One). Part 54 applies to all applications for judicial review lodged after 2 October 2000.

[34] For these changes see rule 54.1 in particular and Part 54 in general.

[35] This change of name may be doubted since the Supreme Court Act 1981, s. 31(1) refers to the procedure 'to be known as an application for judicial review'. See Appendix Two.

[36] This is also open to doubt since the 1981 Act, s. 31(3) refers to the 'leave of the High Court' being required. This change of name provides a rare example of the civil justice reforms substituting a Latin word (permission) for an English one (leave). See Appendix Two.

[37] *Practice Direction* [2000]1 WLR 1654.

[38] For comment see [2001] *PL* 4 (Fordham); [2001] *PL* 11 (Sunkin); [2000] 5 Web *JCLI* (Cornford) [2001] *JR* 138 (Smith).

[39] See, in particular, below, pp. 655, 656 and 659.

to deal with cases justly'. This, subject to a requirement of practicality, requires that the parties should be on 'an equal footing' and the case is dealt with in ways which are proportionate to the sums involved, the importance and complexity of the cases and the means of the parties.[40]

The procedure of judicial review

All the remedies mentioned are made interchangeable by being made available 'as an alternative or in addition' to any of them.[41] In addition, the court may award damages if they are claimed in the application and if they could have been awarded in an action at the same time.[42] If a claim to prerogative remedies is not opposed a declaration may still be granted to support a 'parasitic' claim for damages.[43] A declaration may also be granted where no prerogative remedy is available, as in a claim that an Act of Parliament conflicts with European Union law.[44] Even where no prerogative remedy is sought, the application is usually entitled in the name of the Queen.[45] A novel 'substitutionary remedy' is created by CPR 54.19(3) and may be noted here. Where no purpose is served in the court remitting a matter to the original decision-maker for decision, the court is empowered to take the decision itself. The power to take the decision is 'subject to any statutory provision' and, since in most cases the statute will have entrusted the decision to the original decision-maker, this remedy is of very limited scope.

It must be emphasised that judicial review, as thus reformed, is not itself a remedy: it is merely the procedure for obtaining one or more of the established legal remedies, which except as altered by the reforms retain their own characteristics. The *Electricity Commissioners* formula, discussed in the previous chapter, remains the basic text for the scope of judicial review, though extended and qualified now by important exceptions.[46]

[40] For the full definition see CPR, Part 1.2.

[41] Ord. 53 r. 2. The availability of all the remedies in the alternative is only implicit in CPR, Part 54.

[42] Supreme Court Act 1981, s. 31(4). See *R.* v. *Northavon DC ex p. Palmer*, [1994] COD 60. See Appendix Two for the extension of this power to restitution and recovery of a sum due.

[43] *R.* v. *Northavon DC ex p. Palmer* (1993) 6 Admin. LR 195.

[44] *R.* v. *Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] 1 AC 1, not citing Lord Wilberforce's statement to the contrary in *Davy* v. *Spelthorne BC* (above) at 277–8.

[45] As in *R.* v. *London Transport Executive ex p. Greater London Council* [1983] QB 484. Contrast *Chief Constable of North Wales* v. *Evans* [1982] 1 WLR 1155; *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 (both cases of judicial review).

[46] Above, p. 608.

Procedural details

Order 53 remedied in part the procedural deficiencies previously associated with the procedure for obtaining the prerogative remedies. In particular, it made uniform interlocutory facilities—discovery of documents, interrogatories and cross-examination—available although subject to control of the court.[47]

In practice, however, discovery was ordered only in limited circumstances. The applicant needed to show that discovery was 'necessary . . . for disposing fairly of the cause',[48] and this he rarely succeeded in doing without access to the documents. This will continue to be the case with disclosure of documents—the new name for discovery—only being required when the court so orders.[49] The duty under the Protocols Practice Direction 'to act reasonably in exchanging information and documents relevant to the claim'[50] as well as the defendant's duty of candour to the court once permission has been granted[51] offsets in part this parsimonious approach to disclosure.

Cross-examination was also only rarely allowed under Order 53. On the whole judicial review is not concerned with factual disputes and is ill suited to resolve such disputes. But factual disputes can arise—for instance, over the existence of a jurisdictional fact or the truthfulness of a particular witness—and then justice requires that cross-examination be ordered.[52] CPR 54, however, apparently through inadvertent error, removes any express power to cross-examine in claims for judicial review.[53] But the Administrative Court has held that, none the less, it retains the power to order cross-examination under CPR 32.1 (power to control evidence).[54] Moreover, in some human rights contexts cross-examination may prove necessary more frequently.[55]

Where prohibition or certiorari are sought, the court may direct a stay of the challenged proceedings, and where other remedies are sought it may grant interim relief as in an ordinary action.[56] If was held accordingly that a stay could be granted

[47] Order 53, rule 8.

[48] Order 24 rules 8 and 13(1).

[49] CPR 54.16 read with the Judicial Review Practice Direction, para. 2.1 ([2000] *JR* 222, 224).

[50] Para. 4.1 (www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm)

[51] See below, p. 656; and see also, p. 526.

[52] See, for instance, *R.* v. *Waltham Forest LBC ex p. Baxter* [1988] QB 419 and *R.* v *Derbyshire County Council ex p. Times Supplements Ltd* (1991) 3 Admin. LR 241 (cross-examination revealed that the councillors 'displayed an unworthy lack of candour').

[53] See [2001] *JR* 138 (M. Smith) for criticism. CPR 8.6(3) permits, even in Part 8 proceedings (which concerns cases that are 'unlikely to involve a substantial dispute of fact'), directions to witnesses to attend for cross-examination. But CPR 54.16(1) provides that CPR 8.6 does not apply to claims for judicial review.

[54] *R. (PG)* v. *Ealing LBC* [2002] EWHC 250; The Times, 18 March 2002.

[55] *R. (Wilkinson)* v. *Broadmoor Hospital Authority* [2001] EWCA Civ. 1545; [2002]1 WLR 419 (CA) (consideration of whether patient might be treated without consent).

[56] Ord. 53 r. 3(10).

to prevent the implementation of decisions of the Secretary of State for the reorganisation of county schools, although in the circumstances the stay was not needed.[57]

Permission/Leave to apply

A necessary preliminary step[58] in making a claim for judicial review is obtaining the permission of the court. In the past the application for leave was made ex parte, i.e. without notice to the defendant and other parties involved. An important change made by CPR 54 is that the claim form must be served on 'the defendant and . . . unless the court otherwise directs, any person the claimant considers to be an interested party'.[59] The significance of this is that the permission stage will be an inter partes procedure. Hearing both sides at the permission stage is intended to ensure in the interests of efficiency that permission is not granted in inappropriate cases. The test for whether permission should be granted remains whether an arguable case has been shown,[60] although now the court will be aware of the defendant's case. Consideration of the defendant's case—even if only in summary—will surely sometimes lead to the conclusion that the claimant's case is unarguable, thus leading to the denial of permission in cases in which it would otherwise be granted. These changes have been criticised as unlikely to lead to a more efficient procedure and as being unfair to claimants.[61]

That hearing will be 'on paper' with the judge deciding after having read the claim form and the defendant's summary of grounds for contesting the claim. But if permission is refused the claimant may request reconsideration of the decision at a hearing.[62] The dissatisfied claimant may apply to the Court of Appeal for permis-

[57] *R.* v. *Secretary of State for Education and Science ex p. Avon CC* [1991] 1 QB 558 (CA), distinguishing between a stay and an injunction. See also *Ex parte Ewing* [1991] 1 WLR 388; *R.* v. *Home Secretary ex p. Muboyayi* [1992] 1 QB 244 at 269; *Scotia Pharmaceuticals International Ltd.* v. *Department of Health* [1993] COD 408. Contrast *Minister for Foreign Affairs, Trade and Industry* v. *Vehicles and Supplies Ltd.* [1991] 1 WLR 550, where the Privy Council held the corresponding provision in Jamaica to apply to judicial proceedings only, but the *Avon* case was not cited.

[58] The first step will now generally be writing a 'letter before claim' to the defendant to identify the issues in dispute and avoid litigation. This is not a legal requirement but it is required under the 'Pre-action Protocol' ([2001] *JR* 197) other than in urgent cases. Non-compliance with the protocol will be taken into account in managing the case and determining costs.

[59] CPR 54.7. Service must take place within seven days of filing of the claim form with the court. Service must be acknowledged within twenty-one days (CPR 54.8).

[60] See, for instance, *R.* v. *Income Tax Special Commissioners ex p. Stipplechoice* [1985] 2 All ER 465. Bowman favoured a presumption in favour of permission where arguability was shown (Ch.7 paras 13 and 14) but this was not implemented in terms.

[61] See [2000] *PL* 649–668 (Bridges, Meszaros and Sunkin) and [2001] *PL* 11 (Cornford and Sunkin).

[62] CPR 54.12(3). The defendant cannot apply to set aside an order granting permission (CPR 54.13).

sion to appeal against the refusal of permission.[63] Where after a contested hearing permission is granted on one ground but not on another, the ground on which permission was refused will not generally be able to be raised in the substantive hearing. But if the claimant shows 'substantial justification' this will be allowed.[64]

Criticism of the requirement of permission/leave

The requirement of permission, which formerly applied only to the prerogative remedies, has thus been extended to declarations and injunctions when sought for the purpose of judicial review, its justification being that it enables many unmeritorious cases to be disposed of summarily if an arguable case cannot be shown. In principle it seems wrong to impose this special requirement on proceedings against public authorities, who ought not to be treated more favourably than other litigants.[65] It is notably absent from the statutory judicial review procedures which impose six-week time limits,[66] and also from corresponding procedures in other jurisdictions.[67] It would be open to grave objection if the applicant did not enjoy the right of appeal against refusal of leave.[68]

In practice, also, it seems that the permission requirement often operates erratically.[69] Empirical evidence shows a high success rate for renewed applications, suggesting a high rate of error at the initial stage, where the judge makes only 'a quick perusal of the material', as Lord Diplock described it.[70] The degree of arguability may vary widely, and new developments in this expanding branch of the law

[63] CPR 52. The Court may give permission to appeal or it may give permission to claim judicial review in which case the claim proceeds in the High Court, unless the Court of Appeal orders otherwise (CPR 52.15).

[64] *R. (Smith)* v. *Parole Board* [2003] 1 WLR 2548 (CA) (prisoner on licence recalled to prison claimed judicial review for alleged breach of Art. 5 and Art. 6; permission granted at contested hearing to argue Art. 6, subsequently allowed to argue Art. 5 because claims so closely interrelated; no new legal or factual point need to have risen). Cf. *R. (Opoku)* v. *Principal of Southwark College* [2003] 1 WLR 234 (new material required).

[65] The leave requirement is defended by Lord Woolf, *Protection of the Public—A New Challenge*, 19 and by The Law Commission, Law Com. No. 226, Pt. V, but criticised by the *Justice/All Souls Review*, 153.

[66] Below, p. 727.

[67] In Scotland there is no requirement of leave: see [1987] *PL* at 315 (A. W. Bradley), [1992] *PL* at 634 (W. J. Wolffe). In Australia, where there is also no requirement of leave, the Administrative Review Council has concluded that the requirement is wrong for 'sound reasons of both principle and pragmatism': Report No. 26, 1986, para. 66. Nor is it to be found in judicial review procedures in New Zealand and Canada.

[68] In the Administration of Justice Bill 1985, clause 43, the government proposed to abolish this right of appeal, but after much protest the clause was dropped.

[69] For detailed evidence and commentary see [1992] *PL* 102 (A. P. Le Sueur and M. Sunkin); M. Sunkin, L. Bridges and G. Meszaros, *Judicial Review in Perspective*, 2nd edn. (1995).

[70] In *R.* v. *Inland Revenue Commissioners ex p. National Federation of Self-employed and Small Businesses Ltd.* [1982] AC 617 at 644.

may be rejected at the outset as unarguable.[71] The success rate may be markedly different with different judges. Procedure also is variable, being sometimes oral and sometimes written. It is now generally inter partes. Defects of this kind are perhaps inevitable with such summary and informal procedure. But they may be enough to counterbalance such advantages as the leave stage may have.

Other details

When quashing on certiorari the court may remit the case to the tribunal or deciding body with a direction to decide in accordance with the court's findings.[72] This removes the need for an order of mandamus in addition.

Whether an unincorporated association may apply for judicial review is uncertain.[73] A positive answer is recommended by the Law Commission.[74]

Delayed applications/claims

Good administration requires that important decisions, on which many other decisions and actions will depend, should not be able to be set aside long after the event by a successful application or claim for judicial review.[75] For this reason the question of whether there has been 'undue delay' in the bringing of a claim has long been important in applying for judicial review.[76] The fundamental provisions are sections 31(6) and (7) of the Supreme Court Act 1981 which are in the following terms:

(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—

(a) leave for the making of the application; or
(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.

[71] A striking example is the *Datafin* case, above. See also the *Stipplechoice* case, above; *R.* v. *Stratford-on-Avon DC ex p. Jackson* [1985] 1 WLR 1319.

[72] Supreme Court Act 1981, s. 31(5).

[73] See *R.* v. *Darlington BC ex p. Association of Darlington Taxi Owners* [1994] COD 424 (refused); *R.* v. *Tower Hamlets LBC ex p. Tower Hamlets Combined Traders Association* [1996] COD 248 (allowed); *R.* v. *Traffic Commissioners ex p. 'Brake'* [1996] COD 248 (discussed).

[74] Law Com. No. 226, para. 5.38.

[75] For discussion, critque and examples and for European parallels see Forsyth and Hare (eds.), *The Golden Metwand*, 267 (M. J. Beloff).

[76] For discussion of the law prior to CPR, Part 54, see the 8th edn. of this book, pp. 647–9.

These provisions are supplemented by CPR 54.5 which is in the following terms:[77]

1. The claim form must be filed (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose.
2. The time limit in this rule may not be extended by agreement between the parties.
3. This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review.

The claim must be made 'promptly' which means that in appropriate cases there may be 'undue delay' even when brought within the three month limit. These cases are, primarily, in where a successful claim would cause 'substantial hardship' or 'prejudice the rights' of 'any person' or would be 'detrimental to good administration'.[78] But the House of Lords has said that the possibility of 'undue delay' within the three months limit may be 'productive of unnecessary uncertainty and practical difficulty'.[79]

Success in resisting a claim on this ground is likely to be rare.[80] But the grant of permission precludes the later dismissal of the application on account of undue delay if there is no finding of the specified hardship, prejudice or detriment; and if there is, the court should refuse relief for that reason rather than for delay.[81]

Order 53, rule 4 allowed the three-month limit to be extended where 'good reason' for the extension was shown. CPR 54.5, however, contains no similar provision although it spells out that time may not be extended by agreement between the parties. The court, however, retains power under CPR 3.1(2)(a) to 'extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)'. Thus the absence of a specific power to extend in this context is unlikely to be significant. And the previous cases of 'good reason' will continue to provide guidance. The courts were inclined to be generous in finding 'good reason' for extending the three-months period, thereby tempering the unduly severe time

[77] The infelicitous drafting that led to similar but conflicting provisions in Order 53, rule 4 and s. 31(6) & (7), described as 'this muddle' and as 'in truth, nonsense' (by Lloyd LJ in *R.* v. *Dairy Quota Tribunal ex p. Caswell* [1989] 1 WLR 1089 at 1094), has been in large measure resolved (by interpretation rather than amendment). For discussion see the 8th edn. p. 648 and *The Golden Metwand* (as above), 267, 272 (M. J. Beloff). Thus 'application for judicial review' in s. 31(6) & (7) means 'application for leave' not the substantive application (*R.* v. *Dairy Quota Tribunal ex p. Caswell* [1990] 2 AC 738 at 747). Under CPR 54 this will be the filing of the claim form since that is the application for 'permission'. Note the discussion below on the 'good reason' for delay in Order 53, rule 4.

[78] 1981 Act, s. 31(6). See *R. (Burkett)* v. *Hammersmith & Fulham LBC* [2002] 1 WLR 1593 (HL) for discussion and rejection of the proposition that in planning cases the rule of thumb should be that the claim was made within six weeks.

[79] *Burkett* (above) (Lord Steyn). Lord Steyn pointed out that in 'truly urgent cases the court would in any event in its ultimate discretion or under section 31(6) of the 1981 Act be able to refuse relief where it is appropriate to do so . . .'

[80] See also *R. (Burkett)* v. *Hammersmith & Fulham LBC* rejecting the proposition in *R.* v. *Secretary of State for Trade and Industry ex p. Greenpeace* [1998] COD 59 that where the impugned action takes place in stages the challenge should be launched against the earlier stage rather than the final and decisive stage (analysis of Forsyth ([1998] *JR* 8) approved).

[81] *R.* v. *Criminal Injuries Compensation Board ex p. A* [1999] 2 WLR 974 (HL).

limit.[82] Time taken in applying for legal aid or for ministerial intervention in a planning dispute,[83] or in seeking to exhaust alternative remedies,[84] may justify delay if the applicant cannot fairly be criticised in the circumstances. Even where he can, the court may allow him to proceed with the case if the issues are of general importance and need to be resolved.[85]

One example of detriment to good administration is provided by a decision of the House of Lords, in which relief was refused on a delayed application because it would have required the reopening of dairy produce quotas for several past years with great administrative complications.[86] Another was where a belated challenge to a land reclamation scheme might have caused heavy financial losses.[87] Planning decisions, in particular, need to be challenged promptly.[88]

Standing

The Supreme Court Act 1981, s. 31(3) provides that:

> the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

The Law Commission had recommended this 'sufficient interest' formula in order to allow further development of the law about standing, which they recognised was changing to meet new situations.[89] The wisdom of this advice was shown by the decision of the House of Lords in the *Inland Revenue Commissioners* case, in which the House made use of the new rule to remodel the law radically. CPR 54, unlike Order 53,[90] contains no provision on standing relying instead upon development through the common law.[91] That subject must be reserved for later discussion in the context of the whole law about standing.[92]

[82] See M. J. Beloff (as above) at 276.

[83] *R.* v. *Stratford-on-Avon D.C. ex p. Jackson* (above), allowing both excuses. Contrast *Atherton* v. *Strathclyde Regional Council* 1995 SLT 557.

[84] *R.* v. *Rochdale MBC ex p. Cromer Ring Mill Ltd.* [1982] 3 All ER 761; *R.* v. *Home Secretary ex p. Ruddock* [1987] 1 WLR 1482 (telephone tapping).

[85] See *R.* v. *Collins ex p. M.S.* [1998] COD 52.

[86] *R.* v. *Dairy Produce Quota Tribunal, ex p. Caswell* [1990] 2 AC 738, 749–50 (Lord Goff). See also *R. (Lichfield Securities Ltd.)* v. *Lichfield District Council* [2001] PLCR 519 and *R. (Gavin)* v. *Haringey LBC* [2003] EWHC 2591 taking different views on whether relief could be refused simply on detriment to good administration being shown (*Gavin*) or only where hardship or prejudice shown (*Lichfield Securities*).

[87] *R.* v. *Swale BC ex p. Royal Society for the Protection of Birds* (1990) 2 Admin. LR 790. See also *R.* v. *Bradford MBC ex p. Sikander Ali* (1997) 6 Admin. LR 589 (possible disruption of school allocation system); *R.* v. *Leeds CC ex p. Leeds Industrial Co-operative Society Ltd.* (1996) 73 P & CR 70.

[88] *R.* v. *Newbury DC ex p. Chieveley Parish Council* (1998) 10 Admin. LR 676.

[89] Cmnd. 6407 (1976), para. 48.

[90] Which repeated the statutory formula.

[91] See the discussion in Cornford (above in section 'Standing and Third Party Intervention') suggesting that this was to avoid a decision to accord standing explicitly on public interest grounds.

[92] Below, p. 679.

THE DIVORCE OF PUBLIC AND PRIVATE LAW

An exclusive procedure?

In preparing the ground for the new procedure adopted in 1977 the Law Commission emphasised that they did not intend it to be exclusive. They were clearly of opinion that ordinary actions for a declaration or injunction, as contrasted with applications for prerogative orders, and also public law issues raised collaterally in ordinary actions or criminal proceedings, should remain unaffected.[93] Their object was to remove the procedural disadvantages of the prerogative remedies and to allow declarations and injunctions to be sought along with them, but not to deprive the litigant of the choice of procedures which he had enjoyed previously and which the courts had for several decades encouraged him to exploit to the full.

This policy, however, contained a grave flaw. Before 1977 there was only one procedure by which any one remedy could be sought. After 1977, according to the Law Commission's plan, there would have been two quite different procedures by which declaration and injunction could be sought in the public law field, one under Order 53 and the other by ordinary action. Between these two procedures there were sharp contrasts. The former was subject to obtaining leave of the court and to a very short time limit extendable only at the court's discretion, and its facilities for disputing questions of fact were in practice limited. The latter was free from all these restraints. How then could it make sense to allow a choice of procedures for obtaining the same remedies under which the restrictions of one could simply be evaded by recourse to the other? As soon as judges were confronted with this contradiction they began to hold that they should no longer grant declarations and injunctions in cases falling within Order 53 except in accordance with that Order.[94] They could no longer claim, as they had done before the reforms, that it was reasonable to allow the defects of the ancient prerogative remedies to be evaded by the use of ordinary actions. For those defects had now been remedied, or at least reviewed, and the new procedure had been sanctified by a deliberate act of policy. It was now quite a different matter for the courts to allow its evasion at the litigant's option. This was the reasoning which led to the decision of the House of Lords in *O'Reilly* v. *Mackman*, in which the divorce of public and private law was proclaimed in categorical terms. Judicial review by declaration and injunction in an ordinary action, which the courts had encouraged with great success for many

[93] Law Com. No. 73 (as above), para. 34.

[94] e.g. *Heywood* v. *Hull Prison Visitors* [1980] 1 WLR 1386; *Re Tillmire Common, Heslington* [1982] 2 All ER 615 (originating summons seeking declaration as to error of law by commons registration authority disallowed). Contrast *Steeples* v. *Derbyshire CC* [1985] 1 WLR 256 (decided in 1981), the last reported example of the former procedure.

years, was suddenly held to be an abuse of the process of the court. Yet in the changed circumstances, and for the reasons just explained, some such result was probably inevitable.[95]

Under the former law the prerogative remedies had, indeed, represented a separate system of public law since they were confined to the sphere of governmental powers and duties. But that system was not exclusive, and much benefit resulted from the availability of declaratory judgments in ordinary actions begun by writ or originating summons, which the courts in their discretion allowed freely. It was the availability of the alternative procedure of private law for public law purposes which made it unnecessary for the sphere of public law to be strictly defined. Now, however, it is ordained that public and private law procedures are mutually exclusive; and since the dividing line between them is impossible to draw with certainty, a great deal of fruitless litigation has resulted and is continuing. As will be seen below, however, the border between public and private law is beginning to open. And the problem of procedural exclusivity, while still serious, is becoming less intense.

The dichotomy which has been imposed, and which must now be explained, must be accounted a setback for administrative law. It has caused many cases, which on their merits might have succeeded, to fail merely because of choice of the wrong form of action. It is a step back towards the time of the old forms of action which were so deservedly buried in 1852. It has produced uncertainty as to the boundary between public and private law, since these terms have no clear or settled meaning. It has increased costs, since judicial review is available only in the High Court. Procedural law, which caused very little difficulty before 1977, is now full of doubts and pitfalls. Nor are these in any way necessary, as may be seen from a comparison with judicial review legislation and practice in Scotland,[96] Australia, New Zealand and Canada, where procedural obstacles have been avoided. Nor do there appear to be countervailing benefits in the English reforms. As will be seen, the House of Lords has expounded the new law as designed for the protection of public authorities rather than of the citizen. Such are the misfortunes which can flow from the best-intentioned reforms.

[95] The Law Commission itself says 'perhaps inevitable': Law Com. No. 226 (1994), para. 3.2.

[96] For a full discussion see *West* v. *Secretary of State for Scotland* 1992 SLT 636, rejecting the public/private law dichotomy and explaining the simpler procedure of judicial review in Scotland. For this important decision see [1992] *PL* 625 (W. J. Wolffe). See also *Judicial Review in Scotland* (C. M. G. Himsworth) in Supperstone and Goudie (eds.), *Judicial Review*, 2nd edn., 19.14. For the scope of review in Scots law see above, p. 646. For the rules of procedure see SI 1985 No. 500, SI 1990 No. 705.

O'Reilly *v.* Mackman[97]

The sole issue in this case was whether the court could grant declaratory relief in ordinary actions begun by writ or originating summons at the instance of prisoners disputing the validity of punishments awarded by a board of prison visitors. The plaintiffs were four inmates of Hull prison, who sued (three by writ and one by originating summons) for declarations that the visitors' awards were void for breach of the prison rules and for violation of natural justice. They chose the ordinary forms of action because they expected substantial disputes on questions of fact and wanted to be sure that they could call oral evidence. As the trial judge said, this was clearly a rational choice.[98] The House of Lords held that in view of the new Order 53 the proceedings should be struck out as an abuse of the process of the court;[99] and that the only available procedure in such a case, since it was a matter of public law, was application for judicial review.

Lord Diplock's speech, in which the whole House concurred summarily, is an outstanding feat of analysis and synthesis, ranging widely over the landmarks of administrative law. Observing that the distinction between private law and public law 'has itself been a latecomer to the English legal system', he attributed its arrival to the expansion of judicial review over the previous thirty years, beginning with the *Northumberland* case,[1] reinforced by the Tribunals and Inquiries Act 1958,[2] and culminating in the *Anisminic* case.[3] He took the opportunity to restate his doctrine of jurisdictional error and to broaden Atkin LJ's *Electricity Commissioners* formula[4] by eliminating the 'duty to act judicially' in accordance with Lord Reid's speech in *Ridge* v. *Baldwin*.[5] He pointed out that *Anisminic* was an action by writ for a declaration where the vital facts had been obtained only upon discovery of documents, so that certiorari would have been useless. In the most striking part of the speech he then presented the restrictions of prerogative remedy procedure, both before and after 1977, as designed to protect public authorities against irresponsible and protracted litigation, emphasising the following:

1. The need to obtain leave to apply.
2. The need to file affidavits from the outset, so that the case has to be stated on oath and with the utmost good faith, 'an important safeguard against groundless or unmeritorious claims', in contrast with the unsworn pleadings of an ordinary action.

[97] [1983] 2 AC 237, noted in (1983) 99 *LQR* 166 and discussed in (1985) 101 *LQR* 180. In the Court of Appeal Lord Denning MR decided in the same sense as the House of Lords.
[98] [1983] 2 AC at 249 (Peter Pain J).
[99] They were 'blatant attempts to avoid the protections for the defendants for which Order 53 provides' (at 285).
[1] Above, p. 270.
[2] Below, p. 921.
[3] Below, p. 718.
[4] Above, p. 608.
[5] Above, p. 610.

3. The court's power on granting leave to impose terms as to costs or security.
4. Very speedy procedure, 'available in urgent cases within a matter of days rather than months'.
5. The time limit, now reduced to three months and extended to all forms of relief.

'The public interest in good administration', Lord Diplock explained, 'requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision' disputed by a litigant.

The remainder of the speech is concerned with the availability of declaratory relief before and after 1977. Lord Diplock accepted that the disadvantages of the prerogative writ procedure, particularly the absolute bar on discovery of documents, justified the use of ordinary actions for declarations before 1977, as the House of Lords had allowed in *Ridge* v. *Baldwin*, *Anisminic* and other cases, even though the safeguards imposed in the public interest were thereby evaded. But those disadvantages had now all been removed by the new Order 53. Discovery of documents, interrogatories and cross-examination were now allowable wherever the justice of the case required, though cross-examination would be needed only on rare occasions, since issues of fact would seldom be crucial because of the court's limited function on review.[6] To allow ordinary actions for public law remedies might subject public authorities to lengthy delays which would defeat the policy of the reforms and the interests of good administration. To do so, therefore, was as a general rule contrary to public policy and an abuse of the process of the court. There might be exceptions, such as collateral pleas of public law issues in claims arising under private law (an exception which was to prove important later),[7] or cases where none of the parties objected to ordinary procedure.[8] But the classes of cases where the new procedure was mandatory, and any further exceptions, should be left for future decision on a case-to-case basis.

The need for a single procedure

It is undoubtedly right that public authorities should not be harassed by vexatious legal procedures and that disputes about their powers and duties should be settled expeditiously. But it is questionable whether the logic of *O'Reilly* v. *Mackman* is as compelling as Lord Diplock maintained. For several decades before 1977 the courts were actively encouraging ordinary actions for declarations in order to evade the handicaps of certiorari, yet it did not appear that public authorities were lacking any protection which they could properly claim. In the case of baseless actions they could, like other litigants, apply for pleadings to be struck out, and they often did

[6] For criticism see above, p. 260.

[7] See below, p. 670.

[8] An example is *Securities and Investments Board* v. *Financial Intermediaries, Managers and Brokers Regulatory Association Ltd.* [1992] Ch. 268. But jurisdiction for judicial review cannot be created by agreement: *R.* v. *Durham City Justices ex p. Robinson*, The Times, 31 January 1992.

so. Points of law could be tried as preliminary issues, often saving trial of the facts. Public authorities did not appear to feel the need of the procedural privileges on which the House of Lords laid such stress. The Public Authorities Protection Act had been repealed in 1954[9] with general approval. Despite some incongruities, public and private law worked harmoniously together without any need for exclusive forms of action, and the system of remedies efficiently supported the great expansion of administrative law during those years.

The last eighteen years, on the other hand, have been a period of unprofitable litigation about which of two exclusive procedures a litigant should use. The decisions are summarised below and they show that plenty of problems remain. The need for law reform is clearly greater now than it was before 1977. The first necessity is to abandon mutually exclusive procedures and institute a single comprehensive procedure, which ought to be the same for both public and private law. Instead of putting declaration and injunction into the group of the prerogative remedies, as was in effect done in 1977, the prerogative remedies ought to be sought, at least initially, by the same procedure as applies to ordinary remedies.[10] Once the initial step is taken, it can be decided whether the case should be tried by judicial review procedure, which is best suited to the summary disposal of questions of law, or by ordinary procedure, which is best suited to the trial of disputed facts. That decision should be taken by a judicial officer, perhaps a master in suitable cases. Where the validity of a public authority's action (or inaction) was challenged, either party could apply for expedited procedure and evidence by affidavit and the public authority could apply for dismissal of the claim on the ground of undue delay. In this way claims of whatever kind could be sorted out and directed into the right channels at the interlocutory stage. Cases of judicial review should still have a prerogative-style title with the Queen as the nominal plaintiff, in order to preserve the important public interest element. No case could then be lost by choice of the wrong procedure before its merits ever came before the court.

Problems of dichotomy

As soon as *O'Reilly* v. *Mackman* was decided the courts had to undertake surgical operations in order to sever public from private law.[11] Never having had to do this previously, they naturally encountered difficulty.

[9] See below, p. 731.

[10] See the comments in *New Directions in Judicial Review* 5 at 16 (M. Beloff QC); (1991) 107 *LQR* 298 at 314 (S. Fredman and G. Morris).

[11] For criticism see *Administrative Justice—Some Necessary Reforms* (the JUSTICE/All Souls Report, 6.18 (Sir P. Neill); (1987) 103 *LQR* 34 (J. Beatson); [1985] *CLJ* 415 (Forsyth); (1985) 101 *LQR* 150 (Wade); [1994] *PL* 51 (A. Tanney); [1994] *PL* 69 (S. Fredman and G. Morris). For approval see [1986] *PL* 220 at 232 (Sir Harry Woolf), repeated in his Hamlyn Lectures, *Protection of the Public—A New Challenge*, 27; the Law Commission's report (Law Com. No. 226), discussed below, p. 676.

Their work made a mystifying start in a decision of the House of Lords delivered on the same day as *O'Reilly* v. *Mackman* and coordinated with that case.[12] Proceedings had been started in the county court for a declaration that a district council was in breach of its duty to provide permanent accommodation for the plaintiff under the Housing (Homeless Persons) Act 1977.[13] He found himself taken to the House of Lords on the preliminary issue whether he should have sought judicial review in the High Court. The House of Lords held that there was now 'a dichotomy between a housing authority's public and private law functions': their decision[14] whether they were satisfied that the plaintiff fulfilled the statutory conditions was a matter of public law, but their obligation to provide housing, if so satisfied, was a matter of private law enforceable by ordinary remedies. Since the plaintiff was challenging the decision of the housing authority, he could proceed only by judicial review in the High Court in accordance with *O'Reilly* v. *Mackman*. The difficulty in this case is to understand how a single statutory duty (to provide housing in certain circumstances) can be dichotomised in indefinable terms of functions. The remedy for enforcing the duty should have been mandamus (necessarily by judicial review in the High Court) so that it was correct to disallow an ordinary action.[15] But the fallacy of the dichotomy was shown by a later case[16] in which a homeless applicant failed to obtain a mandatory injunction in the county court in exactly the circumstances in which the House of Lords had said that he should succeed, namely where the duty to house the applicant was accepted but he claimed that the house was inadequate. The Court of Appeal held, surely correctly, that the duty and its fulfilment were inseparable elements of the same composite duty, which must be either public or private and could not be both. It remained for the House of Lords to hold, rejecting the reasoning of the original case, that the homeless persons legislation created no private right by way of statutory duty, so that judicial review was the only remedy available.[17]

A similar misunderstanding defeated the owner of a decommissioned fishing vessel who sued for the government grant by ordinary action when his proper remedy (in the absence of private law right) was mandamus, available only by judicial review.[18] Yet when a candidate in a local government election sued to enforce the local authority's statutory duty to provide him with a room for an

[12] *Cocks* v. *Thanet DC* [1983] 2 AC 286. See comment in (1983) 99 *LQR* at 169 and [1984] *PL* at 20 (P. Cane).

[13] Now Pt. III of the Housing Act 1985.

[14] For such 'decisions' see above, p. 611.

[15] As the House of Lords in effect confirmed in *O'Rourke* v. *Camden LBC* (below), criticising the decision in *Cocks* v. *Thanet DC* (above).

[16] *Mohram Ali* v. *Tower Hamlets LBC* [1993] QB 407; see also *Tower Hamlets LBC* v. *Abdi* (1992) 91 LGR 300; and see *R.* v. *Northavon DC ex p. Palmer* (1993) 6 Admin. LR 195.

[17] *O'Rourke* v. *Camden LBC* [1988] AC 188.

[18] *Cato* v. *Minister of Agriculture, Fisheries and Food* [1989] 3 CMLR 513. See also *R.* v. *Kidderminster District Valuer ex p. Powell* [1992] COD 54 (district valuer's valuation of police house: judicial review).

election meeting, and the local authority claimed that he should have applied for judicial review, it was held to be a matter of private law suitable for an action by writ claiming a declaration and injunction.[19] Such are the results of the attempt to dichotomise the duties of public authorities.

The impossibility of dividing public and private law cleanly is illustrated by another case where the House of Lords gave a variety of different reasons for allowing an action by writ for a declaration to be brought against a government department. The department had issued a circular to local health authorities to the effect that doctors could in some circumstances give contraceptive advice and treatment to girls under 16 without parental consent. Mrs Gillick, a mother of five young girls, sued by writ for a declaration that to act on this advice would infringe her parental rights. Her claim failed on the merits, but the House of Lords approved the procedure used.[20] Of the various reasons given[21] the simplest was that the defendants raised no objection—an exception expressly recognised in *O'Reilly* v. *Mackman*,[22] presumably on the ground that if a public authority chooses to waive its procedural privileges, the logic of that decision no longer applies. Another reason, put forward by Lord Scarman, was that 'the private law content of her claim was so great as to make her case an exception to the general rule'; and, abandoning the mutual exclusivity of *O'Reilly*, he held that she was entitled to proceed either by ordinary action or by judicial review. It might, indeed, be expected that she could bring an ordinary action for a declaration as to her personal legal rights without being caught in the *O'Reilly* entanglement, as had for so long been allowed in classic cases such as *Dyson*[23] and *Pyx Granite*.[24] No mention was made of those authorities in the *Gillick* case and it is not clear how they now stand.[25] But the case did indicate that the House of Lords was avoiding a collision course and was disinclined to press the logic of *O'Reilly* to its limit.

From this point onwards the stream of decisions is best divided into categories as follows.

[19] *Ettridge* v. *Morrell* (1986) 85 LGR 100.

[20] *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112. The effective defendant was the Department of Health and Social Security. For comment see (1986) 102 *LQR* 173. On the question whether the scope of judicial review has been extended to include such cases see above, p. 571.

[21] Others were that it was a pre-*O'Reilly* case (Lord Fraser, *contra* Lord Scarman) and that it was a collateral issue (Lord Scarman).

[22] [1983] 2 AC at 285. This may also explain *R.* v. *Doncaster MBC ex p. Brain* [1986] 85 LGR 233 (declaration that land was statutory 'open space' granted on judicial review).

[23] *Dyson* v. *Attorney-General* [1911] 1 KB 410 (above, p. 570).

[24] *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] AC 260 (above; p. 571).

[25] Perhaps *Dyson* would now require judicial review since the validity of a departmental demand was challenged but *Pyx Granite* would not since no administrative action was disputed. On the latter point see *O'Reilly* at 281. *Pyx Granite* was quoted with approval by Lord Fraser in *Wandsworth LBC* v. *Winder* [1985] AC 461 at 510. See also *R.* v. *Bromley LBC ex p. Lambeth LBC*, The Times, 16 June 1984 (declaration that local authorities might lawfully subscribe to association of London authorities granted on judicial review).

Actions in tort

Claims to remedies in tort are based on the infringement of private law rights and are in principle ineligible for judicial review, even though brought against public authorities. An action for damages for negligence, for example, must be brought against a public authority by the same procedure as against a private defendant. The House of Lords made this clear in a planning case where the plaintiff sued by writ for damages for negligent official advice which had prevented him from appealing in time against an enforcement notice, and also claimed, in the alternative, an injunction against its enforcement and an order to set it aside on the ground that it was invalid. It was held that the first claim could proceed but that the second and third claims must be struck out, since they could be raised only by judicial review.[26] The claim to damages raised no issue of public law since it assumed the validity of the enforcement notices, whereas the other claims impugned it. A litigant ought to be able to pursue alternative claims in one proceeding, but this can be done by seeking judicial review and making an alternative claim to damages as the rules allow.

Despite the House of Lords' ruling, the High Court later dismissed as an abuse of process an action for damages and breach of statutory duty brought against a local authority for alleged failure to make proper provision for a child in their care. Since it was claimed that the degree of negligence was such as to render their conduct ultra vires,[27] this was held to be 'a substantial public law element' which made judicial review the only available procedure, even though public and private law rights were intermingled.[28] Similarly where a landowner disputed the legality of a highway closing order it was held that judicial review was his only remedy and that his action in tort for nuisance must fail.[29] If these decisions are right, litigants are faced with insoluble dilemmas.

Employment and contractual relationships

Contractual and commercial obligations are enforceable by ordinary action and not by judicial review.[30] An employee of the BBC failed in her application for

[26] *Davy* v. *Spelthorne BC* [1984] AC 262. See also *An Bord Bainne Co-operative Ltd.* v. *Milk Marketing Board* [1984] 2 CMLR 584 (action for damages and injunction against the Board for price discrimination contrary to EEC law properly brought by ordinary action); *Garden Cottage Foods Ltd.* v. *Milk Marketing Board* [1984] AC 130 at 144 (House of Lords ruled similarly); *Bourgoin SA* v. *Ministry of Agriculture, Fisheries and Food* [1986] QB 716 (dicta); *Lonrho Plc* v. *Tebbitt* [1992] 4 All ER 161 (action for damages for misuse of minister's power: ordinary action allowed).

[27] For this point see below, p. 764.

[28] *Guevara* v. *Hounslow LBC*, The Times, 17 April 1987. In general wardship proceedings are preferable in the case of children in care: *R.* v. *Newham LBC ex p. McL.* [1988] 1 FLR 416.

[29] *The Great House at Sonning Ltd.* v. *Berkshire CC* (1996) 95 LGR 350.

[30] See *R.* v. *Lord Chancellor ex p. Hibbit and Saunders* [1993] COD 326 (complaint by a firm of shorthand writers that their tender for court services was unfairly rejected held a purely commercial matter and ineligible for judicial review).

certiorari to quash her dismissal by the Corporation since the ordinary contractual obligations of master and servant had never been within the scope of the prerogative remedies, which had not been extended by Order 53 and the Supreme Court Act 1981.[31] A civil servant also failed in attempting to have a disciplinary penalty quashed, since his proper course was to sue for breach of contract.[32] The Court of Appeal similarly rejected an application for certiorari to quash the dismissal of a male nurse by a health authority.[33] Lord Donaldson MR said that 'employment by a public authority does not *per se* inject any element of public law'. It could be different if there were statutory 'underpinning' of the employment such as statutory restrictions on dismissal, which would support a claim of ultra vires, or a statutory duty to incorporate certain conditions in the terms of employment, which could be enforced by mandamus. A sufficient 'statutory underpinning' was found immediately afterwards in a case where the Home Secretary's decision to dismiss a prison officer was quashed for violation of natural justice.[34] Unlike the male nurse, he was held not to be under a contract of employment[35] but appointed to an office and subject to a statutory code of discipline which had not been fairly applied. His dismissal was therefore ultra vires, and judicial review was the right way to contest it. But when a deputy police surgeon sought judicial review, complaining similarly that his dismissal was in breach of natural justice, he failed on the ground that he should have proceeded by writ, since his rights were contractual only.[36] So did a probationary prosecutor dismissed by the Crown Prosecution Service, though the court's attitude might have been different if there had been any infringement of the 'constitutional principle' of the prosecutor's independence.[37] Cases of this kind, in which contract, office and regulations are mixed in uncertain quantities, show well the snares that entrapped litigants[38] before the case of a

[31] *R.* v. *British Broadcasting Corporation ex p. Lavelle* [1983] 1 WLR 23 (decided before *O'Reilly* v. *Mackman*). Leave to continue as if by writ was granted.

[32] *R.* v. *Lord Chancellor's Department ex p. Nangle* [1992] 1 All ER 897; alternatively it was held to be a mere matter of internal discipline with no element of public law.

[33] *R.* v. *East Berkshire Health Authority ex p. Walsh* [1985] QB 152. Leave to continue as if by writ was refused. See similarly *R.* v. *Trent Regional Health Authority ex p. Jones*, The Times, 19 June 1986 (consultant surgeon: no sufficient 'statutory underpinning'); *Doyle* v. *Northumberland Probation Committee* [1991] 1 WLR 1340 (probation officers' claim for breach of contract: private law). Contrast *R.* v. *Salford Health Authority ex p. Janaway* [1989] AC 537 (dismissal of secretary by health authority: judicial review).

[34] *R.* v. *Home Secretary ex p. Benwell* [1985] QB 554. See likewise *R.* v. *Home Secretary ex p. Attard* (1990) 2 Admin. LR 641 (prison officer suspended without pay: judicial review granted without dispute).

[35] See above, p. 576.

[36] *R.* v. *Derbyshire CC ex p. Noble* [1990] ICR 808. An additional reason was that conflicting evidence made judicial review unsuitable—an example of judicial reluctance to implement the reform of 1977 (above, p. 260). There was a lack of statutory underpinning in *R.* v. *Leeds CC ex p. Cobleigh* [1997] COD 69 (disposal of land by council: judicial review refused).

[37] *R.* v. *Crown Prosecution Service ex p. Hogg* (1994) 6 Admin. LR 778.

[38] See (1991) 107 *LQR* 298, [1994] *PL* 69 (S. Fredman and G. Morris).

health service doctor, discussed below, heralded a change.[39] Again and again claimants failed, not because their cases were bad, but because they could not tell which procedure to follow. Again and again public authorities pleaded, often with ill-deserved success, that the wrong avenue was chosen.

Private law also regulates associations and bodies whose relations with their members are governed by contract, however powerful their licensing and disciplinary powers may in fact be. Where a greyhound trainer disputed the suspension of his trainer's licence and sued by originating summons for declarations, the national association's objection that he should have proceeded by judicial review was disallowed by the Court of Appeal, which emphasised that the new rules did not extend public law remedies to private law relationships.[40] The same is presumably true in the case of trade unions,[41] and in the case of private, but not state, schools.[42] But where disciplinary powers are statutory, judicial review now seems to be favoured, even in the case of professional associations which, being outside the sphere of government, were formerly outside the scope of the prerogative remedies.[43] A possible reason for this change may be that, in the uncertainty created by *O'Reilly* v. *Mackman*, it is safer to seek judicial review, which in case of mistake can be converted into a private law proceeding as if by writ, than to begin by writ when the reverse process is possible only exceptionally.[44]

Defensive and collateral pleas

An important question was whether issues of public law might be raised by way of defence, or as collateral issues, in proceedings of any kind. On a rigorous interpretation of *O'Reilly* v. *Mackman* it was argued that a defendant who wished to attack the validity of some official act or order should do so by separate proceedings for judicial review,[45] and apply for an adjournment of the main proceedings

[39] The *Roy* case (below).

[40] *Law* v. *National Greyhound Racing Club Ltd.* [1983] 1 WLR 1302.

[41] See *R.* v. *Inland Revenue Commissioners ex p. National Federation of Self-employed and Small Businesses Ltd.* [1982] AC 617 at 639 (Lord Diplock).

[42] *R.* v. *Fernhill Manor School ex p. Brown* [1992] COD 446.

[43] As in *R.* v. *Committee of Lloyd's ex p. Posgate* The Times, 12 January 1983; *R.* v. *Pharmaceutical Society of Great Britain ex p. Sokoh*, The Times, 4 December 1986; *R.* v. *General Medical Council ex p. Gee* [1987] 1 WLR 564; *Colman* v. *General Medical Council*, The Times, 14 December 1988 (why the case was so entitled does not appear). See above, p. 635. Perhaps the same may happen with public utilities. In *R.* v. *Midlands Electricity Board ex p. Busby*, The Times, 28 October 1987, the court entertained an (unsuccessful) application for judicial review against a 'decision' of the Board to require a domestic customer to pay in advance for electricity under his agreement with the Board.

[44] See above, p. 658, and below, p. 674 (Lord Woolf's third suggestion).

[45] This was the opinion of Ackner LJ in the *Wandsworth* case (below) and also of the county court judge, who had granted a stay so that judicial review might be sought, but the High Court refused leave. For a similar view see [1986] *PL* at 234 (Woolf LJ).

meanwhile. But the House of Lords, once again refraining from the extreme course, held that it would be wrong to deprive a defendant of the opportunity to raise any available defence as a matter of right. The question arose when a tenant of a local authority refused to pay an increase of rent on the ground that the local authority's decision raising the rent from £12.06 to £18.53 was void for unreasonableness. The local authority applied to strike out this defence to its action in the county court for the rent, and for possession, claiming that the issue could be raised only by application for judicial review; and it took the tenant to the House of Lords on this preliminary question alone. The House held that it could not be an abuse of the process of the court to raise the familiar defence of ultra vires, which can normally be pleaded as a collateral issue,[46] when the defendant was not able to select the procedure adopted.[47] 'In any event,' Lord Fraser said, 'the arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims.' A defendant is entitled to make his defence as a matter of right, whereas judicial review proceedings are subject to the discretion of the court.

This principle has since been held by the Court of Appeal to be confined to persons who are 'seeking to raise a true defence'; and it was denied to gipsies resisting a local authority's eviction action because they did not deny that they were trespassers but contended that the local authority was in breach of its statutory duty to provide sites for them and so was acting unreasonably.[48] Having no 'defence on the merits', they could make their complaint only by application for judicial review. But it seems impossible to draw any logical line between this defence and that which was allowed by the House of Lords. Here then is yet another trap for the litigant.

The House of Lords' principle will at least apply where the defence is raised against a criminal charge. On a prosecution for violation of a byelaw the Crown Court or a magistrates' court must decide upon the validity of the byelaw if this is raised by way of defence.[49] On the other hand a firm prosecuted for operating a

[46] See above, p. 281.

[47] *Wandsworth LBC* v. *Winder* [1985] AC 461. Contrast *Aspin* v. *Estill* (1987) 60 TC 549, where the Court of Appeal held that the General Commissioners of Income Tax could not consider a plea by a taxpayer that the Inland Revenue had misled him and abused their power. But in *Pawlowski (Collector of Taxes)* v. *Dunnington*, (1999) 11 Admin. LR 565, the Court of Appeal allowed a defence of 'no evidence' to be raised against a direction issued by the Inland Revenue, following the *Winder* case. See to like effect *Rhondda Cynon Taff CBC* v. *Watkins* [2003] 1 WLR 1864.

[48] *Avon CC* v. *Buscott* [1988] QB 656, approving *Waverley BC* v. *Hilden* (below). Compare *West Glamorgan CC* v. *Raffery* [1987] 1 WLR 457, where a gipsy sought judicial review successfully on similar grounds.

[49] *R.* v. *Reading Crown Court ex p. Hutchinson* [1987] QB 384; *R.* v. *Oxford Crown Court ex p. Smith* (1989) 2 Admin. LR 389 (planning authority's notice).

sex shop without a licence cannot escape by pleading that its application for a licence had been wrongfully refused, since this cannot alter the fact of the offence.[50] Nor can gipsies escape conviction for disregarding planning enforcement notices by pleading that the local authority was in breach of its duty to provide sites for them, since that cannot alter the fact that they had no planning permission.[51]

Judicial protests and proposals

In a relatively early case Lord Wilberforce gave an apt warning:[52]

> The expressions 'private law' and 'public law' have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. In this country they must be used with caution, for, typically, English law fastens, not upon principles but upon remedies. . . . Before the expression 'public law' can be used to deny a subject a right of action in the court of his choice it must be related to a positive prescription of law, by statute or by statutory rules. We have not yet reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts: to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remove.

Judicial protests have since become more vehement, mostly in cases where defendants have applied for the striking out of some claim on the ground that it should have been brought by judicial review and the decision on the striking out application is appealed by itself. Pointing to the confusion in the case law, Henry J called it 'a formidable extra hurdle for plaintiffs' and said that the forms of action abolished in 1854 'appeared to be in danger of returning to rule us from their graves'.[53] In a decision where the sole issue was which procedure to use the House of Lords, reversing the Court of Appeal which had reversed the trial judge, held that ordinary procedure was allowable for disputing the interpretation of a condition in a telecommunications licence.[54] Lord Slynn spoke of the need to avoid 'the over-rigid demarcation between procedures reminiscent of earlier disputes as to the forms of action' and said:

[50] *Quietlynn Ltd.* v. *Plymouth City Council* [1988] QB 114, where the result is correct but the decision that such defences cannot now be raised in criminal proceedings is erroneous: see the *Reading Crown Court* case (above).

[51] *Waverley BC* v. *Hilden* [1989] 1 WLR 246, holding that this plea could be made only by way of judicial review and refusing, on the merits, to grant a stay for that purpose.

[52] *Davy* v. *Spelthorne BC* [1984] AC 262 at 278.

[53] *Doyle* v. *Northumbria Probation Committee* [1991] 1 WLR 1340 at 1348.

[54] *Mercury Communications Ltd* v. *Director General of Telecommunications* [1996] 1 WLR 48.

In the absence of a single procedure allowing all remedies—quashing, injunctive and declaratory relief, damages—some flexibility as to the use of different procedures is necessary. It has to be borne in mind that the overriding question is whether the proceedings constitute an abuse of the process of the court.

The procedural dilemma was again the sole issue before the Court of Appeal when the Customs and Excise Commissioners asserted that a claim in restitution for a statutory relief from excise duty could be made only by way of judicial review. Reversing the trial judge, the court held that the claimant could use an ordinary action for restitution.[55] Saville LJ said:

It is now well over 100 years ago that our predecessors made a great attempt to free our legal process from concentrating upon the form rather than the substance, so that the outcome of cases depended not on strict compliance with intricate procedural requirements, but rather on deciding the real dispute over the rights and obligations of the parties . . . This is only the most recent such case, for over the last decade or so there has been a stream of litigation on this subject, much of it proceeding to the House of Lords. The cases raise and depend upon the most sophisticated arguments, such as the distinction and difference between what is described as 'public' as opposed to 'private' law . . . The cost of this litigation, borne privately or through taxation, must be immense, with often the lawyers the only people to gain. Such litigation brings the law and our legal system into disrepute, and to my mind correctly so . . . the courts have to address difficult and complex questions which in my view, under a proper system, it should not be necessary even to ask, let alone answer.

In another case in the Court of Appeal Sir Michael Kerr said that the law had 'suffered too much from the undesirable complexities of this over-legalistic procedural dichotomy'.[56]

A claim to a statutory benefit was also in issue in the Court of Appeal when a city council resisted a pension fund's claim for housing improvement grants on the ground that it should have been brought by judicial review.[57] This unmeritorious defence prompted Lord Woolf MR, in rejecting it, to suggest guidelines which might help to reduce litigants' dilemmas. He prefaced his suggestions by saying:

This appeal raises yet again issues as to the relationship between public and private law proceedings. It illustrates the fact that, despite the hopes to the contrary, a very substantial volume of the resources of the parties and the courts are still being consumed to little or no purpose over largely tactical issues as to whether the correct procedure had been adopted. This appeal is the third court and the fourth hearing to consider the issue in the present proceedings. I have little doubt that the amount of the costs already incurred far exceeds the

[55] *British Steel Plc* v. *Customs and Excise Commissioners* [1997] 2 All ER 366. See similarly Saville LJ (dissenting) in *The Great House at Sonning* case, above, p. 668.
[56] *Lonrho plc* v. *Tebbit* [1992] 4 All ER 161.
[57] *Trustees of the Dennis Rye Pension Fund* v. *Sheffield CC* [1998] 1 WLR 840.

sum in issue in the proceedings but the parties and the courts have yet to turn their attention to the merits of the dispute.

Lord Woolf then made three suggestions, here briefly summarised. First, in case of doubt it is safer to opt for judicial review and so avoid 'arid arguments' as to the right procedure. Secondly, where application is made to strike out an ordinary action, the court should ask itself whether leave to apply for judicial review would have been granted. If so, there should be no objection based on abuse of process. Thirdly, it should be remembered that a case can always be transferred to the Crown Office list (now the Administrative Court) as an alternative to being struck out.[58] If the procedure chosen has no significant disadvantages for the parties, the public or the court, Lord Woolf said, then it should not normally be regarded as constituting an abuse.

Signs of liberality

Into the welter of procedural pitfalls and conflicting judicial opinions a more favourable wind began to blow about ten years ago. In the case of a prison officer suspended without pay for refusing to work a new shift system, which he claimed was contrary to his conditions of service, the Court of Appeal rejected the Home Office's objection that judicial review should have been sought and held that conditions of service, where it was arguable that they were contractual, were to be treated as matters of private law for which ordinary actions would lie.[59] Taking a step further in a notable decision, the House of Lords held that private law rights, whether contractual or statutory, were enforceable by ordinary action notwithstanding that they might involve a challenge to a public law act or decision. In this case the remuneration of a doctor in the national health service had been reduced by the local committee on the ground of insufficient time devoted to general practice, as required by statutory regulations, and he sued for the amount deducted. The committee pleaded the usual objection and at first instance they succeeded. But on appeal it was held that a claim to pay, even though governed by statutory regulations and by a discretionary decision of the committee, was essentially a matter of private right and enforceable by ordinary action, free from the constraints of judicial review.[60] Lord Lowry said 'if Dr Roy has any kind of private law right, even though not contractual, he can sue for its alleged breach'. He approved a distinction made in the Court of Appeal: if the committee had initially refused to take Dr Roy onto their panel of doctors, he

[58] But the three-months time limit may have expired, unless the court is willing to extend it.

[59] *McClaren* v. *Home Office* [1990] ICR 824.

[60] *Roy* v. *Kensington and Chelsea Family Practitioner Committee* [1992] 1 AC 624. For a discerning discussion see (1993) 13 *Legal Studies* 183 (J. Alder).

would have had no private right to assert and judicial review would be his only remedy; but when he took employment with the committee, he acquired private rights to pay and conditions of service in accordance with the regulations. Lord Steyn has similarly pointed out that under the House of Lords' decisions the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision.[61]

In thus liberating the whole area of private right by exploiting the exception which Lord Diplock himself had suggested,[62] the House of Lords made it clear that it made no difference whether the private right was asserted in attack[63] or in defence, endorsing an earlier statement by Robert Goff LJ:[64]

> For my part, I find it difficult to conceive of a case where a citizen's invocation of the ordinary procedure of the courts in order to enforce his private law rights, or his reliance on his private law rights by way of defence in an action brought against him, could, as such, amount to an abuse of the process of the court.

Although there may still sometimes be difficulty in identifying 'private right', particularly in non-contractual relationships,[65] many litigants will now have been freed from the dangers of what Lord Lowry called 'a procedural minefield'.

Lord Lowry also contrasted the two possible interpretations of *O'Reilly* v. *Mackman*. The 'broad approach' was that proceedings challenging a public law act or decision were required to employ judicial review only when private law rights were not at stake. The 'narrow approach', which was that of Lord Diplock in the original decision, was that all such proceedings must be by judicial review, subject only to some exceptions where private law rights were involved. Lord Lowry declared his strong preference for the broad approach, though unfortunately he found it unnecessary to decide categorically. He gave a series of good reasons for a liberal attitude even if the narrow approach should be adopted. The whole tenor of the case is in favour of the broad approach and in favour of relief from Lord Diplock's rigid logic.

The House of Lords corroborated this position in 2000, holding that an individual's claim to statutory compensation (as distinct from a challenge to the

[61] *Boddington* v. *British Transport Police* [1999] 2 AC 143; *Pawlowski* v. *Dunnington* (1999) 11 Admin. LR 565.

[62] See above, p. 664.

[63] As in *Shears Court (West Mersey) Management Co. Ltd.* v. *Essex CC* (1986) 85 LGR 479 (landowner may sue in trespass contesting council's determination as to public right of way).

[64] *Wandsworth LBC* v. *Winder* [1985] AC 461 at 480, criticised by Sir Harry Woolf in [1986] *PL* 220 at 233. See [1992] *CLJ* 308 (C. Emery). Contrast *Tower Hamlets LBC* v. *Abdi* (1992) 9 LGR 300.

[65] e.g. in *R.* v. *Home Secretary ex p. Benwell* (above), which was not cited in *Roy*.

legality of the whole compensation scheme) could properly be brought by ordinary action.[66]

Prospects of reform

Lord Diplock's speech in *O'Reilly* v. *Mackman* was a brilliant judicial exploit, but it turned the law in the wrong direction, away from flexibility of procedure and towards a rigidity reminiscent of the bad old days of the forms of action a century and a half ago. The well-intentioned reforms of 1977 became a classic example of the remedy being worse than the disease. Although the House of Lords is now clearly disposed towards relaxation and future decisions are likely to continue the process, the root cause of the dichotomy will be difficult to extirpate judicially, and new legislation is needed.

It was surprising, therefore, that the Law Commission, after extensive consultation and study, reported in 1994 that the present position was satisfactory.[67] They recommended that reform should be effected by a combination of 'building on the restrictive approach to the exclusivity principle' taken in the *Roy* case and 'facilitating the transfer of issues or proceedings in or out of Order 53 so as to avoid serious detriment to cases involving combination of public law and private law issues'.[68] They favoured retention of a separate judicial review procedure, thus continuing the dichotomy,[69] and they expressly disfavoured a unified procedure, suggesting a number of objections which are far from convincing.[70] The report has many merits, but on the central problem of procedural exclusivity it does not appear to recognise the gravity of the difficulties or to penetrate to the heart of them. Moreover it seems probable that it will be overtaken by the more positive reforms advocated by Lord Woolf in his report of 1996, *Access to Justice*.

Lord Woolf's report is wide-ranging, but here we are concerned only with his chapter on the Crown Office List now renamed the Administrative Court.[71] He is more radical than the Law Commission, saying that his objective is to secure greater uniformity in cases which 'can at present be bedevilled by disputes as to procedure' which are 'wholly undesirable procedural wrangles'.[72] He recommends that the form of application for judicial review, instead of being a separate claim

[66] *Steed* v. *Home Secretary* [2000] 1 WLR 1169 (claim for interest on delayed payment of compensation for surrender of handguns; Home Secretary's claim that judicial review was the only permissible procedure dismissed).

[67] *Administrative Law: Judicial Review and Statutory Appeals*, Law Com. No. 226, Pt. III, para. 3.15.

[68] Para. 3.7.

[69] Para. 3.6.

[70] Para. 3.5.

[71] *Access to Justice*, ch. 18.

[72] Para. 2.

form, should follow the standard claim form. After various recommendations on procedural details he says:[73]

> The recommendations which I have made are intended to bridge the divide between public and private law claims by bringing the two procedures together. The same statements of case will be used in both, so that there will be no need for a claim in one area to be treated as though it has been begun by another procedure. It is nevertheless important that the safeguards of the three month time limit and of standing, which are necessary in judicial review claims, should not be bypassed, but these can be retained without making it an abuse of process to adopt the wrong procedure.

The report then explains how objections to the use of private law procedure could be referred to the Crown Office for a case management conference without the court having to consider whether the issues are in public or private law, and leaving questions of standing and time limits to the final hearing.

Although many particulars remain to be clarified, Lord Woolf's proposals amount in substance to a unified procedure of the kind suggested in this book.[74] They were not implemented in the first instalment of his reforms, introduced in 1999,[75] perhaps because they conflict so directly with the recommendations of the Law Commission. But Lord Woolf has said: 'I am reasonably confident that the rejection of proceedings on the basis of the wrong choice of procedure will soon be a problem of the past.'[76]

The fulfilment of this overdue reform was foreshadowed in a case where a university student sued the university in contract, alleging wrongful treatment in examinations.[77] The new Civil Procedure Rules had been introduced but CPR 54 had not yet been made. The university, which had no visitor, pleaded that she could proceed only by judicial review, for which she was out of time, under the strict doctrine of *O'Reilly* v. *Mackman*. In rejecting this plea, and so allowing the action to proceed, the Court of Appeal observed that the ground had shifted considerably since that decision; and that the new Civil Procedure Rules introduced the principle that the mode of commencement of proceedings should not matter.

The Court of Appeal in this case looked forward to the further reform of the procedure for judicial review along the lines proposed by Lord Woolf. CPR 54, however, when eventually made did not in terms abandon procedural exclusivity. Claims for judicial review, indeed, fall within CPR 8 as proceedings 'unlikely to involve a substantial dispute of fact'. But the protections for public authorities—the requirement of permission/ leave and the short time limits—are retained and prerogative remedies will only be available in a claim for judicial review brought

[73] Para. 26.

[74] Above, p. 664; similarly in the 8th edn., p. 653.

[75] Under the Civil Procedure Rules 1998. As explained above, p. 653. CPR 54 was not made at this stage.

[76] (1998) 114 *LQR* 579 at 589.

[77] *Clark* v. *University of Lincolnshire and Humberside* [2000] 1 WLR 1988.

under CPR 54.2. This leaves the way clear for claimants to seek advantage through the adoption of one procedure or another and for courts to resist this by the adoption of procedural exclusivity.

Lord Woolf, however, had reasoned in the case of the university student that it was not generally necessary to strike out a claim which was more appropriate for judicial review but which had been brought by ordinary action under Part 7 or 8 of the CPR. The reason for this was that CPR 24 allowed summary judgment to be given against the claimant where, for instance, the claimant was seeking to evade the short time limit in CPR 54 or otherwise misusing the ordinary procedure. While this easing of the rigours of procedural exclusivity is welcome, Lord Woolf does not address the converse situation. This is when a claim that should be brought by ordinary action is brought by way of judicial review in order to secure a prerogative remedy.[77a] This may yet generate fruitless litigation.

On the other hand, the rigours of exclusivity have been further abated by the rules which allow, subject to the court's discretion, the transfer of claims both out of Part 54 and into Part 54 if the claim has been commenced in the wrong way.[78] Recent reported cases on procedural exclusivity are relatively rare, suggesting that this unwelcome innovation has, at last, crept unsung from the scene.[79]

[77a] e.g., *R.* v. *Association of British Travel Agents ex p. Sunspell Ltd* [2000] The Independent, 27 November (ABTA's contractual relationship with agents precluded judicial review of its decisions; *Clark* relevant only to procedure).

[78] CPR 54.20 (out of Part 54) and CPR 30.5 (into Part 54). Under RSC Order 53 only transfer out of the application for judicial review expressly provided for and even then set about with technicality. See *R.* v. *East Berkshire Health Authority ex p. Walsh* [1985] QB 152. See Woolf LJ in [1986] *PL* 220 at 232 for discussion of transfer into Order 53. A two-way transfer system such as that which now exists under the CPR was recommended by the Law Commission (Law Com. No. 226, para. 5.38).

[79] Cf. [2004] Judicial Review 140 (R. Bateson) arguing that the impact of *Clark* is restricted to 'wrongly brought' applications for judicial review, to the exclusion of 'wrongly brought' private claims.

19

RESTRICTION OF REMEDIES

THE OLD LAW OF STANDING

The problem of standing

It has always been an important limitation on the availability of remedies that they are awarded only to litigants who have sufficient locus standi, or standing.[1] The law starts from the position that remedies are correlative with rights, and that only those whose own rights are at stake are eligible to be awarded remedies. No one else will have the necessary standing before the court.

In private law that principle can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the public interest. Where some particular person is the object of administrative action, that person is naturally entitled to dispute its legality and other persons are not. But public authorities have many powers and duties which affect the public generally rather than particular individuals. If a local authority grants planning permission improperly, or licenses indecent films for exhibition, it does a wrong to the public interest but no wrong to any one in particular. If no one has standing to call it to account, it can disregard the law with impunity—a result which would 'make an ass of the law'.[2] An efficient system of administrative law must find some answer to this problem, otherwise the rule of law breaks down.

Having grown to a considerable extent out of private law, administrative law has traditionally contained a number of restrictive rules about standing. But as governmental powers and duties have increased, and as public interest has gained prominence at the expense of private right, more liberal principles have emerged.

[1] For this subject see Lewis, *Judicial Remedies in Public Law*, 3rd edn. (2004), ch. 10; Supperstone and Goudie (eds.), *Judicial Review*, 2nd edn., ch. 15; *Standing in Public Interest Litigation* (1985, Report No. 27), Law Reform Commission, Australia—an extensive study); Eleventh Report (1978), Public and Administrative Law Reform Committee, New Zealand; L. Stein (ed.), *Locus Standi*; S. M. Thio, *Locus Standi and Judicial Review*; J. Vining, *Legal Identity* (discussing United States law); P. Van Dijk, *Judicial Review of Government Action and the Requirement of Interest to Sue* (discussing Anglo-American, European and international law). See (2002) 65 *MLR* 1 (C. Harlow) criticising the expansion of pressure group standing.

[2] *Steeples* v. *Derbyshire CC* [1985] 1 WLR 256 at 296 (Webster J). See also *Minister of Justice* v. *Borowski* (1982) 130 DLR (3d) 588.

The prerogative remedies, in particular, have shown their worth, since they exist for public as well as private purposes and provide the nucleus of a system of public law. The Attorney-General also can act in the public interest and will sometimes, though not always, do so. The resources of the legal system are adequate to solve the problems, which are basically problems of judicial policy.

Judges have in the past had an instinctive reluctance to relax the rules about standing. They fear that they may 'open the floodgates' so that the courts will be swamped with litigation. They fear also that cases will not be best argued by parties whose personal rights are not in issue. But recently these instincts have been giving way before the feeling that the law must somehow find a place for the disinterested, or less directly interested, citizen in order to prevent illegalities in government which otherwise no one would be competent to challenge.

The law in transition

The law about standing has been passing through a transitional stage. Formerly there were different rules for different remedies, as might be expected in a system which operates with a mixture of private law and public law remedies. The private law remedies of injunction and declaration were for the most part available only to parties whose own rights were in issue. The prerogative remedies, on the other hand, were nominally sought by the Queen and might be awarded at the instance of anyone whom the court considered to be deserving. The strict rules as to injunction and declaration could sometimes be evaded with the assistance of the Attorney-General. The generous rules for the prerogative remedies, on the other hand, were tightened in an illogical way by making them stricter for mandamus than for certiorari and prohibition.

The situation was transformed by the introduction in 1977 of the application for judicial review.[3] The remedies in both groups then became available in a single proceeding and it became obvious (as indeed it had been beforehand) that a uniform rule about standing ought to apply to them all. The provision in the rules of court, now embodied in the Supreme Court Act 1981, appeared to leave this question open. But when it came before the House of Lords in the *Inland Revenue Commissioners* case[4] the majority opinion was that a uniform rule had been established. But it may be premature to consign to oblivion the rules which made distinctions between the various remedies previously. 'We should be unwise in our enthusiasm for liberation from procedural fetters to discard reasoned authorities which illustrate this'.[5] It may be, therefore, that some at least of the former rules

[3] Above, p. 652.

[4] *R.* v. *Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617, explained below, p. 691.

[5] [1982] AC at 631E (Lord Wilberforce); and see at 646A (Lord Fraser).

will remain valid. An abbreviated account of them is given in the following sections.

Injunction

Any person whose own legal rights are under threat from a public authority naturally has standing to seek an injunction. If a public right is under threat, a private person may seek an injunction in two cases: if some private right of his is interfered with at the same time (e.g. by obstruction of the highway which also obstructs access to his land); and where he suffers special damage peculiar to himself from the interference with the public right.[6] In other cases it was held that only the Attorney-General could vindicate a public right.[7] If for example a public authority created a public nuisance which did no special damage to any private person, only the Attorney-General could apply for an injunction. It was a 'fundamental rule' that 'the court will only grant an injunction at the suit of a private individual to support a legal right'.[8] But there are many situations where a person has a special interest without any specific legal right, and there has been a tendency for the courts to grant injunctions on the strength of the special interest only. In one of the Enfield comprehensive school cases, where it was shown that the local education authority's scheme did not comply with the Act, the court granted an injunction at the instance of a governor of one of the affected schools, holding that he had a sufficient interest in the observance of the law in relation to that school.[9] It was also said that a ratepayer or parent[10] might equally have standing, but this point was left open. In another of the Enfield cases an injunction was granted at the instance of ratepayers who should have been given an opportunity to object if the statutory procedure had been followed correctly, but who would have suffered no actionable wrong if the unlawful scheme had been carried out.[11] Similarly where a comprehensive school scheme in Lambeth was vitiated by discrepancies between the proposals, the public notice and the Secretary of State's approval, parents were held to be entitled to an injunction merely because the scheme was ultra vires.[12] But in

[6] *Boyce* v. *Paddington BC* [1930] 1 Ch. 109, summarising earlier cases.

[7] *Gouriet* v. *Union of Post Office Workers* [1978] AC 435, following *London Passenger Transport Board* v. *Moscrop* [1942] AC 332. For the *Gouriet* case see the following section on declaration. An earlier classic statement is that of Lord Chelmsford LC in *Ware* v. *Regent's Canal Co.* (1858) 3 De G & J 212 at 228: 'Where there has been an excess of the powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the Attorney-General on behalf of the public has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the Legislature.'

[8] *Thorne* v. *British Broadcasting Corporation* [1967] 1 WLR 1104 (Lord Denning MR).

[9] *Lee* v. *Enfield London Borough Council* (1967) 66 LGR 195 at 208.

[10] A parent has standing to seek remedies, including injunctions, on behalf of his children: see below, p. 743.

[11] *Bradbury* v. *Enfield London Borough Council* (1967) 1 WLR 1311.

[12] *Legg* v. *Inner London Education Authority* [1972] 1 WLR 1245.

neither of the last two cases did the court mention the question of standing, and it may be that the decisions conflict with restrictive remarks made later in the House of Lords.[13] Several of the cases discussed earlier in connection with the Crown and Parliament were attempts to obtain injunctions in support of interests rather than rights.[14]

Local authorities, as already explained,[15] have statutory powers to bring proceedings in the public interest and they usually seek injunctions.

Declaration

An applicant for a declaration does not need to have a subsisting cause of action or a right to some other relief, but some legal right of his own must be in issue, actually or contingently. Unless this is the case, there is nothing relating to his legal position which the court can declare. As Lord Diplock has said:[16]

> But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of any one else.

The law as thus laid down confined the declaration, much like the injunction, to the character of a private law remedy. If the applicant had no personal right at stake, he could succeed only if the Attorney-General would assist him by allowing a relator action. This position was emphatically confirmed by the House of Lords in a case where a member of the public, whom the Attorney-General had refused to assist, failed in a claim for a declaration that the calling of a strike by Post Office Workers would be a criminal offence as provided in the Post Office Act 1953.[17] Lord Wilberforce said:

> It can be properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public.

This principle was held to rule out injunction and declaration alike. It is equally applicable even where the plaintiff has some special concern with the matter in hand. Thus where it was a criminal offence to refuse to supply information to inspectors holding an inquiry into the affairs of a housing association, the inspectors themselves failed in their action for a compulsory order against the defaulters.

[13] In *Gouriet* v. *Union of Post Office Workers* [1978] AC 435 at 484 Lord Wilberforce said that only the Attorney-General could apply in the civil courts for injunctive relief against threatened breaches of the law. But in its context this probably means breaches of the criminal law.

[14] Above, p. 565.

[15] Above, p. 581.

[16] *Gouriet* v. *Union of Post Office Workers* [1978] AC 435 at 501.

[17] *Gouriet* v. *Union of Post Office Workers* (above); and see above, p. 583.

Only the Attorney-General could employ civil proceedings to enforce the criminal law.[18] A ratepayer, likewise, must obtain the aid of the Attorney-General in the traditional form of a relator action if he wishes to contest the legality of expenditure by his local authority.[19] An apparently inadvertent decision of the Court of Appeal to the contrary[20] is not taken to have changed the law.

The requirement of a legal right has restricted the utility of the declaration in planning cases, owing to the fact that the planning legislation gives no rights to neighbours and other third parties. If, for instance, a planning authority grants permission for the building of a school but fails to follow the statutory procedure, a neighbour who objects to the school has been held unable to obtain a declaration that the permission is invalid.[21] What a man may do on his own land is a matter between him and the planning authority, and is not legally the business of anyone else. A mere neighbour has no right or status in the matter which the court can declare, unless some nuisance or other wrong is committed or threatened against him. Yet under the new law of standing he may be granted certiorari,[22] or allowed to bring a relator action,[23] and it is recognised that the law has progressed.

Where the plaintiff's legal position is prejudiced it does not matter that he is one of many people equally affected.[24] This opens the way for challenging legislative acts such as byelaws, without having to wait for penal proceedings for infringement. Accordingly a farmer obtained a declaration against an invalid byelaw prohibiting auction sales in a market[25] and a hotel owner was granted a declaration against an invalid order for a one-way street.[26]

Before the House of Lords temporarily shut the door on declaratory relief for disinterested citizens Lord Denning MR had twice said that he would not object on grounds of standing to actions for declarations brought by private citizens disputing the exercise of the treaty-making power of the Crown, and he rejected the plaintiffs' claims solely on their merits.[27] There were also signs of relaxation of

[18] *Ashby* v. *Ebdon* [1985] Ch. 394.

[19] *Barrs* v. *Bethell* [1982] Ch. 294. But he may be able to make an application for judicial review.

[20] *Prescott* v. *Birmingham Cpn.* [1955] Ch. 210; above, p. 581.

[21] *Gregory* v. *Camden London Borough Council* [1966] 1 WLR 899; *Bray* v. *Faber* [1978] 1 NSWLR 335.

[22] See below, p. 699.

[23] As to this see above, p. 580; and *A.-G.* v. *Codner* [1973] 1 NZLR 545; *A.-G. ex rel. Benfield* v. *Wellington CC* [1979] 2 NZLR 385; *A.-G.* v. *Taff-Ely BC* (1981) 42 P & CR 1.

[24] *Dyson* v. *A.-G.* [1911] 1 KB 410; *Gouriet* v. *Union of Post Office Workers* (above) at 483, 506.

[25] *Nicholls* v. *Tavistock UDC* [1923] 2 Ch. 18. See also *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* [1892] 3 Ch. 242.

[26] *Brownsea Haven Properties Ltd.* v. *Poole Cpn.* [1958] Ch. 574.

[27] *Blackburn* v. *A.-G.* [1971] 1 WLR 1037; *McWhirter* v. *Attorney-General* [1972] CMLR 882 (note contrary opinion of Cairns LJ). These were unsuccessful challenges to the legality of joining the European Economic Community. See also *Booth & Co. Ltd.* v. *National Enterprise Board* [1978] 3 All ER 624 (commercial competitor's action for declaration allowed to proceed); *Wilson* v. *IBA* 1979 SLT 279 (above, p. 584).

doctrine in other jurisdictions. The Supreme Court of Canada, in an important decision, laid down the principle that the rule requiring personal standing applies to legislation of a regulatory character which affects particular persons or classes; but that where no particular persons or classes are affected more than others, where the issue is justiciable and where the nature of the case is suitable, the court may grant declaratory relief to any citizen in its discretion.[28] A taxpayer was accordingly held able to dispute the constitutional validity of the Official Languages Act in Canada. Drawing an analogy from the generous rules for the prerogative remedies Laskin J said:

> It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.

In the United States also, a federal taxpayer has been awarded a declaration and injunction against federal expenditure which was unconstitutional.[29] But the federal courts, despite some liberal decisions,[30] have insisted that the applicant show actual injury to his personal interest as opposed to mere concern.[31] Similar rules used to prevail in Australia[32] and New Zealand.[33]

Certiorari and prohibition

The prerogative remedies, being of a 'public' character as emphasised earlier, have always had more liberal rules about standing than the remedies of private law.[34] Prerogative remedies are granted at the suit of the Crown, as the titles of the cases show; and the Crown always has standing to take action against public authorities, including its own ministers, who act or threaten to act unlawfully. As Devlin J said:[35] 'Orders of certiorari and prohibition are concerned principally

[28] *Thorson* v. *A.-G. of Canada* (No. 2) (1974) 43 DLR (3d) 1. This decision did not deal with the merits. See similarly *Nova Scotia Board of Censors* v. *McNeil* (1975) 55 DLR (3d) 632; *Benjamin* v. *Downs* [1976] 2 NSWLR 199.

[29] *Flast* v. *Cohen* 392 US 83 (1968).

[30] Schwartz and Wade, *Legal Control of Government*, 290. It must however be noted that in federal administrative law the declaration has to do the work of the prerogative remedies, which it has superseded.

[31] *Sierra Club* v. *Morton* 405 US 727 (1972), 348 F Supp. 219 (1972); *Simon* v. *Eastern Kentucky Welfare Rights Organisation* 426 US 26 (1975). But slight and hypothetical injury may suffice: *United States* v. *Students Challenging Regulatory Agency Procedures* 412 US 669 (1973). The American rules have been greatly relaxed.

[32] *Australian Conservation Foundation* v. *Commonwealth* (1979) 28 ALR 257 (conservation society denied standing for declaration and injunction against ministerial permission for development of tourist resort).

[33] See below, p. 689, n. 64.

[34] See (1955) 71 *LQR* 388, (1956) 72 *LQR* 36 (D. C. M. Yardley); (1955) 71 *LQR* 483 (D. M. Gordon).

[35] *R.* v. *Fulham etc. Rent Tribunal ex p. Zerek* [1951] 2 KB 1 at 11.

with public order, it being the duty of the High Court to see that inferior courts confine themselves to their own limited sphere.' In the same sense Brett J had said in an earlier case[36] that the question in granting prohibition 'is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed'. Consequently the court is prepared to act at the instance of a mere stranger, though it retains discretion to refuse to do so if it considers that no good would be done to the public.[37] Every citizen has standing to invite the court to prevent some abuse of power, and in doing so he may claim to be regarded not as a meddlesome busybody but as a public benefactor. Parker LJ thus stated the law as to certiorari:

> Anybody can apply for it—a member of the public who has been inconvenienced, or a particular party or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary. Where, however, it is made by a person who has a particular grievance of his own, whether as a party or otherwise, then the remedy lies *ex debito justitiae* . . .[38]

This was a case where a newsvendor obtained certiorari to quash the allocation of a street trader's pitch to a vendor of jellied eels, the magistrates having assigned the pitch without jurisdiction. Although the newsvendor was a mere rival for the pitch, and had not been a party to the proceedings before the magistrates, it was held that he was a person with a particular grievance and not a mere stranger. The same was held in the case of a local inhabitant who obtained the quashing of a highway order made without proper notice.[39] A ratepayer, likewise, has a particular grievance if the rating list is invalidly made, even though the defects will make no difference to him financially.[40] In licensing cases a mere commercial rival who objects to the granting of the licence to another person has a particular grievance.[41] So also has a neighbour who objects to a grant of planning permission.[42] The extreme case,

[36] *Worthington* v. *Jeffries* (1875) LR 10 CP 379 at 382.

[37] *Re Forster* (1863) 4 B & S 187; *London Cpn.* v. *Cox* (1867) LR 2 HL 239 at 279; *R.* v. *Surrey Justices* (1870) LR 5 QB 466; *R.* v. *Speyer* [1916] 1 KB 595 at 613.

[38] *R.* v. *Thames Magistrates' Court ex p. Greenbaum* (1957) 55 LGR 129. The law as thus stated was not mentioned in *Durayappah* v. *Fernando* [1967] 2 AC 337, where the Privy Council denied certiorari to a mayor who had lost office when the municipal council was dissolved by a ministerial order made in breach of natural justice. The decision may be justified on the ground that failure to give a hearing is a wrong which is strictly personal to the party entitled to be heard: see above, p. 510. The Privy Council's confused reasoning (see above, p. 495) does not refer to the ordinary rules as to standing.

[39] *R.* v. *Surrey Justices* (above); and see *R.* v. *Bradford-on-Avon Urban District Council ex p. Boulton* [1964] 1 WLR 1136.

[40] *R.* v. *Paddington Valuation Officer ex p. Peachey Property Corporation Ltd.* [1966] 1 QB 380 at 400.

[41] *R.* v. *Richmond Confirming Authority ex p. Howitt* [1921] 1 KB 248. The police may also intervene: *R.* v. *Berwyn JJ ex p. Edwards* [1980] 1 WLR 1045.

[42] See the *Hendon* case and others noted below.

perhaps, is that of newspapers who are held to be persons aggrieved by magistrates' orders affecting the rights of the press to report criminal proceedings.[43]

When the remedy lies *ex debito justitiae*, as in these cases, this means that the court will normally exercise its discretion in the applicant's favour; it does not mean that the court has no discretion to withhold the remedy, for example, where there has been undue delay.[44] In the case of prohibition, it has been held that there is no discretion to withhold the remedy where there is a patent defect of jurisdiction on the face of the proceedings, however unmeritorious the applicant and however remote his interest;[45] but this refinement may perhaps be obsolete since similar rules should govern certiorari and prohibition alike.

The meaning of 'particular grievance' being so wide, there are few examples of certiorari or prohibition being granted to total strangers. But the Court of Appeal supplied one by holding that prohibition might issue at the instance of a private citizen, applying primarily from motives of public interest, to prevent the Greater London Council from licensing indecent films by applying an unduly indulgent test of obscenity.[46] As Lord Denning MR said, 'if he has not sufficient interest, no other citizen has'. Unless any citizen has standing, therefore, there is often no means of keeping public authorities within the law unless the Attorney-General will act—which frequently he will not. That private persons should be able to obtain some remedy was therefore 'a matter of high constitutional principle'.[47] Lord Denning added: 'The court would not listen, of course, to a mere busybody who was interfering in things which did not concern him. But it will listen to any one whose interests are affected by what has been done'.[48] The same tendency is illustrated by the courts' willingness to grant certiorari to a trade union acting on behalf of one of its members.[49]

The broad principle which almost eliminates the requirement of standing for these remedies shows how far the law has gone in the direction of admitting an element of *actio popularis* on grounds of public interest, just as it has done with mandamus and with the relator action. By such means, therefore, a remedy may be

[43] *R.* v. *Russell ex p. Beaverbrook Newspapers Ltd.* [1969] 1 QB 342.

[44] *R.* v. *Stafford Justices ex p. Stafford Corporation* [1940] 2 KB 33; *R.* v. *Herrod ex p. Leeds City Council* [1976] QB 540; but see [1978] AC 403.

[45] *London Cpn.* v. *Cox* (1867) LR 2 HL 239 at 278, 285; *Ellis* v. *Fleming* (1876) 1 CPD 237; *Farquharson* v. *Morgan* [1894] 1 QB 552. Contrast *Chambers* v. *Green* (1875) 20 Eq. 552, where Jessel MR held that the court always had discretion to refuse prohibition to a stranger. Decisions on this question conflicted freely.

[46] *R.* v. *Greater London Council ex p. Blackburn* [1976] 1 WLR 550. The applicant's wife and co-applicant was a ratepayer and they had children who might have been harmed by indecent films, but that interest was not decisive. Issue of the prohibition was suspended to give the Council 'time to mend their ways'. See similarly *Benjamin* v. *Downs* [1976] 2 NSWLR 199.

[47] This revised version of Lord Denning's principle, unlike its predecessor (above, p. 583), earned the approval of the House of Lords: see below, p. 693.

[48] *R.* v. *Paddington Valuation Officer* (above) at 401 (Lord Denning MR).

[49] As in *Minister of Social Security* v. *Amalgamated Engineering Union* [1967] AC 725. This practice is now common.

found for the citizen who is genuinely aggrieved but who has no grievance in the eye of the law. He may, for example, object strongly to a building for which his neighbour has been granted planning permission, although legally this is no concern of his. If he can show that the permission is void, for example because the decision is vitiated by bias, he may have it quashed by certiorari[50] even though he could not have obtained a declaratory judgment because of his lack of personal legal right.[51]

Mandamus: restrictions and contradictions

In principle the law as to the standing of an applicant for mandamus should be no more exacting than it is in the case of other prerogative remedies. It should recognise that public authorities should be compellable to perform their duties, as a matter of public interest, at the instance of any person genuinely concerned, subject always to the discretion of the court. That this is now the position under the new law of standing is explained below. The following paragraphs summarise the evolution of the earlier case-law, which may retain some importance for reasons already mentioned.

A line of restrictive decisions was started by a case (now overruled[52]) where a local sanitary authority unsuccessfully sought mandamus against the guardians of a poor law union on the ground that they were neglecting their statutory duty to enforce the Vaccination Acts.[53] It was laid down that an applicant for mandamus 'must first of all show that he has a legal specific right to ask for the interference of the court'. Citing this decision with approval, later cases added that the court proceeds 'on a very strict basis',[54] and must apply 'a far more stringent test' than in applications for certiorari.[55] None of the cases indicated any reason for this differentiation:[56] it was merely repeated mechanically.

The result was to encourage government departments to break the law. In one

[50] As in *R.* v. *Hendon RDC ex p. Chorley* [1933] 2 KB 696; *R. (Bryson)* v. *Ministry of Development* [1967] NI 180; *Re Prince Edward Island Land Use Commission and Beatson* (1979) 101 DLR (3d) 404. Although the *Hendon* case was treated with some doubt in the *Gregory* case (below), it was followed with approval in *R.* v. *Hillingdon LBC ex p. Royco Homes Ltd.* [1974] QB 720. See also *Murphy (J.) & Sons Ltd.* v. *Secretary of State for the Environment* [1973] 1 WLR 560 (where however the neighbour's standing appears to have been taken for granted); *R.* v. *Sheffield CC ex p. Mansfield* (1978) 77 LGR 126.

[51] *Gregory* v. *Camden London Borough Council* [1966] 1 WLR 899; above, p. 683.

[52] By *R.* v. *Inland Revenue Commissioners* (below).

[53] *R.* v. *Lewisham Union Guardians* (1897) 1 QB 498.

[54] *R.* v. *Commissioners of Customs and Excise ex p. Cook* [1970] 1 WLR 450.

[55] *R.* v. *Hereford Cpn. ex p. Harrower* [1970] 1 WLR 1424; and see *R.* v. *Russell ex p. Beaverbrook Newspapers Ltd.* [1969] 1 QB 342.

[56] Possibly it derives from the well-known remark of Lord Ellenborough in *R.* v. *Archbishop of Canterbury* (1812) 15 East 117 at 136 that mandamus is 'the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right'. This in turn derives from Lord Mansfield: see above, p. 617.

case[57] the Commissioners of Customs and Excise were allowing bookmakers to pay betting duty in monthly instalments, as an administrative concession, instead of in half-yearly instalments as required by the Act. The court refused mandamus to other bookmakers who wanted the Act enforced against their competitors. In theory mandamus might have been sought by the Attorney-General, who always has standing to enforce the law; but his practice, as it appears, is not to apply for mandamus and never to proceed against the central government.[58] So the Commissioners were able to defy the law with impunity.

In many other cases, however, the courts applied a more liberal test, while paying lip-service to the supposed requirement of specific legal right. Ratepayers, in particular, were allowed to apply for mandamus to require their local authority to fulfil its duties, such as to make a proper rating list[59] or to act in accordance with their standing orders,[60] as required by statute, in letting contracts. In the latter case it was said that ratepayers had a sufficient 'specific legal right', though this was plainly a contradiction in terms; and that contractors on the local authority's approved list had no standing as such to require observance of the standing orders, but had standing as ratepayers, though plainly they had a more direct interest in the former capacity than in the latter. The courts were led into contradictory positions by not appearing to recognise that mandamus was a remedy of public law, which ought to be available on the same basis as certiorari. To restrict it to cases of personal legal right was in effect to make it a private law remedy.

Mandamus: private and public interests

Against the statements that an applicant for mandamus must show a specific legal right could be set decisions merely requiring the applicant to have 'a sufficient interest', i.e. some genuine interest greater than that of the public at large. One way to show such an interest was to become a party to some sort of legal process. An insurance company was granted a mandamus to compel the Manchester Corporation to make a byelaw as required by a local Act, since the company had procured the provision in question and that gave them an interest superior to that of the general public.[61] In a case where justices had improperly allowed the transfer of a liquor licence a clergyman obtained a mandamus to direct them to hear and

[57] *R.* v. *Commissioners of Customs and Excise* (above). This decision was held to be wrong by Lord Denning MR but was not criticised by the House of Lords in *R.* v. *Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617.

[58] See above, p. 581.

[59] *R.* v. *Paddington Valuation Officer ex p. Peachey Property Co. Ltd.* [1966] 1 QB 380 (application failed on the facts).

[60] *R.* v. *Hereford Cpn. ex p. Harrower* [1970] 1 WLR 1424; *R. (McKee)* v. *Belfast Cpn.* [1954] NI 122. In *R.* v. *Peterborough (Mayor)* (1875) 44 LJQB 85 mandamus was refused to a ratepayer, apparently on the ground that he was not genuinely acting as such.

[61] *R.* v. *Manchester Cpn.* [1911] 1 KB 560.

determine the case correctly,[62] merely on the ground that he had appeared as an objector to the application for the transfer. The case was still clearer where the applicant had suffered loss personally. Thus the Irish High Court granted mandamus against the Dublin Corporation for failing to make a planning scheme and submit it to the minister 'with all convenient speed', so injuring the interests of the applicant, a property company, which could not obtain planning permissions.[63]

Furthermore, the courts were preparing the way for allowing standing to an applicant whose interest was no greater than that of other people generally, and who might come before the court in the guise of a public-spirited citizen concerned to see that the law was obeyed in the interests of all. The Court of Appeal showed itself clearly in favour of this use of mandamus in the proceedings brought against the police in which it was sought to compel them to take more effective action to enforce the law against gaming clubs and pornography.[64] The applicant had no special interest other than his concern as a citizen that the police should fulfil their legal duty to enforce the law. Yet so far from objecting to his lack of standing, the court in both cases emphasised that he had performed a public service in bringing the proceedings. Lord Denning MR said of them in a later case:[65]

> Take the recent cases when Mr Raymond Blackburn applied to the court on the ground that the Commissioner of Police was not doing his duty in regard to gaming or pornography. Mr Blackburn had a sufficient interest even though it was shared with thousands of others. I doubt whether the Attorney-General would have given him leave to use his name . . . But we heard Mr Blackburn in his own name. His intervention was both timely and useful.

Public authorities have many such duties of a general character, enforceable by no one unless by the ordinary citizen. The Attorney-General does not appear to concern himself with them. If the private citizen could not do so, there would be a serious gap in the system of public law.

The House of Lords, with a reference to these last words,[66] have now decisively put mandamus onto the same basis as certiorari and prohibition, as will shortly be seen.

[62] *R.* v. *Cotham* [1898] 1 QB 802 (see at 804).

[63] *The State (Modern Homes Ltd.)* v. *Dublin Cpn.* [1953] IR 202.

[64] *R.* v. *Metropolitan Police Commissioner ex p. Blackburn* [1968] 2 QB 118; Same (No. 3) [1973] 1 QB 241; above, p. 360. See also *Adams* v. *Metropolitan Police Cmr* [1980] RTR 289 (local residents may require police to prosecute traffic offenders). It was held in *Environmental Defence Society Inc.* v. *Agricultural Chemicals Board* [1973] 2 NZLR 758 that an amenity society had no standing to ask for mandamus to require a public board to prevent the use of injurious chemicals; but it appeared that the board had discretionary power and no specific duty.

[65] *A.-G. ex rel. McWhirter* v. *Independent Broadcasting Authority* [1973] QB 629. Compare *Wilson* v. *IBA* 1979 SLT 279 (above, p. 584).

[66] [1982] AC at 654 (Lord Scarman).

Statutory remedies

Many statutes exclude all the remedies hitherto discussed and instead allow 'any person aggrieved' to apply to the court for the quashing or suspension of the order. Standing is then determined by the interpretation of those words, and here too there is conflict between restrictive and liberal interpretations. This is best explained later along with the special statutory remedies themselves.[67]

THE NEW LAW OF STANDING

The reformed procedure

When the application for judicial review was introduced in 1977 the prerogative remedies, declaration and injunction all became available in a single form of proceeding, in which the first step was to obtain the court's leave to apply. The rules of court provided:[68]

> The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

This provision has since been incorporated in the Supreme Court Act 1981.[69]

Standing for the purposes of this procedure is thus first of all made a 'threshold question', to be determined at the stage of the initial application for leave, which is made ex parte. At this point the court can reject 'simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest',[70] and so 'prevent abuse by busybodies, cranks and other mischief-makers'.[71] The Law Commission has recommended a 'two-track system' under which standing would be refused unless the applicant has been or would be adversely affected, or the court considers that it is in the public interest for the application to be made.[72]

By requiring the interest to be 'in the *matter* to which the application relates' the rule suggests also that standing is to be related to the facts of the case rather than (as previously) to the particular remedy sought, so that one uniform test should apply to all the remedies alike. Extrajudicially Lord Denning MR has expressed the view that the rule 'lays down one simple test' and gives standing to 'an ordinary

[67] Below, p. 736.
[68] Ord. 53 r. 3(5).
[69] s. 31(3).
[70] [1982] AC at 630C (Lord Wilberforce).
[71] [1982] AC at 653G (Lord Scarman).
[72] Law Com. No. 226 (1994), paras. 5.20, 5.22.

citizen who comes asking that the law should be declared and enforced'.[73] The House of Lords has now indicated that this may indeed be its result. It is no longer a problem to explain how such changes in the law can be effected by rules of court,[74] since the new rule now has full statutory effect in the Supreme Court Act 1981.

The Inland Revenue Commissioners *case*

The House of Lords gave a new and liberal but somewhat uncertain character to the law of standing in the *Inland Revenue Commissioners* case.[75] This decision was to some extent a result of the above-mentioned procedural reforms. But in fact the rules gave the House a wide choice of solutions and their decision is an act of judicial policy which is clear in its general thrust if not in all particulars. In general it may be said to crystallise the elements of a generous and public-oriented doctrine of standing which had previously been sporadic and uncoordinated.

Application for judicial review was made by an association of taxpayers who resented the fact that the Inland Revenue had agreed to waive large arrears of income tax due from some 6,000 workers in the newspaper printing industry who for some years had collected pay under false names and defrauded the revenue. The applicants complained that the Inland Revenue had failed in their duty to administer the tax laws fairly as between different classes of taxpayers and that they had been unduly influenced by the fact that the printing workers might cause serious disruption by striking if their cooperation could not be obtained. The remedies sought were a declaration that the Inland Revenue had acted unlawfully and an order of mandamus requiring them to collect the arrears of tax. The Divisional Court granted leave ex parte but upon hearing both parties held, as a preliminary matter, that the applicants had not 'sufficient interest'. The Court of Appeal reversed them and the House of Lords reversed the Court of Appeal. The House of Lords' decision may be summarised as follows.

1. It was right to grant leave on the ex parte application.[76]
2. It was wrong to treat standing as a preliminary issue for determination independently of the merits of the complaint. 'In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be

[73] *The Discipline of Law*, 133.

[74] Rules of Court must deal with 'practice and procedure'. In the *Inland Revenue Commissioners* case (below), decided before the rule became statutory, Lord Diplock held that standing was a matter of practice in the exercise of the court's discretion: [1982] AC at 638B.

[75] *R.* v. *Inland Revenue Cmrs ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617. For comment see [1981] *PL* 322 (P. Cane).

[76] Decided unanimously.

taken together with the legal and factual context.'[77] It 'is not simply a point of law to be determined in the abstract or upon assumed facts—but upon the due appraisal of many different factors revealed by the evidence produced by the parties, few if any of which will be able to be wholly isolated from the others'.[78]

3. On the facts (not considered by the lower courts), the applicants had failed to show any breach of duty by the Inland Revenue. Their wide managerial powers allowed them to make 'special arrangements' of the kind in question, despite their legal duty to act fairly as between one taxpayer and another.[79]
4. But if it had been shown that the Inland Revenue had yielded to improper pressure, or had committed a breach of duty of sufficient gravity, the applicants might have succeeded.[80] Such rare cases apart, the assessment of one taxpayer is not the business of another, individual assessments being confidential.[81] Rating assessments are another matter.[82]
5. The law as to standing is now the same for all the remedies available under Order 53.[82a] Mandamus is not subject to stricter rules than certiorari.[83] Injunction and declaration are available where certiorari would be available.[84]

The testing of an applicant's standing is thus made a two-stage process.[85] On the application for leave (stage one) the test is designed to turn away hopeless or meddlesome applications only. But when the matter comes to be argued (stage two), the test is whether the applicant can show a strong enough case on the merits, judged in relation to his own concern with it. As Lord Scarman put it:[86] 'The federation, having failed to show any grounds for believing that the revenue has failed to do its statutory duty, have not, in my view, shown an interest sufficient in law to justify any further proceedings by the court on its application.' He added that had reasonable grounds for supposing an abuse been shown, he would have agreed that the federation had shown a sufficient interest to proceed further.

The novel aspect of the second-stage test, as thus formulated, is that it does not appear to be a test of standing but rather a test of the merits of the complaint. The essence of standing, as a distinct concept, is that an applicant with a good case on

[77] [1982] AC at 630D (Lord Wilberforce). Lords Diplock and Scarman agreed, Lord Fraser disagreed, as also does Scots law: *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179, holding that 'the matter of locus standi is logically prior to and conceptually distinct from the merits of the case'; but in fact the court decided the merits first.

[78] At 656D (Lord Roskill).

[79] Decided unanimously.

[80] Decided unanimously.

[81] At 633C (Lord Wilberforce), 646E (Lord Fraser), 663A (Lord Roskill).

[82] At 632H (Lord Wilberforce); 646D (Lord Fraser); *Arsenal Football Club Ltd.* v. *Ende* [1979] AC 1, explained below, p. 739.

[82a] No change is made by CPR 54 discussed above, p. 655.

[83] At 640D (Lord Diplock), 646A (Lord Fraser—probably), 653C (Lord Scarman), 656G (Lord Roskill). See also *R.* v. *Metropolitan Police Cmr ex p. Blackburn*, The Times, 7 March 1980.

[84] At 639D (Lord Diplock), 646A (Lord Fraser—possibly), 648A (Lord Scarman), 656G (Lord Roskill—probably).

[85] See at 630C (Lord Wilberforce), 642E (Lord Diplock), 645E (Lord Fraser).

[86] At 654H; likewise at 644D (Lord Diplock).

the merits may have insufficient interest to be allowed to pursue it. The House of Lords' new criterion would seem virtually to abolish the requirement of standing in this sense. However remote the applicant's interest, even if he is merely one taxpayer objecting to the assessment of another, he may still succeed if he shows a clear case of default or abuse. The law will now focus upon public policy rather than private interest.[87]

Another, though minor, curiosity is that the House of Lords repeatedly spoke of the formula of Order 53 ('a sufficient interest in the matter to which the application relates') as the second-stage test whereas the Order makes it the first-stage test. Since they are substantially different tests, the same formula will hardly do for both. This may be another indication that the second-stage test is not in fact based upon a distinct concept of standing. That, again, is tantamount to saying that standing has been abolished as a restrictive principle of public law.

A citizen's action?

A recurrent theme of the speeches in the *Inland Revenue Commissioners* case is the 'change in legal policy'[88] which has greatly relaxed the rules about standing in recent years. This was put at its highest by Lord Diplock, who related it to 'that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime'.[89] He spoke of 'a virtual abandonment of the former restrictive rules as to the locus standi' of applicants for prerogative orders[90] and he approved the widest implications of the award of prohibition to a citizen seeking to prevent a local authority from licensing indecent films.[91] He also approved the eloquent words of Lord Denning MR in the same case:

> I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the court of law and seek to have the law enforced, and the courts *in their discretion*[92] can grant whatever remedy is appropriate.

Lord Diplock expressed the same point in his own words:[93]

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated

[87] For arguments for and against such an 'open system' see [1990] *PL* 342 (Sir K. Schiemann).
[88] At 656G (Lord Roskill).
[89] At 641C.
[90] At 640C.
[91] *R.* v. *Greater London Council ex p. Blackburn* [1976] 1 WLR 550; above, p. 686.
[92] Lord Diplock's italics.
[93] At 644E.

technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

Although Lord Diplock's speech was the most far-reaching in its terms, it is fully consistent with the majority view that the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved.[94]

In effect, therefore, a citizen's action, or *actio popularis*, is in principle allowable in suitable cases. Whether the case is suitable will depend upon the whole factual and statutory context, including any implications that can fairly be drawn from the statute as to who are the right persons to apply for remedies.[95] In fact the possibility of a citizen's action has long existed in the case of the prerogative remedies; but now the court may, in its discretion, grant a declaration or an injunction also. Although the House of Lords had laid it down in 1977 that only the Attorney-General could sue on behalf of the public for the purpose of preventing public wrongs, and that declarations could be granted only to litigants whose own legal position was in issue,[96] the House held that these sweeping statements were inapplicable to judicial review of governmental powers, to the prerogative remedies and to declarations and injunctions available in the same procedure under Order 53.[97] Lord Diplock pointed out that neither the Attorney-General's practices, nor the doctrine of ministerial responsibility to Parliament, were adequate to fill the 'grave lacuna' which would exist otherwise.[98] It would seem, *a fortiori*, that under Order 53 a ratepayer will now have standing to challenge the legality of his local authority's actions without needing to enlist the aid of the Attorney-General, provided only that he can show a good case.[99]

Uniformity of rules under Order 53

The House of Lords has made it clear that Order 53 signalises a rationalising and simplifying of the tangle of different rules which used to complicate the subject of remedies. The changes were, as Lord Roskill said, 'intended to be far-reaching'.[1] He continued:

[94] Approved in the *World Development Movement* case (below, p. 698) at 395 (Rose LJ), holding that 'standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case'.

[95] At 646C (Lord Fraser).

[96] *Gouriet* v. *Union of Post Office Workers* [1978] AC 435; above, p. 583.

[97] [1981] AC at 639A (Lord Diplock), 649F (Lord Scarman), 657H (Lord Roskill). Compare the liberal Scots doctrine in *Wilson* v. *IBA* 1979 SLT 279 (above, p. 584).

[98] At 644E.

[99] See *Barrs* v. *Bethell* [1982] Ch. 294 and *Steeples* v. *Derbyshire CC* (later reported: [1985] 1 WLR 256) there discussed.

[1] At 657E.

They were designed to stop the technical procedural arguments which had too often arisen and thus marred the true administration of justice, whether a particular applicant had pursued his claim for relief correctly, whether he should have sought mandamus rather than certiorari, or certiorari rather than mandamus, whether an injunction or prohibition, or prohibition rather than an injunction, or whether relief by way of declaration should have been sought rather than relief by way of prerogative order. All these and like technical niceties were to be things of the past. All relevant relief could be claimed under the head of 'judicial review', and the form of judicial review sought or granted (if at all) was to be entirely flexible according to the needs of the particular case. The claims for relief could be cumulative or alternative under rule 2 as might be most appropriate.

Not all the law lords were willing to go so far and to hold that the old technical rules could now be forgotten,[2] and as already mentioned, it is probably premature to treat them merely as history. There was a similar difference of opinion as to the discretion which the court may exercise.[3] But the House of Lords is clearly now determined to prevent technicalities from impeding judicial review so as to protect illegalities and derelictions committed by public authorities. The law about standing has moved forward, and the more progressive interpretations of it are probably the more likely to prove right in the future.[4]

Later decisions on standing

Since the decision of the House of Lords the law has continued to reflect the liberal character of their ruling and the elasticity of 'sufficient interest' for the purposes of judicial review. The House of Lords' condemnation of the practice of treating standing as a preliminary issue has inclined the courts to decide adversely on the merits of the case, taking standing for granted, where this offers an easier route to the solution. The Court of Appeal dealt in this way with challenges made by the Leader of the Opposition and three local authorities to proposals published by the Boundary Commission for the reorganisation of parliamentary constituencies; the alleged illegalities were clearly not made out, so that there was no need for the court to express any opinion about standing.[5]

Lord Diplock's 'single public-spirited taxpayer' has also received encouragement. In the capacity merely of a taxpayer and elector an individual was able to dispute (though unsuccessfully) the legality of the government's undertaking to pay its contribution of some £121 million to the European Economic Community,

[2] See at 631E (Lord Wilberforce), 646A (Lord Fraser). Lord Diplock (at 640A) and Lord Roskill (at 656E) said that decisions earlier than 1950 were no longer to be relied upon.

[3] Contrast Lord Diplock's 'unfettered discretion' (at 642E) with Lord Fraser's rejection of 'uncontrolled discretion' (at 646A).

[4] For comments on legal policy, see [1990] *PL* 342 (Sir K. Schiemann). For a detailed study see the Australian Law Reform Commission's report No. 27 (1985).

[5] *R. v. Boundary Commission for England ex p. Foot* [1983] QB 600.

claiming that the draft Order in Council laid before Parliament was ultra vires.[6] Quoting the House of Lords' decision, Slade LJ referred to the 'change in legal policy' and to the 'virtual abandonment' of the old restrictive rules. 'If only in his capacity as a taxpayer', he said, the applicant should have standing, and on the serious question raised the right of challenge should not belong to the Attorney-General alone. Another taxpayer, public-spirited no doubt but also self-interested, achieved standing on the same question as in the *Inland Revenue Commissioners* case, namely whether one taxpayer could complain that the Inland Revenue had treated another taxpayer too leniently.[7] The applicant was a chemical company which contended that the Inland Revenue had accepted from competitor companies an unduly low valuation of ethane contrary to the Oil Taxation Act 1975. Although this was 'one of the rare cases' where one taxpayer could complain of the treatment of another, it would seem that such an applicant with a genuine and substantial complaint is likely to be accorded standing. And on this occasion the complaint was upheld.

A farmer whose land had been used for the incineration of many slaughtered animals during the foot and mouth epidemic had standing to challenge the Secretary of State's plans for the disposal of the remains, even though it was said the challenge was brought simply to bolster the compensation due to him.[8]

Other individual applicants have had mixed fortunes, but on the whole have fared well. A journalist, in the capacity of a public-spirited citizen, has been able to obtain a declaration that it was unlawful for a magistrates' court to conceal the identity of the justices as a matter of policy.[9] The press, 'as guardian and watchdog of the public interest', was entitled to raise this 'matter of national importance'. It is held that every holder of a television licence has an interest in the quality of the programmes, so that a breach by the Independent Broadcasting Authority of its duty to monitor controversial programmes effectively was remedied by a declaration at the instance of a lady offended by the film *Scum*.[10] On the other hand an opponent of cigarette smoking was denied standing to seek to restrain the BBC from broadcasting a snooker championship sponsored by a tobacco company, since he was no more affected than anybody else and so could proceed only with

[6] *R.* v. *Her Majesty's Treasury ex p. Smedley* [1985] QB 657 (Sir John Donaldson MR not deciding positively). Contrast *Wilson* v. *Grampian Regional Council* 1993 SLT 588.

[7] *R.* v. *Attorney-General ex p. Imperial Chemical Industries Plc* (1986) 60 TC 1. *In R.* v. *Camden LBC ex p. H* [1996] ELR 360, the victim of a school shooting incident was granted judicial review on the ground that the decision of the governors was faulty and too lenient.

[8] *R. (Feakins)* v. *Secretary of State for the Environment* [2003] EWCA Civ. 1546 (motive of claimant relevant but not, in this case, determining).

[9] *R.* v. *Felixstowe Justices ex p. Leigh* [1987] QB 582 (mandamus in respect of a particular decision refused since the journalist could show no sufficient interest in the identity of the justices).

[10] *R.* v. *Independent Broadcasting Authority ex p. Whitehouse*, The Times, 14 April 1984. In *Ogle* v. *Strickland* (1987) 71 ALR 41 priests were allowed standing to oppose registration of an allegedly blasphemous film, their vocation giving them a special interest.

the aid of the Attorney-General.[11] The apparent inconsistency of these decisions may be due to the fact that standing is no longer a matter separate from the merits of the complaint. A public duty may amount to a sufficient interest to confer standing, so that a minister may challenge a local authority's budgetary estimates,[12] and a chief constable's duty to secure the restoration of stolen property can justify his application for an injunction to prevent its dissipation in a third party's hands.[13] In Canada a citizen was allowed to complain that statutory provisions about abortion conflicted with the right to life in the Canadian Bill of Rights;[14] but in New Zealand a doctor was not allowed to challenge a duly certified abortion with which he had no connection.[15]

If a personal right or interest is in issue the case is still stronger. A gipsy living on a caravan site may apply for an order that the Secretary of State should direct the local authority to fulfil its statutory duty to provide an adequate site.[16] No objection was raised to the standing of a mother of five young girls who sued a government department for a declaration that contraceptive advice given to her daughters without her knowledge, as proposed in a departmental circular, would infringe her rights as a parent, even though no such advice had been given and she was in no different position from any similar parent.[17] The holder of a gaming licence who objects to the grant of a licence to another company may proceed by judicial review.[18] So may a barrister who complains that a disciplinary decision in a case reported by him was too lenient.[19]

State agencies, amenity societies and other representative bodies have profited from the relaxation of the former restrictions. The Equal Opportunities Commission, in the light of its statutory duty 'to work towards the elimination of discrimination', was able to contend (successfully) that European Union law against sex discrimination was violated by British legislation which excluded part-time workers from compensation for unfair dismissal and from redundancy payments,

[11] *Holmes* v. *Checkland*, The Times, 15 April 1987.
[12] *R.* v. *London Borough of Haringey ex p. Secretary of State for the Environment* [1991] COD 135.
[13] *Chief Constable of Kent* v. *V.* [1983] QB 34.
[14] *Minister of Justice* v. *Borowski* (1981) 130 DLR (3d) 588.
[15] *Wall* v. *Livingstone* [1982] 1 NZLR 734.
[16] *R.* v. *Secretary of State for the Environment ex p. Ward* [1984] 1 WLR 834.
[17] *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (the active defendant was the DHSS). Contrast *R. (Bulger)* v *Home Secretary* [2001] EWHC Admin. 119 (father of murdered child lacked standing to challenge tariff period (see above, p. 76) set for murderer; his standing was limited to the impact of the decision on him personally).
[18] *Patmor Ltd.* v. *City of Edinburgh District Licensing Board* 1987 SLT 492; contrast *Matchett* v. *Dunfermline DC* 1993 SLT 537; and see *R.* v. *Department of Transport ex p. Presvac Engineering Ltd.* (1992) 4 Admin. LR 121 (trade competitor allowed standing).
[19] *R.* v. *General Council of the Bar ex p. Percival* [1991] 1 QB 212 (relief refused). But a litigant may not complain that her counsel was insufficiently remunerated: *R.* v. *Legal Aid Board ex p. Bateman* [1992] 1 WLR 711.

since many more women than men were in part-time employment.[20] Where a government department had failed to review cases of benefits wrongfully refused, contrary to social security regulations, because the administrative cost far outweighed the amount at stake, standing was accorded to the Child Poverty Action Group, acting in the interests of claimants; but at the same time standing was refused to the Greater London Council who were held not to have a sufficient interest.[21] In the same way the National Union of Mineworkers had standing to represent one of its members, but the Trades Union Congress had not.[22] The Royal College of Nursing was entitled to sue a government department in order to settle a doubtful question as to the legality of nurses performing certain functions in terminating pregnancy.[23] A local action group were able to proceed against a district council in an attempt to force them into action to prevent the demolition of listed buildings.[24] An environmental defence society had standing to challenge the authorisation of a nuclear generator.[25] A similar society with worldwide concerns was allowed to contest (successfully) the government's proposed overseas development grant of £316 m. for the construction of the Pergau dam in Malaysia on the ground that, being uneconomic the project was not within statutory authority.[26] In New Zealand an environmental group had standing to oppose the construction of an aluminium smelter by disputing the validity both of the government's order[27] and of the company's planning application,[28] and members of football clubs in New Zealand were allowed standing to challenge the decision of the football union to send a team to South Africa.[29] Australian aborigines were also able to oppose plans for a smelter in Victoria, having a special interest in the land concerned.[30] The Campaign for Nuclear Disarmament even had standing to

[20] *R.* v. *Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] 1 AC 1, Lord Jauncey dissenting on the question of standing.

[21] *R.* v. *Secretary of State for Social Services ex p. Greater London Council*, The Times, 16 August 1984. The standing of the CPAG was accepted by the Court of Appeal in a similar case: *R.* v. *Secretary of State for Social Services ex p. Child Poverty Action Group* [1990] 2 QB 540. Contrast *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179 (standing refused to welfare organisation disputing legality of circular on social security payment for severe weather).

[22] *R.* v. *Chief Adjudication Officer ex p. Bland*, The Times, 6 February 1985.

[23] *Royal College of Nursing* v. *Department of Health and Social Security* [1981] AC 800.

[24] *R.* v. *Stroud DC ex p. Goodenough* (1980) 43 P & CR 59 (no relief granted).

[25] *R.* v. *Inspectorate of Pollution ex p. Greenpeace Ltd* (No. 2) [1994] 4 All ER 329.

[26] *R.* v. *Secretary of State for Foreign and Commonwealth Affairs ex p. World Development Movement Ltd* [1995] 1 WLR 386. See similarly *R.* v. *Secretary of State for the Environment ex p. Friends of the Earth Ltd* (1994) 7 Admin. LR 26 (claim for proper enforcement of water quality standards: standing allowed).

[27] *Environmental Defence Society Inc.* v. *South Pacific Aluminium Ltd.* (No. 3) [1981] 1 NZLR 216.

[28] (As above) (No. 4) [1981] 1 NZLR 530. Contrast *Everyone* v. *Tasmania* (1983) 49 ALR 381, where the High Court of Australia held that 'mere intellectual or emotional concern' was not enough.

[29] *Finnigan* v. *New Zealand Rugby Football Union Inc.* [1985] 2 NZLR 159.

[30] *Onus* v. *Alcoa of Australia Ltd.* (1981) 149 CLR 27.

apply for an advisory declaration as to the legality of the use of armed force against Iraq (although the claim was dismissed primarily as non-justiciable).[31]

In contrast to these decisions the High Court refused standing to a trust company formed for the purpose of preserving the remains of the Rose Theatre in London; which the Secretary of State refused to list as an ancient monument.[32] A series of propositions was laid down by the judge as to standing, but they did not include any allowance for the strength, or rather weakness, of the case, which according to the House of Lords' doctrine should have been the dominant factor. It is significant, also, that the judge first dealt fully with the merits, rejecting the claim, before coming to the question of standing and deciding it restrictively. If, however, the applicants could have shown any possibility that the Secretary of State had acted improperly the decision on standing should have been different, since otherwise no one would have had standing and the law could have been violated with impunity. The case is best regarded as one where an arguable issue was not shown.

The problem of the standing of neighbours and third parties alleging the illegality of a planning permission[33] may now at last be resolved. In one case, where the grant of permission for a 'leisure centre' was held to be vitiated by bias, a neighbour was able to sue both because his land adjoined the proposed development and, apparently, because he was a ratepayer.[34] A hostile precedent of 1966[35] was obviated by the 'considerable development in the field of administrative law' and the new law of judicial review. In another case, where a number of rival companies had applied for permission to build a supermarket, an unsuccessful applicant challenged the legality of the permission eventually granted without their standing being questioned.[36]

In none of these cases has it been suggested that there is any remaining difference as regards standing between the various remedies available by way of judicial review. Nor, despite conflicting authorities, are unincorporated associations likely to be held disqualified from suing in their own names.[37]

The question of standing is held to go to the jurisdiction of the court, so that it is

[31] *R. (Campaign for Nuclear Disarmament)* v. *Prime Minister* [2002] EWHC 2777; The Times, 27 December 2002.

[32] *R.* v. *Secretary of State for the Environment ex p. Rose Theatre Trust Co.* [1990] 1 QB 504, not followed in *R.* v. *Somerset CC ex p. Dixon* [1992] COD 323 for reasons explained by Sedley J at 327 (note).

[33] For this see above, p. 683.

[34] *Steeples* v. *Derbyshire CC* [1985] 1 WLR 256 (decided in 1981, before the House of Lords' decisions in the *Inland Revenue Commissioners* case and *O'Reilly* v. *Mackman*). See similarly *R.* v. *Somerset CC ex p. Dixon* (above).

[35] The *Gregory* case, above, p. 683.

[36] *R.* v. *St Edmundsbury BC ex p. Investors in Industry Commercial Properties Ltd.* [1985] 1 WLR 1168 (complaint not upheld) and see *R.* v. *Ceredigion CC ex p. McKeown* [1997] COD 465; *R.* v. *St Edmundsbury DC ex p. Walton*, (1999) 11 Admin. LR 648 (planning consent quashed for unlawful delegation). Cf. *Consumers Co-operative Society (Manawatu) Ltd.* v. *Palmerston North CC* [1984] 1 NZLR 1 (standing allowed to commercial rival).

[37] See above, p. 698.

not open to the respondent to waive the objection and thus confer jurisdiction by agreement.[38]

Where there is express statutory provision for judicial review, standing will depend upon the interpretation of the Act in question, as explained later.[39]

Stricter European doctrines

The progressive relaxation of the rules about standing is not reflected in the law of the European Union or in the law of European human rights. The European rules have been briefly explained and illustrated in an earlier chapter.[40] They disallow actions by representative bodies on behalf of their members, so that the numerous English examples of successful claims by trade unions, environmental bodies and amenity societies have no European counterparts. Claims under the European Convention on Human Rights, incorporated in similar words by the Human Rights Act 1998, can be made only by a 'victim' who has himself suffered a wrong.

DISCRETION, EXHAUSTION, IMPLIED EXCLUSION

Discretion and its consequences

The most active remedies of administrative law—declaration, injunction, certiorari, prohibition, mandamus—are discretionary and the court may therefore withhold them if it thinks fit. In other words, the court may find some act to be unlawful but may nevertheless decline to intervene.[41] In contrast, habeas corpus may be claimed as of right and so may remedies in tort, contract or restitution.

Such discretionary power may make inroads upon the rule of law, and must therefore be exercised with the greatest care. The following passage from an earlier edition of this book has twice been approved judicially:[42]

There are grave objections to giving the courts discretion to decide whether governmental

[38] *R.* v. *Secretary of State for Social Services ex p. Child Poverty Action Group* [1990] 2 QB 540.

[39] Below, p. 736.

[40] Above, pp. 206 (EU), 169 (ECHR).

[41] See Should Public Law Remedies be Discretionary? [1991] *PL* 64 (Lord Justice Bingham), discussing examples; Lord Cooke of Thorndon, *The Discretionary Heart of Administrative Law* in Forsyth and Hare (eds), *The Golden Metwand*, 203, discussing arbitrariness, discretionary relief and alternative remedies.

[42] 6th edn., 354, quoted in *Bugg* v. *Director of Public Prosecutions* [1993] QB 473 at 499 (Woolf LJ and Pill J) and in *R.* v. *Wicks* [1998] AC 92 at 121 (Lord Hoffmann).

action is lawful or unlawful: the citizen is entitled to resist unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion. 'To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from rock to sand.'[43] The true scope for discretion is in the law of remedies, where it operates within narrow and recognised limits and is far less objectionable. If the courts were to undermine the principle of ultra vires by making it discretionary, no victim of an excess or abuse of power could be sure that the law would protect him.

In any normal case the remedy accompanies the right. But the fact that a person aggrieved is entitled to certiorari *ex debito justitiae* does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy. This means that he may have to submit to some administrative act which is ex hypothesi unlawful. For, as has been observed earlier, a void act is in effect a valid act if the court will not grant relief against it.[44]

Nevertheless distinctions may have to be drawn according to the nature of the remedy sought, and according to the differences between public and private law remedies. Certiorari and prohibition have as their primary purpose the preservation of order in the legal system by preventing excess and abuse of power, rather than the final determination of private rights.[45] If certiorari is refused in discretion, the applicant is not prevented from disputing the legality of the administrative decision in other proceedings, e.g. by suing his tenant for the original rent after a rent tribunal has ordered a reduction and an application for certiorari has failed.[46] In other words, he cannot be met with a plea of res judicata, and he may always show, if he can, that the tribunal has no jurisdiction.[47] It would be logical to extend the same doctrine to all the remedies now obtainable by judicial review.

Examples of refusal of relief

An applicant may lose his claim to relief because his own conduct has been unmeritorious[48] or unreasonable.[49] Examples of this have already been given in

[43] *Scott* v. *Scott* [1913] AC 417 at 477 (Lord Shaw).

[44] Above, p. 300. This and the preceding paragraph were approved by the Court of Appeal in *R.* v. *Governors of Small Heath School ex p. Birmingham CC* (1989) 2 Admin. LR 154 at 167.

[45] Above, p. 684.

[46] See above, p. 239.

[47] For res judicata in relation to prerogative remedies see above, p. 249.

[48] As in *R.* v. *Kensington General Commissioners of Income Tax ex p. Polignac* [1917] 1 KB 486 (material facts suppressed in affidavit); *White* v. *Kuzych* [1951] AC 585 (breach of contract); *Windsor and Maidenhead RBC* v. *Brandrose Investments Ltd.* [1983] 1 WLR 509 (council ought not to have litigated); *R.* v. *Secretary of State for Education and Science ex p. Birmingham CC* (1984) 83 LGR 79 (council changed its mind about school closure and pleaded its own procedural error to nullify Secretary of State's confirmation order); *R.* v. *Brent LBC ex p. Dorot Properties Ltd.* [1990] COD 378 (ratepayer with bad record: order for refund of overpayment refused). Contrast *Taylor* v. *Newham LBC* [1993] 1 WLR 444 (no discretion to refuse enforcement by injunction of tenant's statutory right to buy).

[49] As in *ex. p. Fry* [1954] 1 WLR 730; *Fulbrook* v. *Berkshire Magistrates Courts Committee* (1970) 69 LGR 75 (above, p. 509).

the context of natural justice.[50] An applicant may also have raised his objection too late.[51] If a party appearing before a tribunal knows that it is improperly constituted because one of the members has an interest in the case, but raises no objection at the time, he may be refused certiorari.[52] He is treated, in effect, as having waived the objection by accepting the tribunal's jurisdiction. It is a general rule that the court will not intervene in favour of an applicant who has allowed a court or authority to proceed to a decision without setting up an objection of which he was aware at the time—'except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant'.[53]

The court may also withhold remedies for objective reasons—a tendency which has come to the fore with the widening ambit of judicial review.[54] The Court of Appeal gave a notable example in a case where a take-over bid had been referred to the Monopolies and Mergers Commission.[55] The chairman of the Commission, being satisfied by assurances from the bidding company, decided that the controversial part of the proposals had been abandoned, and obtained the Secretary of State's consent to discontinuing the reference. But under the statutory procedure it should have been the Commission itself, and not the chairman alone, who decided the question of abandonment. It was therefore a case of ultra vires delegation. But a rival company, also a bidder, was refused certiorari to quash the discontinuance of the reference. The court considered that the Commission would have reached the same conclusion as the chairman and that account should be taken of the demands of good public administration. These were that substance should prevail over form; that there should be speed of decision, especially in the financial field; that the Secretary of State could protect the public interest; that the statutory scheme was not intended to benefit rival companies; and that decisiveness and finality were vital. The result was that the reference stood discontinued, despite the procedural illegality.

Another striking case was where the court declined to quash unlawful regulations. Before making regulations for the housing benefits scheme the Secretary of State had a mandatory duty to consult organisations representing housing authorities, but his consultation with them was so inadequate both as to time and as to substance that he was held to have failed to consult. The court granted a

[50] Above, p. 509.

[51] As in *R.* v. *Stafford Justices ex p. Stafford Corporation* [1940] 2 KB 33; *R.* v. *Aston University Senate ex p. Roffey* [1969] 2 QB 538; *R.* v. *Herrod ex p. Leeds City Council* [1976] QB 540, but see [1978] AC 403; *R.* v. *Secretary of State for the Environment ex p. Walters* (1998) 30 HLR 328 (also involving defective consultation and third party interests).

[52] *R.* v. *Williams ex p. Phillips* [1914] 1 KB 608; above, p. 464.

[53] *London Cpn.* v. *Cox* (1867) LR 2 HL 239 at 283; *Broad* v. *Perkins* (1888) 21 QBD 533.

[54] See, e.g., *R.* v. *Brent LBC ex p. O'Malley* (1997) 10 Admin. LR 265 (defective consultation but effect minimal); *R.* v. *South Tyneside MBC ex p. Cram* (1997) 10 Admin. LR 477 (disruptive pupil caused threat of teachers' strike—mandamus refused).

[55] *R.* v. *Monopolies and Mergers Commission ex p. Argyll Group Plc* [1986] 1 WLR 763.

declaration to this effect but refused to quash the regulations by certiorari or to declare them void, since they had already been acted upon by local authorities and had been consolidated into new regulations which had not been challenged. Since the applicants did not object to the substance of the regulations, there was no point in invalidating them. So, unlawful though they were, they took effect.[56] In this and the similar cases cited the decisions amounted to a disguised form of prospective overruling, denying relief to the party but establishing the invalidity for the future.[57]

The freedom with which the court can use its discretion to mould its remedies to suit special situations is shown by two decisions already encountered. One was the case where the House of Lords refused mandamus to a police probationer wrongly induced to resign, although he made out a good case for that remedy, in order not to usurp the powers of the chief constable, and instead granted him an unusual form of declaration to the effect that he was entitled to the remedies of unlawful removal from office except for reinstatement.[58] The other was the case of the Take-over Panel, where in fact no relief was granted but the Court of Appeal explained the novel way in which remedies should be employed in future cases, with the emphasis on declaration rather than certiorari and on 'historic rather than contemporaneous' relief.[59] The same freedom to mould remedies exists in European Union law, where the European Court of Justice may declare non-retroactivity when holding some act or regulation to be void.[60]

The court may also exercise a discretion not to interfere with the internal discipline of forces such as the police and fire brigades.[61] Where time is needed for making arrangements to comply with the court's judgment, an order of prohibition may be withheld in discretion, with liberty to apply for it again later.[62]

Exhaustion of remedies—(a) the principle

In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as

[56] *R.* v. *Secretary of State for Social Services ex p. Association of Metropolitan Authorities* [1986] 1 WLR 1. See similarly *R.* v. *Secretary of State for Social Services ex p. Association of Metropolitan Authorities* (1993) 5 Admin. LR 6; *R.* v. *Rochdale MBC ex p. Schemet* [1993] COD 113; *R.* v. *North West Thames Regional Health Authority ex p. Daniels* [1994] COD 44; *R.* v. *Sheffield CC ex p. Hague*, The Times, 20 August 1999.

[57] See above, p. 300.

[58] *Chief Constable of North Wales Police* v. *Evans* [1982] 1 WLR 1155 (above, p. 509).

[59] *R.* v. *Panel on Take-overs and Mergers ex p. Datafin Plc.* [1987] QB 815 (above, p. 641).

[60] See, e.g., *Société des Produits de Mais SA* v. *Administration des Douanes et Droits Indirects* [1988] 1 CMLR 459; and above, p. 207.

[61] *Ex p. Fry* (above); *Buckoke* v. *Greater London Council* [1970] 1 WLR 1092.

[62] *R.* v. *Greater London Council ex p. Blackburn* [1976] 1 WLR 550.

soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not.[63] An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal, which has already been emphasised. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal, for example where an appeal is already in progress,[64] or the object is to raise a test case on a point of law.[65]

In the *Electricity Commissioners* case, accordingly, even though the minister might in the end not have confirmed the scheme, the proceedings were halted by prohibition as soon as it was shown that the scheme would be invalid.[66] Where a police officer, invalidly dismissed by a watch committee, did not exercise his statutory right of appeal to the Home Secretary, this was held no bar to his obtaining a declaration from the court.[67] Similar decisions have many times been given.[68] A redundant vestry clerk was not obliged to pursue his right of appeal to the Treasury before obtaining mandamus to require the local authority to compute his compensation correctly.[69] A vicar did not have to appeal to the Court of the Arches before obtaining prohibition against a Consistory Court which had not given him a hearing.[70] A planning permission vitiated by unreasonable conditions may be quashed at once on certiorari, even though there is a right of appeal to the Secretary of State and a further appeal to the High Court on a question of law.[71] A doctor contesting the legality of a deduction from his pay by a health service committee need not first follow the prescribed procedure of making representa-

[63] Where there is a right of appeal within a time limit, RSC Ord. 53 r. 3(6) (reproduced in CPR 1998, sched. 1) empowers the court to adjourn an application for certiorari until the appeal is determined or the time limit has expired. But this does not affect the principle here discussed.

[64] As in *R.* v. *Civil Service Appeal Board ex p. Bruce* [1989] 2 All ER 907 (civil servant appealed to industrial tribunal); *Nahar* v. *Strathclyde Regional Council* (above); *R.* v. *Commissioner for the Special Purposes of the Income Tax Acts ex p. Napier* [1988] 3 All ER 166; *Wardle* v. *A.-G.* [1987] 1 NZLR 296.

[65] *R.* v. *Chief Adjudication Officer ex p. Bland*, The Times, 6 February 1985.

[66] [1924] 1 KB 171; above, p. 607.

[67] *Cooper* v. *Wilson* [1937] 2 KB 309.

[68] See, e.g., *Burder* v. *Veley* (1841) 12 Ad. & E 263; *White* v. *Steele* (1862) 12 CBNS 383 at 409; *London Cpn.* v. *Cox* (1867) LR 2HL 239 at 278; *R.* v. *Comptroller-General of Patents ex p. Parke Davis & Co.* [1953] 1 All ER 862 at 865 (affirmed on other grounds, [1954] AC 321); *R.* v. *Wimbledon Justices ex p. Derwent* [1953] 1 All ER 390; *Graddage* v. *Haringey London Borough Council* [1975] 1 WLR 241; *R.* v. *Galvin* (1949) 77 CLR 432; *Bell* v. *Ontario Human Rights Commission* (1971) 18 DLR (3d) 1; *Martin* v. *Ryan* [1990] 2 NZLR 209.

[69] *R.* v. *Stepney Cpn.* [1902] 1 KB 317.

[70] *R.* v. *North ex p. Oakey* [1927] 1 KB 491, citing earlier cases.

[71] *R.* v. *Hillingdon Borough Council ex p. Royco Homes Ltd.* [1974] 1 QB 720. Compare *Munnich* v. *Godstone Rural District Council* [1966] 1 WLR 427.

tions to the Secretary of State.[72] These decisions confirm what was said in one of the classic cases: 'A party is not concluded by not appealing against a nullity'.[73] If the order is one which the applicant is entitled for any reason to have quashed as a matter of law, it is pointless to require him first to pursue an administrative appeal on the merits.

The same principle applies in habeas corpus cases, so that a detained immigrant need not go through the procedure of immigration appeals before he can apply for his release on the ground that he is detained illegally.[74] Domestic tribunals such as trade union disciplinary committees are also subject to the same rule,[75] even though their jurisdiction is based upon contract and even though the terms of the contract expressly purport to exclude the jurisdiction of the court[76]—for this the court will not allow.

The remedy of mandamus has a similar history as regards alternative remedies, as explained in the previous chapter.

A paradoxical contention, occasionally put forward, is that the exercise of an administrative appeal implies a waiver of judicial remedies. In *Ridge* v. *Baldwin* the Court of Appeal held that since the chief constable had appealed to the Home Secretary unsuccessfully he had thereby waived his right to seek a declaration from the court that his dismissal was legally invalid.[77] The House of Lords reversed this decision, which rests on an obvious confusion between appeal on the merits of the case and judicial review of the legality of the whole proceeding. Since these are quite different things, it would be an illogical trap if they were mutually exclusive. Administrative remedies are highly desirable and people should be encouraged to use them. But to allow unlawful action to stand, merely because it has been appealed against on its merits, is indefensible.

Exhaustion of remedies—(b) conflicting opinions

In the past two decades the case-law has produced a crop of judicial statements which conflict with the rule just explained.[78] It has been said that, where there is

[72] *Roy* v. *Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624.

[73] *Bunbury* v. *Fuller* (1853) 9 Ex. 111 at 135.

[74] *R.* v. *Governor of Pentonville Prison ex p. Azam* [1974] AC 18 at 31, 41.

[75] *Lawlor* v. *Union of Post Office Workers* [1965] Ch 712; *Leigh* v. *National Union of Railwaymen* [1970] Ch. 326.

[76] *Leigh* v. *National Union of Railwaymen* (above). Contrast *White* v. *Kuzych* [1951] AC 585, decided when the attitude of the courts was different.

[77] *Ridge* v. *Baldwin* [1963] 1 QB 539, reversed [1964] AC 40. See also *Annamunthodo* v. *Oilfield Workers' Trade Union* [1961] AC 945. For sound statements see *Ackroyd* v. *Whitehouse* [1985] 2 NSWLR 239 at 248 (Kirby P); *Mensah* v. *Home Secretary* 1992 SLT 177.

[78] For discussion, mostly antithetical to the views here expressed, see Lewis, *Judicial Remedies in Public Law*, 2nd edn., 11–043; [1992] *CLJ* 138 (C. Lewis); J. Beatson in Forsyth and Hare (eds.) *The Golden Metwand*, 230: Lord Cooke of Thorndon, ibid, 203.

some right of appeal, judicial review will not be granted 'save in the most exceptional circumstances'; and that the normal rule is that the applicant 'should first exhaust whatever other rights he has by way of appeal'.[79] A decision of the Court of Appeal goes further and suggests that, in the absence of a point of law, the existence of alternative dispute mechanisms or statutory complaint procedures is sufficient to preclude judicial review.[80] These propositions, which at first rested upon dicta rather than authority, have been prompted by the rapid growth of applications for judicial review and a judicial desire to limit them. The Law Commission also supports them and favours a general rule requiring the exhaustion of alternative remedies before judicial review is allowed.[81] This is, however, a controversial subject and there is an issue of principle.

In a tax case, where the complainant had failed to show abuse of power by the commissioners, Lord Scarman said that it was 'a proposition of great importance' that 'a remedy by way of judicial review is not to be made available where an alternative remedy exists', and that 'it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision'.[82] But he at once went on to say that judicial review would be available had the commissioners done something equivalent to an abuse of power. Lord Templeman said that 'judicial review should not be granted where an alternative remedy is available', but almost in the same breath he neatly epitomised the familiar grounds which in such a case would allow review,[83] and he added, significantly, that the case in hand was exceptional in that the appeal procedure could not operate if the conduct of the commissioners was unlawful.[84] In another tax case Sir John Donaldson MR said that 'it is a cardinal principle that, save in the most exceptional circumstances, [the judicial review] jurisdiction will not be exercised where other remedies were available and have not been used'.[85] He repeated these words when in fact granting judicial review to police officers, despite their having lodged appeals to the Home Secretary, after they had been

[79] *R.* v. *Chief Constable of Merseyside Police ex p. Calveley* [1986] QB 424 at 435 (May LJ). In Scotland the rules of court require resort to appeal if available: see *O'Neill* v. *Scottish Joint Negotiating Committee for Teaching Staff* 1987 SLT 648.

[80] *R. (Cowl)* v. *Plymouth CC* [2001] EWCA Civ. 1935; [2002] 1 WLR 803 (CA) ('heavy obligation not to resort to litigation if at all possible': para. 27) (Lord Woolf). See [2002] *PL* 203 (Le Sueur).

[81] Law Com. No. 226 (1994), paras 5.33, 5.35, not mentioning any problem of principle.

[82] *R.* v. *Inland Revenue Commissioners ex p. Preston* [1985] AC 835 at 852 (allegations of unfairness and abuse of power not upheld). See likewise *R.* v. *Inland Revenue Commissioners ex p. Opman International UK* [1986] 1 All ER 328.

[83] 'Where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers.'

[84] At 862. For this supposed difficulty see below, p. 950.

[85] *R.* v. *Epping and Harlow General Commissioners ex p. Goldstraw* [1983] 3 All ER 257 at 262 (no case for judicial review shown): see similarly *R.* v. *Panel on Take-overs and Mergers ex p. Guinness Plc* [1990] 1 QB 146 at 177.

unfairly dismissed in a typical natural justice case which had nothing exceptional about it.[86] In a case which was indeed exceptional the Court of Appeal accepted the 'very strong dicta' quoted above and rejected the criticism of them in this book.[87] Those dicta led also to the denial of judicial review of a magistrates' court's conviction of a motorist who had appealed to the Crown Court but had been given an unfair trial. It was held that a fair retrial by that court was the proper remedy despite the citation of about a dozen precedents in favour of judicial review.[88]

Deeper research produced a very different result in another magistrates' court case where an irregular conviction was quashed on judicial review despite the right of appeal to the Crown Court.[89] Numerous authorities going back to 1924 showed that judicial review had constantly been allowed for quashing convictions vitiated by unfairness, bias or procedural irregularity, rights of appeal notwithstanding. Remarks of Lord Caldecote CJ in a case of 1942 make an almost comical contrast with the dicta of Lord Scarman and Lord Donaldson:[90]

> It remains to consider the argument that the remedy of certiorari is not open to the appellant because others were available. It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated. It would mean asking the court to consider as a question of law whether the justices were right in convicting a man without hearing his evidence. That is so extravagant an argument as not to merit a moment's consideration.

Quoting these remarks, and omitting all mention of the dicta, Lord Bingham CJ said that to refuse judicial review for unfairness or bias 'would be to emasculate the long-established supervisory jurisdiction of this court over magistrates' courts, which has over the years provided an invaluable guarantee of the integrity of

[86] *R.* v. *Chief Constable of Merseyside Police ex p. Calveley* (above) at 433, May and Glidewell LJJ concurring. See similarly *R.* v. *Inspector of Taxes ex p. Kissane* [1986] 2 All ER 37 (allegation of improper decision by tax inspector: judicial review granted despite availability of appeal).

[87] *R.* v. *Birmingham CC ex p. Ferrero Ltd* [1993] 1 All ER 530. The exceptional factor was danger to children from the sale of certain toys, which required immediate prohibition. 'Common sense dictates that protection of the public must take precedence over fairness to the trader' (Taylor LJ). See also *R.* v. *Ministry of Defence Police ex p. Sweeney* [1998] COD 122. See also *R.* v. *Humberside CC ex p. Bogdal* (1992) 5 Admin. LR 405 (need to protect occupants of old people's home); *R.* v. *Special Educational Needs Tribunal ex p. Fairpo* [1996] COD 180; *R.* v. *Brighton and Hove BC ex p. Nacion* (1999) 11 Admin. LR 472 (clear statutory intent). Contrast the allowance of judicial review in *R.* v. *Devon CC ex p. Baker* [1995] 1 All ER 73 (point of law); *R.* v. *Bristol Magistrates' Court ex p. Doles* [1994] COD 139 (natural justice); *R.* v. *Falmouth and Truro Health Authority ex p. South West Water Services Ltd.* [1999] COD 305 (lack of consultation); *R.* v. *Wiltshire CC ex p. Lazard Bros Ltd*, The Times, 31 December 1997 (plain error of law).

[88] *R.* v. *Peterborough Magistrates' Court ex p. Dowler* [1997] QB 911.

[89] *R.* v. *Hereford Magistrates' Court ex p. Rowlands* [1998] QB 110, rejecting the reasoning of *ex p. Dowler* (above). For comment on these decisions see [1997] *PL* 589 (Wade).

[90] *R.* v. *Wandsworth JJ ex p. Read* [1942] 1 KB 281.

proceedings in those courts'. The long line of decisions brings out what the dicta ignore, namely that appeal and review exist for different purposes, the first concerning merits and the second concerning legality,[91] and that review of legality is the primary mechanism for enforcing the rule of law under the inherent jurisdiction of the court. If an applicant can show illegality, it is wrong in principle to require him to exercise a right of appeal. Illegal action should be stopped in its tracks as soon as it is shown.[92]

For this purpose there should be no relevant difference between civil and criminal cases. Nor should the much-extended scope of judicial review be allowed to restrict its use as a matter of principle.[93] But it has to be recognised that what ought to be a clear distinction has been blurred by the overlap in the area of error of law, which is now held to be a form of ultra vires, and so a ground for judicial review, but which is particularly suitable for correction on appeal.[94] In addition there may be classes such as planning cases,[95] tax cases,[96] employment cases,[97] and immigration cases[98] for which specialised appeal systems exist, where the court may reasonably hold that appeal is the normal remedy, subject always to the grant of review in case of excess or abuse of power, breach of natural justice, and so forth.[99] What does not seem right is to insist that there is something exceptional about judicial review, that remedies given for different purposes must be exhausted first, and that the choice of remedies depends upon convenience, speed, expertise and other factors which, being imponderable, produce procedural dilemmas and potential traps for litigants. Where appeal lies to a minister, as in many planning cases, that is plainly an unsatisfactory alternative to judicial review in any case turning on questions of law.

In reality the courts are better than their word. When genuine grounds for judicial review are alleged, it is the refusal rather than the grant of review which is

[91] See *Kemper Reinsurance* v. *Minister of Finance* [1998] 3 WLR 630 (PC).

[92] For comment on this see Lord Cooke of Thorndon in *The Golden Metwand*, 215.

[93] For a contrary view see J. Beatson in *The Golden Metwand*, 221 and sources there cited.

[94] But see *R.* v. *Peterborough CC ex p. Hanif* [1992] COD 491 (taxi-cab licence: appeal to lay magistrates on point of law unsuitable); *R.* v. *Leeds CC ex p. Mellor* [1993] COD 352 (appeal to Crown Court unsuitable); *R.* v. *Leeds CC ex p. Hendry*, The Times, 20 January 1994 (similar).

[95] *R.* v. *Epping Forest DC ex p. Green* [1993] COD 81; *R.* v. *Home Secretary ex p. Watts* [1997] COD 152.

[96] See, e.g., *R.* v. *Commissioners for the Special Purposes of the Income Tax Acts ex p. Napier* [1988] 3 All ER 166; *R.* v. *Poole Justices ex p. Benham* (1991) 4 Admin. LR 161; *Horley Development Inc.* v. *CIR* [1996] 1 WLR 727; *R.* v. *Commissioners of Customs and Excise ex p. Bosworth Beverages Ltd.*, The Times, 24 April 2000.

[97] As in *R.* v. *Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] 1 AC 1 (review refused to individual applicant, who could appeal, but granted to EOC, which could not).

[98] As in *R.* v. *Home Secretary ex p. Swati* [1986] 1 WLR 477; *R.* v. *Home Secretary ex p. Capti-Mehmet* [1997] COD 61. Contrast *Choi* v. *Home Secretary* 1996 SLT 590 (review allowed).

[99] As in *Accountant in Bankruptcy* v. *Allans of Gillock Ltd.* 1991 SLT 765; *Macksville Hospital* v. *Mayze* (1987) 10 NSWLR 708.

the exceptional course. Observing this inconsistency, Lord Justice Bingham recorded his impression that the exhaustion doctrine 'is more often proclaimed than applied', and he questions whether 'in practice the reality quite matches the rhetoric'. He does not find the arguments for the principle altogether convincing, and he concludes that where unlawful, as opposed to unjustified, treatment is shown, the court should grant relief regardless of alternative remedies.[1] Similarly, in upholding the statutory rights of gipsies to have sites provided for them, Mann J said: 'There is no case of which I am aware in which the existence of an alternative remedy has been held to exclude the jurisdiction of this court in public law. I can see no reason why it should.'[2]

A diametrically opposite judicial heresy, namely that jurisdictional questions ought not to be raised by way of appeal, is discussed in a later place.[3]

Does a statutory remedy exclude ordinary remedies?

Many statutory schemes contain their own system of remedies, e.g. by way of appeal to a tribunal or to a minister. There may then be a choice of alternative remedies either under the Act or according to the ordinary law. On the other hand it may be held that the statutory scheme impliedly excludes the ordinary remedies. If its language is clear enough it may exclude them expressly.[4]

As a general rule, the courts are reluctant to hold that ordinary remedies are impliedly excluded, particularly where the statutory remedy is in the hands of an administrative body. The House of Lords adopted this policy in granting a declaration that certain quarrying operations did not need planning permission, even though the Act provided that application might be made to the local planning authority to determine whether planning permission was required in any case.[5] Here the plaintiff was merely seeking to establish that the planning legislation did not affect his ordinary legal liberties, which the ordinary courts protect. Lord Simonds said:[6]

> It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is . . . a 'fundamental rule' from which I would not for my part sanction any

[1] In a lecture printed in [1991] *PL* 64 (at 72).

[2] *R.* v. *Secretary of State for the Environment ex p. Lee* (1985) 54 P & CR 311 at 322.

[3] Below, p. 950.

[4] Below, p. 727.

[5] *Pyx Granite Estates Ltd.* v. *Ministry of Housing and Local Government* [1960] AC 260. See also *Slough Estates* v. *Slough Borough Council* [1968] Ch. 299 (appeal to minister and action for declaration pursued concurrently on question whether planning permission effective: conditions as to costs imposed by court); *Ealing LBC* v. *Race Relations Board* [1972] AC 342 (statutory procedure for legal proceedings by the board held no bar to action for declaration against the board).

[6] At 286.

departure. It must be asked, then, what is there in the Act of 1947 which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it, then, an alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away.

There are two differences between this situation and that discussed in the previous section on exhaustion of other remedies. In the first place, the previous section deals with remedies which exist for different purposes, either merits or legality, whereas here the remedies exist for the same purpose. In the second place, the exhaustion of other remedies may not preclude a later application for judicial review, if grounds for it can still be shown and any necessary extension of time obtained.[7] Here, on the other hand, the question is whether the statutory remedy is exclusive.

The court's interpretation may be determined by convenience. Certiorari and mandamus will not be granted to a ratepayer wishing to challenge the correctness of a rating assessment, since the rating legislation provides a detailed procedure for that purpose which impliedly excludes other remedies.[8] But if the validity of the whole rating list is challenged, certiorari and mandamus may be sought, since to challenge every one of the many thousands of assessments would be excessively inconvenient.[9] It is not, however, clear why this distinction should not rest simply on that between legality and correctness, irrespective of convenience, since the ordinary jurisdiction of the High Court to quash illegal acts will not be excluded by the existence of an administrative appeal on the merits, as the decisions in the previous section show.

On the other hand there are situations where the statutory remedy is the only remedy. For example, where a taxing statute gives a right of appeal to the Commissioners of Inland Revenue on a disputed assessment, the court will not grant a declaration that the taxpayer is entitled to certain allowances,[10] or that he is not the owner of the property assessed.[11] Similarly where a river authority is given a statutory right to recover certain expenses in a magistrates' court, it cannot obtain

[7] *Ridge* v. *Baldwin* [1964] AC 40 was such a case. See above, p. 489.

[8] *Stepney Cpn.* v. *John Walker & Sons Ltd.* [1934] AC 365. See similarly *British Railways Board* v. *Glasgow Cpn.* 1975 SLT 45. Compare *R. (Balbo B & C Auto Transport)* v. *Home Secretary* [2001] 1 WLR 1356 (judicial review refused); *R. (Sivasubramaniam) Court* [2003] 1 WLR 475.

[9] *R.* v. *Paddington Valuation Officer ex p. Peachey Property Co. Ltd* [1966] 1 QB 380 at 399. See also the remarks as to convenience in *R.* v. *Hillingdon London Borough Council ex p. Royco Homes Ltd.* [1974] QB 720 at 728, though that case belongs properly to the previous section: above, p. 704.

[10] *Argosam Finance Co. Ltd* v. *Oxby* [1965] Ch. 390. Compare *Harrison* v. *Croydon London Borough Council* [1968] Ch. 479.

[11] *Re Vandervell* [1971] AC 912. Contrast *Thorne Rural District Council* v. *Bunting* [1972] Ch. 470.

a declaration from the High Court that its claim is good;[12] and where Trinity House were empowered to grant pilotage certificates, with a provision for complaint to the Board of Trade if they failed to do so without reasonable cause, disappointed applicants could not complain to the court.[13] These are cases where the right given by the statute does not exist at common law, and can be enforced only in the way provided by the statute. 'The right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other.'[14] The same logic is applied to the important class of cases where the Act prescribes a procedure for the making and consideration of objections to some proposed order and then provides that a person aggrieved may question its validity, after it has taken effect, within a short period of time but not otherwise.[15] This statutory procedure is exclusive, and rules out any challenge except as expressly permitted by the Act.[16]

A still clearer case is where the power of determination is expressly conferred by the Act on a named authority. The court could not entertain an action for a declaration that a claimant to superannuation benefits under the National Health Service Act 1946 was a 'mental health officer' since the Act and regulations validly made under it provided that 'any question arising under these regulations as to the rights or liabilities of an officer . . . shall be determined by the Minister'.[17] Strong judicial comments have been made on enactments of this kind where the minister might have an interest in the result;[18] and a narrow construction has sometimes been put upon them in order to preserve the court's control over the limits of any act which is ultra vires.[19] In any case of excess or abuse of power the court may intervene in the usual way.[20] Disciplinary decisions of the Financial Services Authority under the Financial Services and Markets Act 2000, which contains a detailed statutory scheme for challenging actions by the Authority (by way of appeal to the Financial Services and Markets Tribunal and thence to the Court of Appeal on a point of law), are only subject to judicial review 'in the most exceptional circumstances'.[21]

[12] *Barraclough* v. *Brown* [1897] AC 615. See the *Pyx Granite* case (above) at 286 and 300. See also *Cook* v. *Ipswich Local Board of Health* (1871) LR 6 QB 451; *Wake* v. *Sheffield Corporation* (1883) 12 QBD 142; *Vestry of St James and St John, Clerkenwell* v. *Feary* (1890) 24 QBD 703; *Re Al-Fin Corporation's Patent* [1970] Ch. 160; *Wilkes* v. *Gee* [1973] 1 WLR 742.

[13] *Jensen* v. *Trinity House* [1982] 2 LIR 14. But if the Board of Trade 'should misdirect itself in law or in fact', judicial review could be granted (Lord Denning MR).

[14] *Barraclough* v. *Brown* (above) at 622. See also *Turner* v. *Kingsbury Collieries Ltd.* [1921] 3 KB 169.

[15] For this class see below, p. 727.

[16] *R.* v. *Cornwall CC ex p. Huntington* [1994] 1 All ER 694, rejecting challenges to rights of way modification orders not yet in effect.

[17] *Healey* v. *Minister of Health* [1955] 1 QB 221.

[18] *Wilkinson* v. *Barking Cpn.* [1948] 1 KB 721 at 728; above, p. 461.

[19] *Martin* v. *Eccles Cpn.* [1919] 1 Ch 387, and cases there cited.

[20] *Healey* v. *Minister of Health* (above) at 227. Ouster clauses in contracts are void as against public policy in so far as they attempt to exclude the courts from deciding questions of law, e.g. where the rules of an association give its council exclusive and final power to interpret its rules: see *Barker* v. *Jones* [1954] 1 WLR 1005; compare *Leigh* v. *National Union of Railwaymen* [1970] Ch. 326.

[21] *R. (Davies)* v. *Financial Services Authority* [2003] EWCA Civ. 1128; [2004] 1 WLR 185 (CA).

Difficult cases may arise out of ministerial 'default powers', i.e. special powers under which ministers may take steps to compel local authorities to carry out their functions properly. Since these are special statutory remedies, they are discussed later. But it may be noted that the existence of the minister's default power is sometimes held to imply the exclusion of other remedies, and that this interpretation is open to criticism.[22] Where there is ultra vires action as well as failure to perform a duty, the two may have to be disentangled. This was done by the Court of Appeal where a local education authority had both ceased to maintain existing schools and had also established new schools, in both cases in ways not permitted by the Act.[23] In the first case they were acting contrary to an express statutory prohibition and the court granted an injunction to the plaintiff ratepayers and parents; but in the second case there was merely a failure to perform a duty, for which the only remedy, it was held, was by means of the minister's default power.

PROTECTIVE AND PRECLUSIVE CLAUSES

Presumption in favour of judicial review

Acts of Parliament frequently contain provisions aimed at restricting, and sometimes at eliminating, judicial review, and various forms of these provisions must now be investigated. But first it must be stressed that there is a presumption against any restriction of the supervisory powers of the court. Denning LJ said in one case:[24]

> I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words.

The Court of Appeal has re-emphasised this rule in interpreting the provision of the Mental Health Act 1983 which prohibits the bringing of civil proceedings for anything done without bad faith or negligence in executing the Act. It was held that this language was unsuitable to include judicial review, so that a mental patient could proceed with her application for certiorari and declaration contesting the legality of her admission to hospital.[25] Furthermore, as is mentioned below, restriction of judicial review may violate both human rights and EU law.[26]

[22] See below, p. 742.
[23] *Bradbury* v. *Enfield Borough Council* [1967] 1 WLR 1311; above, p. 681.
[24] *R.* v. *Medical Appeal Tribunal ex p. Gilmore* [1957] 1 QB 574 at 583.
[25] *Ex p. Waldron* [1986] QB 824. This accords with the definition of 'civil proceedings' in the Crown Proceedings Act 1947: see above, p. 565. Contrast *Hutchins* v. *Broadcasting Corporation* [1981] 2 NZLR 593 (protection against 'civil proceedings' restricts judicial review).
[26] Below, p. 724.

'Final and conclusive' and similar clauses

Many statutes provide that some decision shall be final. That provision is a bar to any appeal.[27] But the courts refuse to allow it to hamper the operation of judicial review. As will be seen in this and the following sections, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words.[28] This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. 'Finality is a good thing but justice is a better.'[29]

If a statute says that the decision or order[30] of some administrative body or tribunal[31] 'shall be final' or 'shall be final and conclusive[32] to all intents and purposes' this is held to mean merely that there is no appeal: judicial review of legality is unimpaired. 'Parliament only gives the impress of finality to the decisions of the tribunal on condition that they are reached in accordance with the law'.[33] This has been the consistent doctrine for three hundred years.[34] It safeguards the whole area of judicial review, including (formerly) error on the face of the record as well as ultra vires. In the leading modern case the Court of Appeal granted certiorari to quash the decision of a medical appeal tribunal which had, by misconstruction of the complex 'paired organ' regulations, miscalculated the rate of disablement benefit payable to a colliery pick sharpener whose one good eye had been injured.[35] The Act provided that the tribunal's decision 'shall be final', but the court would not allow this to impede its normal powers in respect of error of law. In cases where the decision is ultra vires the court may equally grant a declaration.[36]

The normal effect of a finality clause is therefore to prevent any appeal. There is

[27] It precludes the Court of Appeal's jurisdiction 'however expressed': Supreme Court Act 1981, s. 18(1)(c).

[28] See (1956) 3 U of Queensland LJ 103 (D. C. M. Yardley).

[29] *Ras Behari Lal* v. *King-Emperor* (1933) 60 IA 354 at 361 (Lord Atkin).

[30] As in *Pollway Nominees Ltd.* v. *Croydon LBC* [1987] AC 79 (repairs notice under Housing Act 1969 served on wrong party: held a nullity despite provision making it 'final and conclusive').

[31] Inferior courts of law may be protected by a finality clause in respect of error of law: above, p. 267.

[32] The words 'and conclusive' add nothing: *Hockey* v. *Yelland* (below).

[33] *Gilmore's* case (below) at 585 (Denning LJ).

[34] *R.* v. *Smith* (1670) 1 Mod. 44; *R.* v. *Plowright* (1686) 3 Mod. 94. See *R.* v. *Nat Bell Liquors Ltd.* [1922] 2 AC 128 at 159–60; *Gilmore's* case (below) at 584.

[35] *R.* v. *Medical Appeal Tribunal ex p. Gilmore* [1957] 1 QB 574. See also *R.* v. *Berkley and Bragge* (1754) 1 Keny. 80 at 100; *Tehrani* v. *Rostron* [1972] 1 QB 182; *Hockey* v. *Yelland* (1984) 56 ALR 215.

[36] *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] AC 261; *Ridge* v. *Baldwin* [1964] AC 40.

no right of appeal in any case unless it is given by statute. But where there is a general provision for appeals, e.g. from quarter sessions to the High Court by case stated, a subsequent Act making the decision of quarter sessions final on some specific matter will prevent an appeal.[37] But in one case the Court of Appeal deprived a finality clause of part even of this modest content, holding that a question which can be resolved by certiorari or declaration can equally well be the subject of a case stated, since this is only a matter of machinery.[38] This does not open the door to appeals generally, but only to appeals by case stated on matters which could equally well be dealt with by certiorari or declaration, i.e. matters subject to judicial review.

A provision for finality may be important in other contexts, for example when the question is whether the finding of one tribunal may be reopened before another,[39] or whether an interlocutory order is open to appeal,[40] or whether an action in tort will lie.[41]

There are many other varieties of protective or preclusive clauses, for example where it is provided that a person detained for deportation 'shall be deemed to be in legal custody';[42] or that hospital managers may detain a mental patient where the application for admission 'appears to be duly made'; or that the application 'shall be sufficient authority' for the managers.[43] The courts must be careful to confine such provisions strictly to their limited meaning, and the Court of Appeal sharply criticised one interpretation which might have validated an unlawful detention.[44]

The effectiveness of all forms of preclusive clauses is now in question under human rights and EU law, as explained later.[45]

[37] *Kydd* v. *Watch Committee of Liverpool* [1908] AC 327; *Piper* v. *St Marylebone Justices* (below).

[38] *Tehrani* v. *Rostron* [1972] 1 QB 182. Although nowadays treated as a mode of appeal, the procedure by case stated used to require a certiorari to bring up the case, until this requirement was removed by Summary Jurisdiction Act 1857, s. 10: see *R.* v. *Chantrell* (1875) LR 10 QB 587; *Walsall Overseers* v. *L & NW Rly* (1878) 4 App. Cas. 30; *R.* v. *Northumberland Compensation Appeal Tribunal ex p. Shaw* [1952] 1 KB 338 at 349–50. Historically therefore a case stated is a form of review for error on the face. The High Court now brings up cases by mandamus: Supreme Court Act 1981, s. 29(4).

[39] As in *R.* v. *National Insurance Commissioners ex p. Hudson* [1972] AC 944 (decisions of national insurance local tribunals held final as against medical boards and tribunals later assessing disablement. A special House of Lords of 7 was divided by 4 to 3. The majority decision was reversed by National Insurance Act 1972, s. 5).

[40] *R.* v. *Lands Tribunal ex p. London Cpn.* [1981] 1 WLR 985 (order for disclosure of documents held appealable).

[41] *James* v. *Department of Employment* [1989] QB 1 (action for negligence barred).

[42] Immigration Act 1971, 2nd sched. para. 18, wrongly held in *R.* v. *Home Secretary ex p. Cheblak* [1991] 1 WLR 890 to restrict the right to habeas corpus, but correctly interpreted in *R.* v. *Home Secretary ex p. Muboyayi* [1992] 1 QB 244.

[43] Mental Health Act 1983, s. 6.

[44] *Re S-C (Mental Patient)* [1996] QB 599, disapproving *R.* v. *Managers of South Western Hospital ex p. M* [1993] QB 683.

[45] Below, p. 724.

A provision that a determination 'shall be conclusive for all purposes' or that a certificate 'shall be conclusive evidence' of something might be expected to be interpreted in the same way as a finality clause, so as not to restrict judicial review. But this is not always the case, as will be seen below in the context of the Tribunals and Inquiries Act 1992.[46]

'No certiorari' clauses

An even bolder, though equally justifiable, judicial policy was that certiorari would be granted to quash an act or decision which was ultra vires even in the face of a statute saying expressly that no certiorari should issue in such a case. When in the seventeenth century the court began to use certiorari in the modern way, it was excessively prone to quash the decisions of justices for trivial defects of form. As one statute recited, orders or judgments were 'quashed or set aside upon exceptions or objections to the form of the order or judgment, irrespective of the truth and merits of the matters in question'.[47] Parliament retaliated by providing in many statutes that no certiorari should issue to remove or quash decisions made under the Act. The court said of such a clause:[48]

> The doctrine of defects and variances in the examinations and grounds of removal before the trial of appeals had been mischievous; and the statute in question was a most beneficial alteration of the law, designed to check a practice which had introduced lamentable and disgraceful technicalities.

But, while giving full effect to these clauses for their proper purposes, the court refused to allow them to interfere with the court's control over excess of jurisdiction; for otherwise (once again) subordinate tribunals would have become a law unto themselves. In any case of ultra vires, therefore, the court continued to grant certiorari regardless of the 'no certiorari' clause. In an early case the Commissioners of Sewers claimed the benefit of a statute of 1571, providing that they should not be compellable to make any return of their actions, and disobeyed writs of certiorari from the King's Bench; but since they had rated lands outside their jurisdiction, they were fined and imprisoned for contempt, Kelynge CJ saying that the court would take care not to allow uncontrollable jurisdictions.[49] In 1759 Lord Kenyon CJ disregarded an express no certiorari clause in an Act of 1690 where

[46] See below, p. 723, and *Piper* v. *St Marylebone Justices* [1928] 2 KB 221.
[47] Quarter Sessions Act 1849 (12 & 13 Vict. c. 45), s. 7.
[48] *R.* v. *Ruyton (Inhabitants)* (1861) 1 B & S 534 at 545.
[49] *Smith's* case (1670) 1 Vent. 66; compare 1 Mod. 44; *R.* v. *Plowright* (1686) 3 Mod. 94.

justices made an order outside their jurisdiction,[50] and a long succession of similar cases followed.[51] Denning LJ said of them:[52]

> In stopping this abuse the statutes proved very beneficial, but the court never allowed those statutes to be used as a cover for wrongdoing by tribunals. If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.

This epitomises the court's determination to preserve regularity in the legal system, and to construe every Act of Parliament as intended to uphold it. 'The consequence of holding otherwise', it was said in one case, 'would be that a Metropolitan magistrate could make any order he pleased without question'.[53]

The only form of error that these clauses would protect, therefore, was mere error within jurisdiction on the face of the record. It was indeed primarily at that branch of judicial control, and the abuse of it, that the clauses were aimed.

No certiorari clauses were extremely common until about a century ago,[54] and indeed may have been used too freely.[55] They are of relatively rare occurrence today since Parliament uses other devices, to be explained shortly. But occasional examples are to be found in modern statutes, such as the County Courts Act 1959.[56] By enacting them repeatedly in similar form Parliament made it clear that it was content with the construction put upon them by the courts.

All such clauses enacted before August 1958 are now subject to the provision, explained below, which restores the full powers of the court to grant certiorari and mandamus.[57]

'As if enacted' clauses

Another form of protective clause is to the effect that a statutory order shall 'have effect as if enacted in this Act' and that confirmation by the minister shall be

[50] *R.* v. *Derbyshire Justices* (1759) 2 Ld Kenyon 299.

[51] e.g. *R.* v. *West Riding of Yorkshire Justices* (1794) 5 TR 629; *R.* v. *Cheltenham Commissioners* (1841) 1 QB 467 (breach of natural justice); *R.* v. *Gillyard* (1848) 12 QB 527; *Colonial Bank of Australasia* v. *Willan* (1874) LR 5 PC 417; *Ex p. Bradlaugh* (1878) 3 QBD 509; *R.* v. *Hurst ex p. Smith* [1960] 2 QB 133; compare *R.* v. *Worthington-Evans ex p. Madan* [1959] 2 QB 145.

[52] *R.* v. *Medical Appeal Tribunal ex p. Gilmore* [1957] 1 QB 574 at 586. See also *R.* v. *Northumberland Compensation Appeal Tribunal ex p. Shaw* [1951] 1 KB 711 at 716 (Lord Goddard CJ), affirmed [1952] 1 KB 338.

[53] *Ex p. Bradlaugh* (above). But mere error on the face of the record could not be controlled: *R.* v. *Chantrell* (1875) LR 10 QB 587 (certiorari refused to bring up a case stated).

[54] See under Certiorari in index to Ruffhead's *Statutes at Large*, ix. 232. A typical example is Highway Act 1835, s. 107.

[55] See *R.* v. *Chantrell* (above).

[56] s. 107. On this see *R.* v. *Hurst*, *R.* v. *Worthington-Evans* (above).

[57] Tribunals and Inquiries Act 1992, s. 12; below, p. 723.

'conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act'.[58] Even this formula should not protect a flagrant case of ultra vires,[59] despite a judicial ruling that it makes an order unchallengeable.[60] The House of Lords has held that the 'as if enacted in this Act' formula applies only to orders which themselves conform to the Act, since it is only such orders that the Act contemplates.[61] Thus the court could still control procedural or other legal errors, and the exclusion clause would be virtually meaningless. This type of clause came into use in the nineteenth century. But it is now in disuse, since Parliament has resorted to a different formula which, instead of attempting to give statutory validity to defective acts, protects them by removing judicial remedies. To this we must turn next.

More about 'as if enacted' clauses will be found in the chapter on delegated legislation.[62]

'Shall not be questioned' clauses

Modern legislation has adapted itself to the wide variety of remedies available in administrative law, and has evolved a comprehensive provision that the order or determination[63] to be protected 'shall not be questioned in any legal proceedings whatsoever'. Sometimes this has been combined with the older form of no certiorari clause, but more commonly it is used on its own. Most commonly of all it is framed so as to take effect only after a time limit, before which remedies may be sought. But that type of provision raises different problems and needs separate discussion. Wide enactments designed to oust the jurisdiction of the courts entirely in respect of all remedies have come to be known as 'ouster clauses'. However they are worded, they are interpreted according to the same principle.

The law as now settled by the House of Lords is that these ouster clauses are subject to exactly the same doctrine as the older no certiorari clauses, namely, that they do not prevent the court from intervening in the case of excess of jurisdiction. Violation of the principles of natural justice, for example, amounts to excess of jurisdiction, so that where a minister refused an application for citizenship without giving the applicant a fair hearing the Privy Council invalidated his decision

[58] e.g. Smallholdings and Allotments Act 1908, s. 39(3); Housing Act 1925, 3rd sched., para. (2).

[59] See Report of the Committee on Ministers' Powers, Cmd. 4060 (1932), 40.

[60] Certiorari to quash a compulsory purchase order protected by this formula was refused in *Ex p. Ringer* [1909] 73 JP 436; and see *Reddaway* v. *Lancashire County Council* (1925) 41 TLR 422.

[61] *Minister of Health* v. *R. ex p. Yaffé* [1931] AC 494.

[62] Below, p. 890.

[63] Sometimes even anything 'which purports to be' an order to determination: below, p. 722.

notwithstanding a statute providing that it 'shall not be subject to appeal or review in any court'.[64]

Wide as the doctrine of ultra vires is, the House of Lords made it even wider for the purpose of minimising the effect of ouster clauses. This they did in the leading case of *Anisminic Ltd.* v. *Foreign Compensation Commission*.[65] That case was a high-water mark of judicial review. But for judges in later cases it presented an acute dilemma.

The crucial words were the provision of the Foreign Compensation Act 1950 that a determination of the Commission 'shall not be called in question in any court of law'.[66] Yet a determination of the Commission was questioned for five years before successive courts, and, as a fitting climax, the House of Lords granted a declaration that it was ultra vires and a nullity. The House held

(a) (unanimously) that the ouster clause did not protect a determination which was outside jurisdiction; and

(b) (by a majority)[67] that misconstruction of the Order in Council which the Commission had to apply involved an excess of jurisdiction, since they based their decision 'on a ground which they had no right to take into account',[68] and sought 'to impose another condition, not warranted by the order'.[69]

Question (b) has been considered elsewhere already, in the context of ultra vires action.[70] But it is significant here also, since it shows clearly the great determination of the courts to uphold their long-standing policy of resisting attempts by Parliament to disarm them by enacting provisions which, if interpreted literally, would confer uncontrollable power upon subordinate authorities.

Anisminic *and after*

The Foreign Compensation Commission, which has to adjudicate claims for compensation against funds paid by foreign governments to the British government for

[64] *A.-G.* v. *Ryan* [1980] AC 718. Whether the same reasoning applies to an ouster clause in a Commonwealth country's constitution was left an open question in *Harrikissoon* v. *A.-G. of Trinidad and Tobago* [1980] AC 265. See also *McDaid* v. *Clydebank DC* 1984 SLT 162 (planning enforcement notice not served and so a nullity; time for appeal expired; ouster clause held no bar to judicial review); *Renfrew DC* v. *McGourlick* 1987 SLT 538 (housing order ultra vires; ouster clause no bar).

[65] [1969] 2 AC 147, restoring a notable judgment of Browne J, for which see [1969] 2 AC at 223, [1969] *CLJ* 230. The case is discussed in (1969) 85 *LQR* 198 (Wade). For a Scottish parallel see *Campbell* v. *Brown* (1829) 3 W & S 441 (cited in *West* v. *Secretary of State for Scotland* 1992 SLT 636) in which the Court of Session asserted its jus supereminens in the face of an express ouster clause. For an American parallel see *Lindahl* v. *Office of Personnel Management* 105 S Ct. 1620 (1985), explained in context with *Anisminic* in 38 *Administrative Law Review* 33 (B. Schwartz).

[66] s. 4(4).

[67] Lords Reid, Pearce and Wilberforce, Lords Morris and Pearson dissenting.

[68] [1969] 2 AC at 175 (Lord Reid).

[69] [1969] 2 AC at 214 (Lord Wilberforce).

[70] Above, p. 264.

the expropriation of British property abroad, had rejected a claim for some £4 m. in respect of a manganese mine in the Sinai peninsula after the Suez hostilities of 1956. The reason was that the claimants had sold their undertaking to the United Arab Republic before the date of the treaty of 1959 under which the compensation fund was established, and that they did not therefore comply with a provision of the Order in Council, duly made under the Act, requiring that claimants and their successors in title should be British nationals at that date. But it was held that the Commission were misled by 'unfortunate telescopic drafting',[71] and that the requirement about the nationality of successors in title did not apply where the original owner was the claimant. This meant that the Commission had entered into matters which it had no jurisdiction to consider and had imposed a condition which it had no jurisdiction to impose. Consequently it had exceeded its jurisdiction, and the ouster clause was no impediment to intervention by the court.

Under this decision the only effect of a 'shall not be questioned' clause was to prevent judicial review for such errors as could be said to be within jurisdiction.[72] This was the same doctrine as had for so long been applied to no certiorari clauses, so that the House of Lords' decision on question (a) represented no change of judicial policy. The remarkable feature of the case was the decision of the majority on question (b), which made a jurisdictional error out of what would more naturally, at that time, have been treated as a mere error of law (misconstruction) within jurisdiction.

The House of Lords had in fact extended their concept of jurisdictional error to such an extreme point that judges were driven to conclude that the basic distinction between jurisdictional and non-jurisdictional error, upon which the *Anisminic* judgment purported to be founded, had been rendered unintelligible. All error of law now appeared to be jurisdictional error, so that the decision of any administrative tribunal or authority could be quashed for such error, regardless of its nature. It has already been explained how this deduction was drawn in the *Pearlman* and *Racal* cases, and confirmed in the *Page* case; and how, on the other hand, the basic jurisdictional distinction was still upheld by the Privy Council and by the High Court of Australia.[73]

According to the logic of the House of Lords, 'shall not be questioned' clauses must now be totally ineffective. Every error of law is jurisdictional; and error of fact, if material, is either jurisdictional or unreviewable anyway.[74] So there is no situation in which these clauses can have any effect. The policy of the courts thus becomes one of total disobedience to Parliament. Under the basic distinction which formerly obtained, and which the House of Lords supposed that they were

[71] [1969] 2 AC at 214 (Lord Wilberforce).
[72] As in *A.-G.* v. *Car Haulaways (NZ) Ltd.* [1974] 2 NZLR 331.
[73] Above, p. 265.
[74] Above, p. 276.

upholding in the *Anisminic* case, judges could at least say that they were obeying Parliament in some situations, while resisting ouster clauses in others. But now they seem to have lost sight of the reasons which justified their attitude originally. Ouster clauses are still being enacted,[75] and the conflict with Parliament is as yet unresolved.

Wider considerations

The *Anisminic* case and its sequels were the culmination of the judicial insistence, so often emphasised in this work, that administrative agencies and tribunals must at all costs be prevented from being sole judges of the validity of their own acts. If this were allowed, to quote Denning LJ again, 'the rule of law would be at an end'.[76] Lord Wilberforce expressed the same idea in different words:[77]

> What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed?

This is the identical point that was made so clearly by Farwell LJ in the *Shoreditch* case, quoted earlier, when he said that subjection to the jurisdictional control of the High Court was 'a necessary and inseparable incident to all tribunals of limited jurisdiction'.[78] That passage was quoted with approval in the *Anisminic* case as correctly expressing the fundamental principle which maintains a coherent and orderly legal system.

In order to preserve this vital policy the courts have been forced to rebel against Parliament. The object of the ouster clause in question in the *Anisminic* case was to keep the distribution of compensation outside the courts altogether,[79] since proved claims will normally exceed the available compensation and they must all be finally settled before the claimants can be paid their dividend. In the *Pearlman* case the object of the legislation was to make the county court's decision final, so as to save further litigation between landlord and tenant. The intention of Parliament was clear in both cases. In refusing to enforce it the court was applying a presumption which may override even their constitutional obedience, namely that jurisdictional limits must be legally effective. This is tantamount to saying that judicial review is a constitutional fundamental which even the sovereign Parliament cannot

[75] See below, p. 721.
[76] Above, p. 716.
[77] [1969] 2 AC at 208.
[78] *R.* v. *Shoreditch Assessment Committee ex p. Morgan* [1910] 2 KB 859 at 880; above, p. 263. This was cited by Browne J (see [1969] 2 AC at 233) with reference to (1966) 82 *LQR* 226 and was approved in the House of Lords by Lords Pearce and Wilberforce in the *Anisminic* case at 197, 209.
[79] Witness the specific exemption of the Commission from s. 11 of the Tribunals and Inquiries Act 1958: below, p. 723.

abolish and that any attempt to abolish it is an abuse of legislative power.[80] There is no incongruity, therefore, in the extra-judicial suggestions of Lord Woolf MR, that judicial obedience to Parliament should stop short of legislation 'removing or substantially impairing the entire reviewing role of the High Court on judicial review', since 'there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold'.[81]

Parliament is mostly concerned with short-term considerations and is strangely indifferent to the paradox of enacting law and then preventing the courts from enforcing it. The judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power. Needless to say, they have maintained throughout that they are correctly interpreting Parliament's true intentions. In the *Anisminic* case they did so behind a dense screen of technicalities about jurisdiction and nullity; and Lord Wilberforce bravely said:[82]

> In each task they are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive.

That this is fair comment, at least at the most sophisticated level of legal thought, is shown by the fact that the policy of the judges has been wisely tolerated by Parliament. The restricted meaning given to no certiorari clauses was never made the object of a legislative counter-attack. After the *Anisminic* decision the government did indeed propose a more elaborate ouster clause to empower the Foreign Compensation Commission to interpret the Orders in Council for itself and making its interpretations unquestionable. But after criticism both in and out of Parliament[83] this proposal was dropped, and instead provision was made for a right of appeal direct to the Court of Appeal, but no further, on any question as to the jurisdiction of the Commission or the interpretation of the Orders in Council; and all restriction of remedies was removed as regards breaches of natural justice.[84] So far, therefore, from joining issue with the courts over their recalcitrance, Parliament to a large extent restored the judicial remedies which the ouster clause had vainly attempted to take away.

Parliament has not, however, abandoned its attempts to devise a really judge-

[80] See Wade, *Constitutional Fundamentals*, 66. But see Lord Irvine LC's critical comment in [1999] *EHRLR* 350 at 362, citing *R. v. Lord Chancellor ex p. Witham* [1998] QB 575 as showing that there must be some formula strong enough to prevail.

[81] See [1995] *PL* 57 at 68 (a published lecture). For the criticism of Lord Irvine QC see above, p. 40.

[82] [1969] 2 AC at 208.

[83] 776 HC Deb. col. 568; 299 HL Deb. col. 640; letters in The Times, 1 and 4 February 1969.

[84] Foreign Compensation Act 1969, s. 3(2), (10). Since breach of natural justice goes to jurisdiction (above, p. 494), questions of natural justice can apparently be taken either to the Court of Appeal direct or else raised in ordinary proceedings with unrestricted rights of appeal. In view of the specific provision, it might be held that only the latter course was open.

proof formula. In the Act just discussed it is provided that, apart from the remedies specified, 'anything which purports to be a determination' of the Commission shall not be called in question in any court of law.[85] The Interception of Communications Act 1985 tries a slightly different line of attack: 'The decisions of the Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any courts'.[86] The latter formula appears also in the Security Service Act 1989,[87] and in the Police Act 1997.[88] Everything that words can do has been done to disarm the court.[89] Nevertheless it is taken for granted in the courts that an ouster clause will not prevent judicial review on jurisdictional grounds.[90] When the Home Secretary's refusal of an application for naturalisation was challenged, he conceded that judicial review was not ousted by the provision in the Act[91] that his decision 'shall not be subject to appeal to, or review in, any court' and the Court of Appeal confirmed the concession, holding also that a provision that he should not be required to give reasons for grant or refusal did not exempt him from observing fair procedure and allowing the applicant to know the substance of the case against him, and being given an opportunity to contest it.[92]

Ouster clauses which take effect only after a period of time, such as six weeks, are a different matter altogether, as explained below.[93]

Statutory reform

Just as the judges have opposed ouster clauses which attempt to restrict judicial control, so lawyers generally are hostile to them as opening the door to dictatorial power. The Committee on Ministers' Powers recommended in 1932 that they 'should be abandoned in all but the most exceptional cases',[94] and in 1957 the

[85] Foreign Compensation Act 1969, s. 3(3),(9).

[86] s. 7(8).

[87] s. 5(4).

[88] s. 91(10). See n. 76, above, for Lord Irvine's comment.

[89] The Asylum and Immigration Bill 2003, as originally published, contained elaborate provisions to be inserted into the Nationality, Immigration and Asylum Act 2002 barring all forms of judicial review and appeal against determinations or purported determinations of the Immigration Appeals Tribunal, except where the President of the Tribunal refers a point of law to an appellate court or where where a member of the Tribunal is charged with bad faith. As this book went to press this very controversial measure was withdrawn but it is not clear what will take its place. Further developments will be dealt with in Appendix II.

[90] Similarly in the High Court of Australia: *Darling Casino Ltd* v. *New South Wales Casino Control Authority* (1997) 143 ALR 55.

[91] British Nationality Act 1981, s. 44(2). The same clause did not prevent the quashing of a similar refusal flawed by restrictive interpretation of the statutory requirements: *R.* v. *Home Secretary ex p. Mehta* [1992] COD 484.

[92] *R.* v. *Home Secretary ex p. Fayed* [1998] 1 WLR 763 (Home Secretary's decisions quashed 'so that they can be retaken in a manner which is fair').

[93] Below, p. 727.

[94] Cmd. 4060 (1932), 65.

Franks Committee recommended that no statute should contain words purporting to oust the prerogative remedies.[95] The Tribunals and Inquiries Act 1992, replacing the Acts of 1958 and 1971, has done something towards fulfilling the latter recommendation. Section 12 provides that

> any provision in an Act passed before 1st August 1958 that any order or determination shall not be called into question in any court, or any provision in such an Act which by similar words excludes any of the powers of the High Court, shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus.

In the Act of 1958 the Foreign Compensation Commission was specifically excepted;[96] and there is an important exception still in force, for time-limited ouster clauses, as explained in the next section. Further exceptions were any order or determination of a court of law; and discretionary decisions on questions of nationality.[97]

The remedy of certiorari has therefore been restored, along with mandamus, in cases governed by pre-1958 ouster clauses which fall within the section. It seems also that a post-1958 clause which substantially re-enacts a pre-1958 clause will be treated as pre-1958 for this purpose. For the Court of Appeal has held that the provision that any determination of a supplementary benefit appeal tribunal 'shall be conclusive for all purposes' does not exclude review by certiorari, although contained in the Supplementary Benefit Act 1966[98] which replaced the National Assistance Act 1948,[99] and this was held to be due to the above-cited section of the Tribunals and Inquiries Act.[1] Another possibility might be that 'shall be conclusive' clauses are to be construed in the same way as 'final and conclusive' clauses, discussed above. But, without referring to its above-cited decision, the Court of Appeal later held that a pre-1958 provision making a registrar's certificate 'conclusive evidence' of compliance with statutory registration requirements is unaffected by the Tribunals and Inquiries Act.[2] There is thus a conflict of authorities as to what are 'similar words' for the purposes of the Act.

This last decision also holds that a 'conclusive evidence' clause is equally unaffected by the *Anisminic* principle, i.e. that it effectively precludes judicial

[95] Cmnd. 218 (1957), para. 117.

[96] s. 11(3), now repealed in view of the Foreign Compensation Act 1969 (above).

[97] For the exceptions see Tribunals and Inquiries Act 1992, s. 12(3).

[98] ss. 18(3), 26(2). This is the same as the Ministry of Social Security Act 1966: see Social Security Act 1973, s. 99(18).

[99] s. 14(4).

[1] *R.* v. *Preston Supplementary Benefits Appeal Tribunal ex p. Moore* [1975] 1 WLR 624 at 628.

[2] *R.* v. *Registrar of Companies ex p. Central Bank of India* [1986] QB 1114 at 1182. The *Preston* case was cited in argument but not in the judgments.

review.[3] This produces the paradox that the strongest form of ouster clause may fail to protect some ultra vires decision or act whereas the weaker one may succeed in doing so.

For no apparent reason the Tribunals and Inquiries Act assumed that certiorari and mandamus were the only relevant remedies in England, ignoring declaratory judgments and injunctions, though it may now be possible to obtain those remedies under the Supreme Court Act 1981, since that Act has made them interchangeable with certiorari and mandamus.[4] There is no such discrimination in Scotland, where the Act safeguards the whole jurisdiction of the Court of Session over the validity of any decision, without reference to particular remedies.[5]

Partial ouster clauses

Instead of providing that an act or order may not be questioned at all, statute may provide that it shall not be questioned on certain specified grounds. Thus under the Town and Country Planning Act 1990 the validity of an enforcement notice may not be questioned in any proceedings whatsoever, except by way of appeal under the Act on certain grounds, including (for example) that there has been no breach of planning control.[6] Since the statutory appeal procedure is in any case more convenient, and provides for an appeal to the court on a point of law, the court will enforce the statute according to its terms.[7]

Such an enactment is scarcely to be distinguished from a provision that all questions of a certain kind shall be determined in the manner provided by the Act and not otherwise. Such provisions are enforced without judicial resistance,[8] as already noticed,[9] since they do not purport to protect any excess or abuse of power.

Ouster clauses and human rights

The European Convention on Human Rights, now incorporated as law by the Human Rights Act 1998, provides by Article 6 that everyone is entitled to a fair and

[3] See particularly at 1175–6 (Slade LJ), stressing that the *Anisminic* principle rests on a presumption which is rebuttable. The European Court of Justice holds that a clause of this kind is unlawful in a case where, as in sex discrimination cases, European Community law requires an effective judicial remedy: *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1987] QB 129 (ECJ).

[4] In *Ridge* v. *Baldwin* [1964] AC 40 at 120–1 Lord Morris expressed the opinion that the Act protected the declaratory judgment in the same way as certiorari. In *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 278 Lord Diplock said that the Act of 1971 suggested a parliamentary preference for certiorari.

[5] Tribunals and Inquiries Act 1992, s. 12(2).

[6] s. 285, replacing earlier provisions to the same effect.

[7] *Square Meals Frozen Foods Ltd.* v. *Dunstable Corporation* [1974] 1 WLR 59.

[8] e.g. *Healey* v. *Minister of Health* [1955] 1 QB 221.

[9] Above, p. 711.

public hearing by an independent and impartial tribunal when their civil rights and obligations are determined. Ouster clauses, whether total or partial, may come into conflict with this right to a judicial determination, since they have the effect of cutting off judicial remedies, at least in so far as the courts allow them to operate.

In a case from Northern Ireland, where contractors complained that their tender for work on a power station had been unlawfully rejected because they were Roman Catholics, the Secretary of State had issued a statutory certificate that the rejection was on grounds of national security or public safety. Under the Act this certificate was made 'conclusive evidence' of the purpose stated in it, and the complaint therefore failed in the High Court. But the European Court of Human Rights held that Article 6 was violated, since the right not to suffer religious discrimination and to have it enforced judicially was disproportionately restricted by the *ipse dixit* of the minister.[10] It ought to have been possible to provide a fairer procedure, while yet safeguarding national security.

A legal immunity, on the other hand, may likewise cut off judicial remedies without engaging Article 6. Whether immunity exists is a matter of substantive domestic law and means that there is no civil right to which Article 6 can apply. That is the position with diplomatic immunity, for example.[11] The same is true where the claim is time-barred under a statute of limitation.[12] Likewise, since there is no duty of care under English law, failure by a local authority to use its powers to protect neglected children falls outside Article 6.[13] The question is whether there is a mere procedural bar to access to the court, as in the Northern Irish case, or a true immunity denying any civil right.

This difficult distinction confronted the House of Lords where a naval mechanic had contracted asbestosis and claimed damages in tort under the Crown Proceedings Act 1947. The Secretary of State issued a certificate under the Act certifying that the illness was attributable to service for pension purposes, which barred any action under the law then in force.[14] The House of Lords held that it was part of the substantive law of remedies against the Crown, under which the Crown had always had immunity at common law and had retained a remnant of that immunity under the certification procedure. The claim therefore failed. The House emphasised that the existence of an immunity, and so the non-existence of a civil right, might always be provided in domestic law. A 'procedural bar', on the other hand, prevented the fair trial of an otherwise existing civil right. The distinction so made, however, may be logically indefinable, and the European Court of Human

[10] *Tinnelly & Sons Ltd* v. *UK* (1999) 27 EHRR 249. For a parallel in EU law see *Johnston* v. *Chief Constable of the Royal Irish Constabulary* (above, also below, p. 878).
[11] *Fogarty* v. *UK* (2001) 34 EHRR 302.
[12] *Stubbings* v. *UK* (1996) 23 EHRR 213.
[13] *Z* v. *UK* (below).
[14] *Matthews* v. *Ministry of Defence* [2003] 2 WLR 435. (The amending Act of 1947 (below, p. 827) was not in force at the relevant time).

Rights has confessed that 'it may sometimes be no more than a question of legislative techniques whether the limitation is expressed in terms of the rights or its remedy'.[15] The European Court has also in effect withdrawn its earlier and much criticised decision that the immunity of the police for negligence in investigating crime amounted to a violation of Article 6.[16]

Many ouster and similar clauses of the kind discussed in this chapter may be vulnerable as procedural bars. The Human Rights Act may provide the judges with a powerful tool in their work, well advanced but not yet complete, of demolishing unjustified obstacles to judicial review.

Canadian and Australian variations

Canadian and Australian legislation has made free use of ouster clauses, sometimes in the 'no certiorari' form, sometimes in the 'shall not be questioned' form, and sometimes in both forms combined.[17] Particularly drastic formulae have been employed in the attempt to prevent the courts from interfering with labour boards and similar bodies administering industrial legislation. The Supreme Court of Canada has in several labour law cases followed the English policy of refusing to allow provisions of this kind to take away its powers of review for jurisdictional error,[18] holding that a 'patently unreasonable' error will destroy jurisdiction.[19] But in other contexts the Court has bowed to novel forms of ouster clauses. It has held that judicial review is altogether excluded by a clause giving to an immigration appeal board 'sole and exclusive jurisdiction to hear and determine all questions of fact and law, including questions of jurisdiction',[20] and by a provision that 'any determination of the Minister made under this subsection is hereby ratified and confirmed and is binding on all persons', where the minister had power to determine whether a beneficiary under a will was a charitable organisation.[21]

The High Court of Australia has made interesting attempts to steer a middle

[15] *Fayed* v. *UK* [1994] 18 EHRR 393 at 430. In *Wilson* v. *First County Trust Ltd* (No. 2) [2003] 3 WLR 568 the House of Lords held that legislation making a pawnbroking agreement unenforceable unless it contained prescribed terms was compatible with Art. 6.

[16] See *Z* v. *UK* (2002) 34 EHRR 97, 138 explaining that in *Osman* v. *UK* (1998) 29 EHRR 245 the court had acted on an erroneous view of English law. For that case see below, p. 766.

[17] For the law in Canada, Australia and New Zealand see [1982] *PL* 451 (G. L. Pieris).

[18] *Toronto Newspaper Guild* v. *Globe Printing Co.* [1953] 3 DLR 561; *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers* (1970) 11 DLR (3d) 336; (1952) 30 Can. BR 986 (B. Laskin). See likewise *New Zealand Engineering Union* v. *Court of Arbitration* [1976] 2 NZLR 283.

[19] *Blanchard* v. *Control Data Canada Ltd.* (1984) 14 DLR (4th) 289; *Re Ontario Public Service Employees' Union and Forer* (1985) 23 DLR (4th) 97.

[20] *Pringle* v. *Fraser* (1972) 26 DLR (3d) 28. See also *Re Robertson and British Columbia Securities Commission* (1973) 42 DLR (3d) 135.

[21] *Woodward's Estate (Executors)* v. *Minister of Finance* (1972) 27 DLR (3d) 608.

course. Its solution is to retain power to quash for plain excess of jurisdiction,[22] however strong the ouster clause, but not to intervene 'where the tribunal has made a bona fide attempt to exercise its authority in a matter relating to the subject with which the legislation deals and capable reasonably of being referred to the power possessed by the tribunal'.[23] On this principle it refused relief where a tribunal was said to have exceeded its jurisdiction by misconstruing 'lock-out'.[24] But it granted prohibition, despite express ouster of that remedy, where a board sat without the statutory quorum required for it to function validly,[25] and where a board made an error of jurisdictional fact in finding that workers were eligible for membership of a particular union.[26] This distinction is plainly difficult to apply in borderline cases. But the court's compromise is a brave endeavour to strike some sort of balance between legislative intention and constitutional logic.

EXCLUSIVE STATUTORY REMEDIES

Statutory review provisions

A prominent feature of many modern statutes is a provision which allows judicial review to be sought only within a short period of time, usually six weeks, and which thereafter bars it completely. These provisions have become common, particularly in statutes dealing with the compulsory acquisition and control of land. They are therefore of great importance in administrative law. Their primary object is to make it safe for public money to be spent, for example on housing schemes, hospitals or motorways, without the danger that the order acquiring the land might later be invalidated. If the six weeks elapse without legal proceedings being started, the public authority can go ahead with its plans in the knowledge that they cannot be upset subsequently. Where any statutory scheme depends upon the authority being able to acquire a secure title to land, a preclusive clause of this kind plays a key role.

But these clauses do not merely cut off remedies after the period of six weeks. They also prescribe how judicial review may be sought within that period, and

[22] But not for mere error of law: *Houssein* v. *Under Secretary, Department of Industrial Relations* (1982) 38 ALR 577.

[23] *R.* v. *Murray ex p. Proctor* (1949) 77 CLR 387. This doctrine appears to derive from the reference to 'manifest defect of jurisdiction' in *Colonial Bank of Australasia* v. *Willan* (1874) LR 5 PC 417 at 442.

[24] *Coal Miners Union of Western Australia* v. *Amalgamated Collieries Ltd.* (1960) 104 CLR 437.

[25] *R.* v. *Murray* (above). The Act provided that the decision was not to be challenged, quashed or called in question in any court on any account whatever.

[26] *R.* v. *Coldham ex p. Australian Workers Union* (1983) 49 ALR 259. See similarly *R.* v. *Hickman ex p. Fox* (1945) 70 CLR 598.

upon what grounds. Except as provided by the Act itself, the order is not to be questioned in any legal proceedings whatsoever. The whole basis of judicial review is therefore changed. Instead of depending, as it normally does, upon the inherent powers of the court at common law, it depends upon the terms of the Act. These clauses have therefore introduced a form of statutory review which, though in general similar to review at common law, may reveal important differences, according to the interpretation adopted by the courts.

The standard formula

The first example of this type of review clause was provided by the Housing Act 1930.[27] Later Acts have not altered the formula in any important respect, so that it may be taken as the type. It provides that with respect to clearance orders and compulsory purchase orders made under the Act the following provisions shall have effect:

> (3) If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court—
>
> (i) may be interim order suspend the operation of the order either generally or in so far as it affects any property of the applicant until the final determination of the proceedings; and
>
> (ii) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant.
>
> (4) Subject to the provisions of the last preceding subsection, an order shall not, either before or after its confirmation, be questioned by prohibition or certiorari or in any legal proceedings whatsoever, and shall become operative on the expiration of six weeks from the date on which notice of its confirmation is published in accordance with the provisions of subsection (2) of this section.

Later versions, such as those in the Acquisition of Land Act 1981[28] (dating from 1946), which governs a great many compulsory purchase orders, and in the denationalising statutes, which govern enforcement orders made by regulatory authorities,[29] omit the reference to prohibition or certiorari and use the general-

[27] s. 11.
[28] s. 25.
[29] e.g. Telecommunications Act 1984, s. 18(3); Gas Act 1986, s. 30(3); Electricity Act 1989, s. 27(3); Railways Act 1993, s. 57.

ised form of ouster clause: 'shall not ... be questioned in any legal proceedings whatsoever'.[30] The final words include criminal proceedings, thus ruling out a collateral plea in defence to a criminal charge.[31] It has been suggested that they do not include appeals to the Secretary of State under the planning legislation,[32] but the contrary seems equally possible.

Similar provisions are found in numerous statutes, primarily but not exclusively[33] in connection with compulsory acquisition and control of the use of land. The Town and Country Planning legislation contains a complex series of sections which apply the usual formula to a wide variety of orders and decisions.[34] It is not applied to the decisions of local planning authorities on applications for planning permission, which may therefore be challenged by ordinary procedures,[35] but it applies to the Secretary of State's decisions on planning appeals and to cases which he calls in for his own initial decision and to a long list of other matters; and there are special provisions restricting challenge to enforcement notices on a number of specified grounds which can be raised only by way of appeal.[36]

In all the clauses now under discussion it is enacted that the court 'may' suspend or quash the offending order. This indicates that the statutory remedy is discretionary,[37] like the other principal remedies of administrative law.[38] But if the statutory conditions are fulfilled the court will normally quash, unless the error is merely technical.[39] There is no provision for declaration or injunction.

If application is made to the High Court within the six weeks, the normal rights of appeal to the higher courts may be exercised without additional restriction as to time.

The statutory formula has generated many problems,[40] of which three in particular stand out.

1. Is judicial review absolutely cut off after six weeks?

[30] These words do not restrict judicial review of a local authority's resolution to make a compulsory purchase order (*R.* v. *Camden LBC ex p. Comyn Ching & Co.* (1983) 47 P & CR 417; but contrast *R.* v. *Central Manchester Development Cpn. ex p. Merlin Great Northern Ltd.* [1992] COD 262) or of a minister's decision refusing confirmation (*Islington LBC* v. *Secretary of State for the Environment* (1980) 43 P & CR 300).

[31] *R.* v. *Smith* (1984) 48 P & CR 392.

[32] *Westminster CC* v. *Secretary of State for the Environment* [1984] JPL 27.

[33] e.g. Medicines Act 1968, s. 107 (licensing system for control of medicines).

[34] Town and Country Planning Act 1990, ss. 284–88, replacing earlier Acts.

[35] As in *R.* v. *Hillingdon Borough Council ex p. Royco Homes Ltd.* [1974] QB 720.

[36] s. 243.

[37] *Errington* v. *Minister of Health* [1935] 1 KB 249 at 279; *Miller* v. *Weymouth Cpn.* (1974) 27 P & CR 498; *Kent CC* v. *Secretary of State for the Environment* (1976) 75 LGR 452.

[38] Above, p. 700.

[39] *Peak Park Joint Planning Board* v. *Secretary of State for the Environment* (1980) 39 P & CR 361.

[40] See (1975) 38 *MLR* 274 (J. Alder).

2. What is the scope of review if the action is duly brought within the six weeks?
3. What is the meaning of 'any person aggrieved'?

In addition there are a number of other questions of construction, such as the meaning of 'substantially prejudiced'.

Effect of expiry of the six weeks

In cases decided prior to the *Anisminic* case it was held that after the expiry of the period of six weeks judicial review of the validity of the order was absolutely cut off. In *Smith* v. *East Elloe Rural District Council*,[41] where it was alleged that a local authority had taken land for housing under a compulsory purchase order made wrongfully and in bad faith, the House of Lords refused to allow the action to proceed since it was brought more than six weeks after publication of the notice of confirmation. This was a majority decision,[42] but in an earlier case the Court of Appeal had decided similarly where a minister's certificate that requisitioned land should be retained, which the Act required to be treated as a compulsory purchase order, was challenged on the ground that it had been confirmed by an irregularly appointed tribunal.[43] The only exception was a case where an order confirming a coast protection scheme, which was not to be questioned in any proceedings whatsoever after six weeks, was followed by a compulsory purchase order for the land required, and the legal proceedings were started within six weeks of the compulsory purchase order but more than six weeks after the confirmation order.[44] The validity of the compulsory purchase order depended upon the validity of the confirmation order, and for the purpose of challenging the compulsory purchase order, which was quashed, the Court of Appeal allowed proof of the invalidity of the confirmation order, which was vitiated by failure to comply with the requirements of the Act. This is the one example of the court insisting on its powers of review after the expiry of the six weeks, in a case where it felt that an order had been improperly made.

In the cases in which the 'shall not be questioned' provision was applied literally, no reference was made to the long-established policy of preserving judicial review, or to the earlier authorities on no certiorari clauses which the House of Lords

[41] [1956] AC 736. The House allowed an action for a declaration of wrongful action to proceed against the clerk to the council on the footing that the validity of the order was not questioned: for this see below, p. 783.

[42] Lords Reid and Somervell dissented.

[43] *Woollett* v. *Minister of Agriculture and Fisheries* [1955] 1 QB 103; and see similarly *Cartwright* v. *Ministry of Housing and Local Government* (1967) 65 LGR 384 (grant of planning permission and compulsory purchase order for ring road).

[44] *Webb* v. *Minister of Housing and Local Government* (1965) 1 WLR 755 (scheme under Coast Protection Act 1949 included land not genuinely 'required' and did not require compulsory purchase).

reactivated in the *Anisminic* case.[45] Furthermore, the *East Elloe* case was for this reason criticised in the *Anisminic* case, Lord Reid and Lord Pearce saying that they did not regard it as a binding authority, and Lord Wilberforce saying that he could not regard it as a reliable solvent of any similar case.[46] The House of Lords did not suggest that there was any fundamental difference between absolute ouster clauses and ouster clauses which operated only after a prescribed time: if anything they tended to emphasise their similarity.[47] The question therefore is whether an order protected by a time-limited ouster clause can be challenged in proceedings brought after the expiry of the time limit on any of the grounds which would render it ultra vires, such as bad faith, wrong grounds, or violation of natural justice, in accordance with the principle of the *Anisminic* case.

Both reason and authority dictate a negative answer. Public authorities would be in an impossible position if their compulsory purchase, housing, planning and similar orders were exposed to invalidation by the court after they had invested much public money, for example in building on land compulsorily purchased. It is true that the remedy is discretionary,[48] and that the court might therefore confine it to cases where this objection did not apply. But it is now clear that the court will, despite the *Anisminic* dicta, make a distinction between absolute ouster clauses and time-limited ouster clauses. The latter might well be regarded not as ousting the jurisdiction of the court but merely as confining the time within which it can be invoked. In other words, clauses of this type might be regarded as analogous to statutes of limitation, setting limits of time within which action must be brought. There is no judicial criticism of statutes of limitation as 'ousting the jurisdiction of the court', though this is exactly what they do; and the courts formerly made no difficulties about enforcing the Public Authorities Protection Act 1893 (repealed in 1954)[49] which set a time limit of six months, later extended to a year,[50] on actions against public authorities acting in execution or intended execution of any Act of Parliament. On this basis the *East Elloe* and *Anisminic* decisions can be reconciled.

A number of decisions have adopted this solution. In 1972 a Scots court rejected a challenge made more than six weeks after a compulsory purchase order, distinguishing the *Anisminic* case since the statute there made no provision for questioning the order at any stage,[51] and in another such case challenge was held to be barred even where the order had not been served on the owner of the land and an

[45] [1969] 2 AC 147; above, p. 717.

[46] [1969] 2 AC at 171, 200, 210. In the *East Elloe* case no reference was made to the decisions about no certiorari clauses and bad faith such as *R.* v. *Gillyard* (1848) 12 QB 527; *Colonial Bank of Australasia* v. *Willan* (1874) LR 5 PC 417.

[47] See [1969] 2 AC at 170 (Lord Reid), 200 (Lord Pearce), 210 (Lord Wilberforce).

[48] See above, p. 729.

[49] Law Reform (Limitation of Actions, etc.) Act 1954.

[50] Limitation Act 1939, s. 21.

[51] *Hamilton* v. *Secretary of State for Scotland* 1972 SLT 233 (averment of receipt of new evidence after inquiry and failure to consult objectors).

innocent purchaser was deceived.[52] The Court of Appeal has decided similarly in a case where breach of natural justice and bad faith were alleged in the case of compulsory purchase orders for a trunk road scheme, under which much work had already been done but which the complainant had not challenged within the six weeks because he had not known of the supplementary plans which would affect his property.[53] Lord Denning MR mentioned the analogy with a limitation period and pointed also to the public interest in imposing finality where action had already been taken under the disputed orders; and the House of Lords refused leave to appeal. Similar decisions have since multiplied.[54]

The same logic evidently governs cases where the difficulty is not the expiry of a time limit, for example where an order may be challenged only for a prescribed period after it has taken effect. In one such case the court refused an application made before the order had taken effect and rejected arguments about fundamental invalidity based on the *Anisminic* case.[55]

The time limit

The real question, in the case of time-limited ouster clauses, should be whether the time limit is reasonable. In the *East Elloe* case Lord Radcliffe described six weeks as 'pitifully inadequate'.[56] In 1932 the Committee on Ministers' Powers recommended that the period should be at least three months and preferably six months.[57] In 1971 the Law Commission, in suggesting that there should be a general time limit of one year for actions seeking judicial review of administrative acts, proposed that an examination should be made of all special statutory limitation periods to see whether a shorter period than one year was really justifiable.[58] But in their formal report on remedies in 1976 they abandoned this proposal.[59] A general view of the kind suggested in 1971 is in fact what is required, since too

[52] *Martin* v. *Bearsden and Milngavie DC* 1987 SLT 300.

[53] *R.* v. *Secretary of State for the Environment ex p. Ostler* [1977] QB 122. Lord Denning MR suggested a variety of reasons including one based on void or voidable, which he later recanted: see above, p. 306. Goff LJ found difficulty in the analogy of a limitation period, but in effect adopted it by holding that literal construction was easier where the order was one which needed to be acted upon promptly.

[54] *Jeary* v. *Chailey Rural District Council* (1973) 26 P & CR 280 (following *East Elloe*, distinguishing *Anisminic*); *Routh* v. *Reading Corporation* (1971) 217 EG 37 (following *East Elloe*, not mentioning *Anisminic*); *Westminster CC* v. *Secretary of State for the Environment* [1984] JPL 27 (following *Ostler*); *R.* v. *Secretary of State for the Environment ex p. Kent* (1988) 57 P & CR 431 (following *Ostler*); see also (1975) 38 *MLR* 274 (J. Alder); (1980) 43 *MLR* 173 (N. P. Gravells).

[55] *R.* v. *Cornwall CC ex p. Huntington* [1992] 3 All ER 566 (public right of way order).

[56] [1956] AC at 769.

[57] Cmd. 4060 (1932), 62.

[58] Law Com. Working Paper No. 40 (1971), para. 123.

[59] Law Com. No. 73, Cmnd. 6407 (1976), para. 7. For the proposals generally see above, p. 650.

many time limits have been enacted in too severe terms and with too little attention to the right overall policy.

The time to be allowed ought to be a fair compromise between the expedition needed for proceeding with public works and development of land and the time reasonably required for legal advice and investigation by the citizen whose property is being taken or whose interests are affected. The danger is that Parliament pays little attention to these provisions in Bills and enacts them sometimes too freely at the instance of government departments. In one case, where the Council on Tribunals protested, a period of six weeks in a Bill was extended to three months in the Act.[60] In the Town and Country Planning Act 1990, where the cutting off of legal remedies in numerous cases[61] after six weeks is effected by complicated provisions which are probably excessively wide,[62] one case has been omitted, apparently by mistake, so that no statutory remedy is available for quashing an improper order,[63] but in any such case ordinary judicial review should be available.

The period of six weeks begins to run from the date on which the decision letter or order was signed and dated, not from the date when it was posted, and there is apparently no obligation as to its notification.[64]

Scope of review: 'powers', 'requirements' and 'substantial prejudice'

It is important to ascertain the scope of judicial review provided by the standard time-limited ouster clause where the action is duly brought within the six weeks or other prescribed period. Ordinary review at common law is replaced by a statutory formula specifying two grounds on which the court may quash: (a) that the order is 'not within the powers of this Act'; and (b) 'that any requirement of this Act has not been complied with'. These are evidently intended to be distinct, because for ground (b) there is the additional requirement that 'the interests of the applicant have been substantially prejudiced'. This last requirement does not apply to ground (a).[65]

It has been held that a breach of natural justice, brought about by improper

[60] Medicines Act 1968, s. 107; Council on Tribunals, Annual Report, 1967, para. 34.

[61] But not including local planning authorities' decisions on ordinary planning applications.

[62] It is not apparent, for instance, why a tree preservation order should not be challengeable after six weeks: s. 284(2)(c). See *Khan* v. *Newport BC* [1991] COD 157.

[63] The case is that of the Secretary of State's power to call in an application for approval required under a development order, under Town and Country Planning Act 1990, s. 77(1); s. 284(3)(a) has not been extended to include this case, as evidently it should have been. The mistake dates from 1968. See *Turner* v. *Secretary of State for the Environment* (1973) 28 P & CR 123.

[64] *Griffiths* v. *Secretary of State for the Environment* [1983] 2 AC 51.

[65] The contrary was held in *Re Manchester (Ringway Airport) Compulsory Purchase Order* (1935) 153 LT 219, but probably wrongly.

consultation or receipt of evidence after a formal inquiry, renders the order liable to be quashed on both grounds, there being substantial prejudice to the objecting party for the purposes of ground (b).[66] The power to quash on ground (a) follows from the fact that a breach of natural justice is an ultra vires act which makes the decision void and a nullity.[67] The same applies to a decision vitiated by failure to take account of some relevant consideration,[68] or by error of law, since that is now also ultra vires.[69] But where the only objection was that a statutory report was defective in form,[70] or that owing to a slip a minister's confirmation order did not agree with the decision letter stating his reasons for extending the time within which a use of land had to be discontinued,[71] it was held that these flaws were merely non-compliance with the requirements of the respective Acts; and that since the objectors had not been misled in any way and had suffered no substantial prejudice, the court had no power to quash the orders. These decisions suggest that the court may attempt to differentiate grounds (a) and (b) by a distinction between substantial breaches of the law and minor or procedural irregularities.[72]

Substantial prejudice was found to have been caused where a local authority served an invalid improvement notice in respect of a cottage,[73] and where a minister advertised his intention to take land for road improvements but misdescribed the land so that persons who would have wished to object were not informed of their opportunity to do so.[74] But where notice of a compulsory order was served upon one only of two joint owners, who were husband and wife, and both were in fact fully aware of the order, there was no prejudice at all.[75]

Since judges have commented on the difficulty of distinguishing between

[66] *Errington* v. *Minister of Health* [1935] 1 KB 249 at 268 (Greer LJ: not within powers of Act), 279 (Maugham LJ: non-compliance with requirement and substantial prejudice), 282 (Roche LJ agreeing with Maugham LJ); *Hibernian Property Co. Ltd.* v. *Secretary of State for the Environment* (1973) 27 P & CR 197 (Browne J: both grounds); *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 WLR 1255 (House of Lords; both grounds). See also *R.* v. *Secretary of State for the Environment ex p. Ostler* [1977] QB 122; *Lithgow* v. *S. of S. for Scotland* 1973 SLT 81.

[67] Above, p. 441.

[68] *Eckersley* v. *Secretary of State for the Environment* (1977); 34 P & CR 124; *North Surrey Water Co.* v. *Same* [1976] 34 P & CR 140; *Spackman* v. *Same* [1977] 1 All ER 257.

[69] See above, p. 264; *Peak Park Joint Planning Board* v. *Secretary of State for the Environment* (1979) 39 P & CR 361.

[70] *Gordondale Investments Ltd.* v. *Secretary of State for the Environment* (1971) 70 LGR 158.

[71] *Miller* v. *Weymouth Cpn.* (1974) 27 P & CR 468. See also *Re Bowman* [1932] 2 KB 621 (minor formal defect in clearance order: no substantial prejudice); *Steele* v. *Minister of Housing and Local Government* (1956) 6 P & CR 386 (clearance order containing redundant statement: no substantial prejudice).

[72] See the *Gordondale* case (above) at 167 (Megaw LJ); *Bugg* v. *Director of Public Prosecutions* [1993] QB 473 (disapproved as noted above, p. 283).

[73] *De Rothschild* v. *Wing Rural District Council* [1967] 1 WLR 740 (in this case the requirement of substantial prejudice was made applicable to invalid improvement notices: Housing Act 1964, s. 27(3)).

[74] *Wilson* v. *Secretary of State for the Environment* [1973] 1 WLR 1083.

[75] *George* v. *Secretary of State for the Environment* (1979) 77 LGR 689.

ground (a) and ground (b),[76] and have favoured a narrow construction of ground (a) in order to find some meaning for ground (b),[77] it may be suggested that the difficulty would disappear if they were construed with reference to the well-known distinction between statutory requirements which are mandatory and those which are directory. Neglect of a mandatory requirement renders an order ultra vires and void, whereas neglect of a directory requirement has no invalidating effect at all.[78] Neglect of a mandatory requirement therefore makes an order 'not within the powers of this Act', just as much as does bad faith or a breach of natural justice. There is no need to confine such cases to ground (b) merely because they are cases of non-compliance with some requirement. Ground (b) may well be intended for the case of neglect of merely directory requirements. Although such neglect does not affect the validity of the order, and therefore does not fall within ground (a), it would be reasonable to empower the court to quash the order where an irregularity of this class has in fact caused substantial prejudice to the aggrieved person. The scope of judicial review under ground (b) would then go further than at common law, though always subject to proof of substantial prejudice and subject also to the discretion of the court. The forms of words used in the standard clause suggest that precisely this may have been the legislative intention. If that were established, the distinction between grounds (a) and (b) would then be a familiar one, and their combined effect would be eminently reasonable.

Scope of review: the East Elloe *case*

In the foregoing commentary it is assumed that, as both the words of the Acts and the decisions indicate, 'not within the powers of this Act' means ultra vires for any of the normal reasons, e.g. bad faith or unreasonableness or breach of natural justice. But in the *East Elloe* case a remarkable variety of opinions were expressed on the meaning of these innocent-looking words. It was treated as a case where, as Lord Simonds said, 'plain words must be given their plain meaning'.[79] But there was little agreement about what the plain meaning might be.

Lord Reid was of opinion that the whole area of bad faith and unreasonableness fell outside the statutory clause altogether, and remained an available ground of challenge even after the six weeks;[80] and Lord Somervell held that fraud was not a

[76] See the *Gordondale* case (above) at 167 (Megaw LJ); *Miller's* case (above) at 478 (Kerr J). In *George* v. *Secretary of State for the Environment* (above) Lord Denning MR suggests that, where the defect is a breach of natural justice the two grounds are almost indistinguishable, since an actionable breach of natural justice must involve substantial prejudice.

[77] As in *Hamilton* v. *Secretary of State for Scotland* 1972 SLT 223 at 240. See also *Hamilton* v. *Roxburgh County Council* 1971 SLT 2 for another case of narrow construction.

[78] As explained above, p. 221.

[79] *Smith* v. *East Elloe RDC* [1956] AC 736 at 751, for which see above, p. 730.

[80] At 763.

matter of ultra vires at all, and could be alleged at any time likewise.[81] Lords Simonds, Morton and Radcliffe opposed these views, holding that challenge for fraud, as for any other reason, was barred after the six weeks. But Lord Morton also held that the Act allowed challenge only for violation of express statutory requirements,[82] so that many kinds of unlawful action would not be challengeable even within the six weeks. This extraordinary conclusion would allow uncontrollable abuse of statutory power and cannot conceivably have been intended by Parliament. The case shows what paradoxes can result from using literal verbal interpretation as a substitute for legal principle.

Later decisions have sensibly turned a blind eye to this confusion, though Lord Denning MR[83] expressed his preference for the opinion of Lord Radcliffe,[84] that the words 'not empowered to be granted under this Act' (equivalent to 'not within the powers of this Act') embraced the whole range of the varieties of ultra vires, without any need 'to pick and choose'.

The key to the true interpretation of these statutory clauses must surely be to presume, following Lord Radcliffe and Lord Denning, that Parliament did not intend to authorise any of the abuses normally controlled by the courts of law, but intended only to set a short time limit within which proceedings must be initiated. 'Not within the powers of this Act' is simply a draftsman's translation of 'ultra vires', comprising all its varieties such as bad faith, breach of natural justice, irrelevant considerations, error of law[85] and breach of statutory requirements.[86] The other parts of the clause then fall easily into place if interpreted as suggested above. The draftsman may have been rash to attempt to express the whole subject of judicial review in a statutory formula; but he could scarcely have foreseen the fate that was in store for it.

Standing. 'Any person aggrieved'

The statutory remedy may be invoked by 'any person aggrieved'. This is the same phrase as is used at common law to define standing for obtaining certiorari and prohibition, and as has been seen it bears a very wide meaning in that context, so that virtually anyone concerned in any way personally falls within it.[87] It has also been used in many statutes, where its meaning ought to be equally wide; for in

[81] At 772.
[82] At 755.
[83] In *Webb* v. *Minister of Housing and Local Government* [1965] 1 WLR 755 at 770.
[84] [1956] AC at 708.
[85] Above, p. 264. This interpretation was adopted in *Peak Park Planning Board* v. *Secretary of State for the Environment* (1980) 39 P & CR 361.
[86] *Save Britain's Heritage* v. *Number 1 Poultry Ltd.* [1991] 1 WLR 153 (HL) (Secretary of State's planning decision challenged for failure to give adequate reasons as required by statutory rules, but no legal error shown).
[87] Above, p. 685.

earlier times the usual phrase was 'any person who feels aggrieved' or 'any person who thinks himself aggrieved', which made it clear that the grievance was purely subjective.[88] When this was abbreviated to 'any person aggrieved' the meaning should have remained the same, as indeed is the natural sense of the words,[89] corroborated by at least one statute.[90]

But in some cases the courts interpreted this apparently guileless phrase as expressing a requirement of standing, and treated it as meaning 'any person affected'.[91] In particular, they were reluctant to hold that a public authority was a person aggrieved for the purpose of a statutory right of appeal, so that a local planning authority was not allowed to appeal against the quashing of its own enforcement notice.[92] By glossing the natural meaning of the words the courts introduced so much ambiguity that judges vainly appealed to Parliament to rescue them from their own confusion.[93] Now, however, the Court of Appeal has established that a public authority may be a person aggrieved, and that those words include the losing party in legal proceedings.[94]

The question arose on the statutory six-weeks formula of the Town and Country Planning Act 1959 in a case where a landowner had objected to an application for permission to work chalkpits on neighbouring land, alleging that the minister had rejected his inspector's findings on the basis of evidence taken after the inquiry and not disclosed. He brought his action within the six weeks, but it was held that, genuinely aggrieved though he was, he was not a person aggrieved within the meaning of the Act.[95] As a mere neighbour he had no rights under the Act, since the question whether permission should be granted is one between the applicant and the planning authority, and the grant of permission affects no one's legal rights adversely. He could have applied for the quashing of the order only if he had

[88] e.g. Highway Act 1835, s. 72 ('if any person shall think himself aggrieved'); Public Health Act 1875, s. 268 ('deems himself aggrieved'); London County Council Act 1947, s. 64 (similar). The National Insurance Act 1911, s. 66(1) referred to 'any person who feels aggrieved'. In the National Insurance Act 1965, s. 65(3) this had become 'any person aggrieved'. The phraseology evolved similarly in rating law: see *Arsenal Football Club Ltd.* v. *Ende* [1979] AC 1 at 15. Even the 'feels aggrieved' formula can be restrictively interpreted: see *R.* v. *Ipswich Justices ex p. Robson* [1971] 2 QB 340.

[89] *R.* v. *Surrey Assessment Committee* [1948] 1 All ER 856.

[90] Parliamentary Commissioner Act 1967, s. 12(1), defining 'person aggrieved' as the person 'who claims or is alleged' to have sustained injustice.

[91] See *Ex p. Sidebotham* (1879) 14 Ch. D 458 at 465. There are many Australian decisions under the Administrative Decisions (Judicial Review) Act 1977, e.g. *Right to Life Association (NSW)* v. *Secretary, Department of Health* (1995) 128 ALR 238.

[92] *Ealing Cpn.* v. *Jones* [1959] 1 QB 384. Contrast *Attorney-General of the Gambia* v. *N'Jie* [1961] AC 617.

[93] In the *Ealing* case (above) and the *Buxton* case (below).

[94] *Cook* v. *Southend BC* [1990] 2 QB 1, overruling *R.* v. *London Quarter Sessions ex p. Westminster Corporation* [1951] 2 KB 508 and so also *R.* v. *Southwark LBC ex p. Watts* (1989) 88 LGR 86.

[95] *Buxton* v. *Minister of Housing and Local Government* [1961] 1 QB 278. Compare *Simpson* v. *Edinburgh Cpn.* 1960 SC 313 (neighbour unable to dispute planning permission).

been one of the specified classes of persons having a statutory right to have their representations considered by the minister. Since then, however, statutory rules of procedure for planning inquiries have been made[96] which confer this status on persons allowed to appear at the inquiry at the inspector's discretion. This has made an important difference, and members of a local preservation society, allowed by the inspector to appear at the inquiry, have been held to be persons aggrieved and so entitled to challenge the validity of the order.[97] In any case, since a neighbour is a person aggrieved for the purpose of obtaining certiorari (when not barred by statute) to quash a planning decision,[98] it is hard to understand why these identical words should be held to debar him from the corresponding remedy under the Act.

The root of the problem is that the common statutory formula contains no other provision about standing, but allows 'any person aggrieved' to apply to the court. Judges have therefore felt that any question of standing must be resolved by interpreting these words restrictively. Since standing depends upon indefinable factors which vary from one case to another, the interpretations have become inconsistent. There has evidently been some confusion of two different questions: whether a person is at liberty to apply to the court; and whether, having done so, he has shown sufficient standing to be entitled to a remedy. There seems to be no reason to hold that, because he passes the first test, he necessarily passes the second. In any case, the statutory formula expressly makes the remedy discretionary, thus giving ample scope for withholding remedies from applicants with inadequate standing. Thus in a planning case it should be possible to hold that a neighbour is a 'person aggrieved', even though he may be denied a remedy because of the implication of the planning legislation that a neighbour has no standing to challenge a grant of planning permission. By disentangling the two questions the court could avoid laying down a restrictive rule.[99]

As already observed in the case of other remedies, the current tendency is to

[96] For these rules see below, p. 982.

[97] *Turner* v. *Secretary of State for the Environment* (1973) 28 P & CR 123; and see *Sevenoaks UDC* v. *Twynam*, above (objector without special personal interest held to be person aggrieved); *Wilson* v. *Secretary of State for the Environment* [1973] 1 WLR 1083 (objectors conceded to be persons aggrieved); *Times Investments Ltd.* v. *Secretary of State for the Environment* (1991) 61 P & CR 98 (successor in title); *North East Fife DC* v. *Secretary of State for Scotland* 1992 SLT 373. If the Act requires the Secretary of State to 'consider all objections' all objectors may be persons aggrieved: *Nicholson* v. *Secretary of State for Energy* (1978) 76 LGR 693; *Lovelock* v. *Minister of Transport* (1980) 40 P & CR 336. See also *Environmental Defence Society Inc* v. *South Pacific Aluminium Ltd.* (No. 3) [1981] 1 NZLR 216 and contrast *Burke* v. *Minister of Housing and Local Government* (1957) 8 P & CR 25. A technical change of legal personality may not matter: *R.* v. *Hammersmith and Fulham LBC ex p. People Before Profit Ltd.* (1981) 45 P & CR 364.

[98] *R.* v. *Hendon Rural District Council ex p. Chorley* [1933] 2 KB 696; *R. (Bryson)* v. *Ministry of Development* [1967] NI 180; above, p. 687.

[99] Cf. the analogous reasoning in *R.* v. *Darlington BC ex p. Association of Darlington Taxi Owners* [1994] COD 424.

relax requirements as to standing, and this is in accordance with an enlightened system of public law.[1] The House of Lords has given the subject a new and broader basis in the *Inland Revenue Commissioners* case,[2] and the principles of that decision should be applicable also to special statutory remedies. In several cases the courts had already favoured a generous interpretation of 'person aggrieved' and it is now less likely that these words will be made an obstacle to any person who may reasonably consider himself aggrieved. Judicial statements suggest that they are likely to cover any person who has a genuine grievance of whatever kind—and that is tantamount to any person who reasonably wishes to bring proceedings.[3] The House of Lords construed them liberally in a rating case, holding that a ratepayer had standing to object to the under-assessment of another property in the same area, but that the interest of a taxpayer would be too remote.[4]

Interim suspension order

One noteworthy element in the common form of time-limited statutory remedy is that it empowers the court to make an interim order suspending the operation of the order challenged, pending the result of the proceedings. In principle this should be a useful power which ought to be available as an adjunct to all remedies by which unlawful orders can be set aside. In 1977 provision was made for it in proceedings for judicial review, though subject to some uncertainty.[5] What is needed is a general power to suspend the operation of an administrative order until its validity can be determined, so as to protect persons affected who would otherwise have to obey the order in the meantime, thereby perhaps suffering irreparable loss.[6]

In fact, however, it does not appear that the courts have availed themselves of their suspending power under time-limited statutory remedies. The reason probably is that where the validity of an order is in dispute, a public authority cannot safely proceed to do anything, in case it should turn out that the order was void and its acts were ultra vires, perhaps with consequent liabilities in tort. Interim suspension of disputed orders, therefore, is virtually automatic in many situations, at any rate in cases involving the compulsory taking of land, which form so large a proportion of those covered by time-limited statutory remedies.

[1] Above, p. 690.
[2] Above, p. 691.
[3] See the remarks of Lord Denning in *A.-G. of the Gambia* v. *N'Jie* [1961] AC 617 at 634 and *Maurice* v. *London County Council* [1964] 2 QB 362 at 377 (where the statute said 'who may deem himself aggrieved'). In the latter case the interpretation in the *Buxton* case (above) was disapproved.
[4] *Arsenal Football Club Ltd.* v. *Ende* [1979] AC 1. But the law of rating provided a special context.
[5] RSC Ord. 53, r. 3(10); above, p. 655.
[6] See above, p. 296.

DEFAULT POWERS

Default powers: exclusive effect

It is common for ministers to be given statutory powers to compel local authorities to fulfil their duties, together with power for the minister to step in and remedy the default himself.[7] Thus the Education Act 1944 provides that if the minister is satisfied, on complaint by any interested person or otherwise, that a local authority has failed to discharge any duty under the Act, the minister may by order declare them to be in default and give them such directions as he thinks expedient for performing the duty; and that any such directions may be enforced by mandamus on the minister's application.[8] Under the Public Health Act 1936 the minister may cause a local inquiry to be held if complaint is made to him, or he is himself of opinion, that a local authority have failed to discharge their functions under the Act; he may then, if satisfied as to the failure, give them directions for making good the default; and if they do not, he may by order transfer any of their functions to a county council or to himself, the expense being charged to the defaulting authority.[9] Similar default powers are conferred by the National Health Service Act 1977.[10] The Town and Country Planning Act 1990 contains more limited powers which the Secretary of State may enforce by mandamus.[11] A number of the more sweeping default powers have been repealed, such as those formerly conferred by the Housing Act 1957[12] and the Housing Finance Act 1972;[13] but the Housing Act 1985 empowers the Secretary of State to act as he may think necessary or expedient for enforcing tenants' 'right to buy' from local authorities, if difficulties are put in their way,[14] and the Local Government Act 1985 contains default powers in case local planning authorities fail in their duty to make unitary development plans.[15]

Powers of this kind are a standard administrative mechanism for enabling the central government to deal with an inefficient or recalcitrant local authority. The mere fact of their existence puts a powerful lever in the minister's hands. In principle they should be powers of last resort and rarely used. But in recent years the tensions between central and local government have called them into play more

[7] For a list of default powers to which local authorities are subject see 58 HC Deb. (WA) 249 (11 April 1984); [1984] *PL* 485.
[8] s. 99.
[9] s. 322. The Public Health Act 1875, s. 299 was the prototype of these powers.
[10] s. 85.
[11] ss. 100, 104.
[12] ss. 171 (conferring such powers on county councils), 173.
[13] s. 95.
[14] s. 164. See *R.* v. *Secretary of State for the Environment ex p. Norwich CC* [1982] QB 808.
[15] 1st sched., para. 13.

frequently.[16] Ministers have sometimes been armed with such a complex battery of default powers that they have misunderstood them and acted unlawfully.[17]

One legal effect of these default powers is that the courts are prone to treat them as exclusive remedies, impliedly excluding other remedies for the enforcement of the duty. The principle is the same as that already explained in connection with powers, but in the case of duties the courts seem less disposed to allow ordinary remedies to be used as alternatives. A learned judge once said:

> Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.[18]

The House of Lords approved this proposition in a case where the owner of a paper mill was trying to force the local authority to build sewers adequate to the discharge of effluent from his mill.[19] Under the Public Health Act 1875 the local authority had the duty to provide such sewers as might be necessary for effectually draining their district. The Act also provided that if complaint was made to the Local Government Board about failure to provide sewers, the Board after duly inquiring into the case might order performance of the duty within a fixed time, and might enforce their order by mandamus, or else appoint some person to perform the duty. This scheme of enforcement was held to bar the right of a private person to seek mandamus on his own account, since the Act implied that his right course was to complain to the Board. The same principle has several times been applied in proceedings for injunctions[20] or declarations[21] against local education authorities in connection with the provision or administration of schools, the courts holding that their obligations in these matters were remediable only by means of the Secretary of State's default power. That was also the only remedy where a local authority was accused of failing to provide temporary accommodation for

[16] Notably when more than twenty local authorities refused to implement the Housing Finance Act 1972; see *Asher* v. *Secretary of State for the Environment* [1974] Ch. 208. The Act was replaced by the Rent Act 1974 and most of the councillors were discharged from personal liability to district auditors' surcharges by the Housing Finance (Special Provisions) Act 1975. See [1985] *PL* 283 at 289 (G. Zellick).

[17] As in *Lambeth LBC* v. *Secretary of State for Social Services* (1980) 79 LGR 61; *R.* v. *Secretary of State for Transport ex p. Greater London Council*, The Times, 31 October 1985 (discretionary power mistaken for duty).

[18] *Doe* v. *Bridges* (1831) 1 B & Ad. 847 at 859 (Lord Tenterden CJ). For this rule and its later relaxation see [1998] *PL* 407 at 416 (Sir R. Carnwath).

[19] *Pasmore* v. *Oswaldtwistle Urban District Council* [1898] AC 387. See also *Clark* v. *Epsom Rural District Council* [1929] 1 Ch. 287 (sewers); *R.* v. *Kensington LBC ex p. Birdwood* (1976) 74 LGR 424 (refuse).

[20] *Bradbury* v. *Enfield London Borough Council* [1967] 1 WLR 1311 (failure to submit plans and obtain approval before establishing new schools); *Wood* v. *Ealing London Borough Council* [1967] Ch. 364 (duty to provide sufficient schools). Contrast *Meade* v. *Haringey LBC* [1979] 1 WLR 637 (duty to keep schools open enforceable by parents).

[21] *Cumings* v. *Birkenhead Cpn.* [1972] Ch. 12 (duty to provide sufficient schools); *Watt* v. *Kesteven County Council* [1955] 1 QB 408 (duty to have regard to wishes of parents); and see *R.* v. *Northampton CC ex p. Gray*, The Times, 10 June 1986 (choice of parent governors).

persons in urgent need under the National Assistance Act 1948,[22] and, in a similar case, of failing to follow ministerial directions and guidance.[23]

Default powers: non-exclusive effect

On the face of it it is strange that the courts should thus regard default powers as a substitute for ordinary legal remedies. A default power is an administrative device of last resort which is rarely used and which has as its object the internal efficiency of the executive machinery of the state. It is suitable for dealing with a general breakdown of some public service caused by a local authority's default, but it is quite unsuitable as a remedy for defaults in individual cases. As a judge once said, a power of this kind is not really a legal remedy at all, and certainly not an equally convenient and beneficial remedy for an individual so as to exclude the remedy of mandamus.[24] Scots law also rejects the English doctrine.[25] A better explanation of the cases mentioned above is probably that the nature of the duty made it unsuitable for enforcement by private action or that, in other words, Parliament did not intend to make it a duty owed to individuals personally. Thus in the case of the sewers Lord Halsbury LC said that

> it would be extremely inconvenient that each suitor in turn should be permitted to apply for a specific remedy against the body charged with the care of the health of the inhabitants of the district in respect of drainage.

In the case under the National Assistance Act Lord Denning MR likewise said:[26]

> It cannot have been intended by Parliament that every person who was in need of temporary accommodation should be able to sue the local authority for it.

It is reasonable to suppose that the general obligations of public authorities in the areas of health, education and welfare are not intended to be enforceable at the suit of individuals. It is unrealistic to suppose that ministerial default powers supply an adequate alternative remedy.

This last point is recognised by the courts in a number of situations. They will not accept default powers as a substitute for ordinary remedies in a case of breach

[22] *Southwark London Borough Council* v. *Williams* [1971] Ch. 734. See similarly *Roberts* v. *Dorset CC* (1976) 75 LGR 79; *Wyatt* v. *Hillingdon LBC* (1978) 76 LGR 727.

[23] *Ex p. P*, (1999) 31 HLR 154.

[24] *R.* v. *Leicester Guardians* [1899] 2 QB 632 at 639 (Darling J). See also *R.* v. *Inner London Education Authority ex p. Ali* (1990) 2 Admin. LR 822; *R.* v. *Secretary of State for Education ex p. Prior* [1994] COD 197, citing a helpful dictum of Woolf J.

[25] *Docherty (T.) Ltd.* v. *Burgh of Monifieth* 1971 SLT 13 (local authority ordered to construct sewers); *Walker* v. *Strathclyde Regional Council* (No. 1) 1986 SLT 523; *Wilson* v. *Independent Broadcasting Authority* 1979 SLT 279; *MacKenzie's Trustees* v. *Highland Regional Council* 1995 SLT 218.

[26] *Southwark London Borough Council* v. *Williams* [1971] Ch. 734 at 743.

of statutory duty causing personal injury;[27] or where something is done which is positively forbidden by the Act;[28] or where something is done which is ultra vires.[29] In these situations it would plainly be wrong to deprive an injured or affected person of his ordinary legal rights. Furthermore, the duty of a body such as a local education authority may sometimes be owed to an individual and therefore enforceable by him. Parents who are obliged to send their children to school under criminal penalties have a legal right to have them accepted by the local education authority in accordance with their statutory duty. Consequently where an authority refused to accept poor children in its schools without a special payment which it was not entitled to demand, the guardians of the children were granted a declaration that the children must be accepted.[30] Where an authority closed schools which it had a duty to keep open, it was held by the Court of Appeal that the minister's default power was not exclusive but left open all the established remedies for breach of statutory duty.[31] In a relator action brought on behalf of a member of the public for an injunction against the broadcasting of an indecent television programme, contrary to the statutory duty of the broadcasting authority, the same court rejected the argument that the complainant's only remedy was to apply for a ministerial intervention under the Television Act 1964.[32]

[27] *Ching* v. *Surrey CC* [1910] 1 KB 736; *Reffell* v. *Surrey County Council* [1964] 1 WLR 358 (failure to keep school buildings safe; pupil injured).

[28] *Bradbury* v. *Enfield London Borough Council* [1967] 1 WLR 1311 (ceasing to maintain school without giving opportunity for objection).

[29] *Cumings* v. *Birkenhead Cpn.* [1972] Ch. 12 (Lord Denning MR); *Meade* v. *Haringey LBC* [1979] 1 WLR 637. See also *R.* v. *Secretary of State for the Environment ex p. Ward* [1984] 1 WLR 834.

[30] *Gateshead Union* v. *Durham County Council* [1918] 1 Ch. 146. The court would have granted an injunction also if necessary.

[31] *Meade* v. *Haringey LBC* (above).

[32] *A.-G. ex rel. McWhirter* v. *Independent Broadcasting Authority* [1973] QB 629 at 649 (no breach of duty was found).

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LIABILITY OF PUBLIC AUTHORITIES

Categories of liability

Any attempt to describe the liability of public authorities to pay monetary damages or compensation runs at once into difficulties of classification.[1] In the first place, there is the problem of the Crown. Crown liability for torts such as trespass and negligence has a very different history from the liability of local authorities and other governmental bodies. But since the Crown Proceedings Act 1947 the Crown has in principle been put on the same footing as public authorities generally. To treat the Crown in an entirely separate compartment would therefore mean segregating materials and illustrations which are best grouped together; but to deal adequately with the Crown in one single discussion would require too many digressions. The course which will be followed here will be to treat matters involving the Crown as part of the general law so far as they rest on the same principles; but the history and peculiarities of Crown proceedings, together with certain connected matters, must be relegated to the next chapter.

Inevitably, also, there will be overlap with the chapter on remedies. The law of liability can never be cleanly detached from the law of remedies, so that reference back may be needed. The present chapter is concerned primarily with liability to pay damages or compensation in money, though the injunction is also an important remedy in actions for nuisance and for breach of contract.

Liability under European Union law is in a class by itself, and in view of the supremacy of EU law over national law can suitably be treated first.

LIABILITY UNDER EUROPEAN UNION LAW

Varieties of liability

An important new head of government liability was created when Britain acceded to the European Communities in 1973 under the European Communities Act 1972, as explained earlier.[2] Breach of Community obligations may make the

[1] For discussion see *Statutory Torts* (2003) (Staunton, Skidmore, Harris and Wright).
[2] Above, p. 192.

government liable to pay compensation or damages under rules which are in continuous development by the European Court of Justice in Luxembourg. It is already apparent that the government's liability may be very extensive and costly.

Community obligations may arise both directly from the EU Treaty and also from regulations, directives and decisions issued by the EU Council and the Commission. Treaty provisions and regulations may have direct effect and may confer rights enforceable in national courts.[3] Although originally directives were to be implemented by the member state by methods of its own choice,[4] the European Court has developed the doctrine that a directive, if unconditional and sufficiently precise, may have direct effect, without national legislation, against the government which is failing to implement the directive, including any body which is a government agency according to national law.[5] Thus where an area health authority dismissed a woman employee because she had reached the age of 60, when the corresponding age for men was 65, the European Court, holding that certain provisions of the directive of the EC Council prohibiting sex discrimination in employment were directly effective, decided that the dismissed employee could rely on the directive in a British court or tribunal and so claim both a retiring age of 65, despite British legislation specifically permitting differential retiring ages, and full financial compensation, despite the limit imposed by British law.[6]

Directives which are directly effective are enforceable as such only against national authorities and not against other individuals or bodies, the principle being that the state may not take advantage of its own failure to implement Community law. In a case such as that just related, therefore, a claim against a private employer would have failed. This anomaly of 'vertical but not horizontal effect' can be indirectly remedied in two ways, as has been explained earlier: one is by extending the meaning of national authorities so as to include any body which provides a public service under state authority and enjoys special powers; the other is by treating national courts as national authorities, which may thus be obliged to give effect to directives even against private parties.[7] State liability may also be incurred, as already explained, where the state has failed to translate a directive into national law, as where the Italian government had failed to give effect to a directive requiring state guarantees for wages owed to employees by bankrupt employers and the European Court held that the employees could sue the Italian government in the Italian courts for damages.[8] For this purpose it is immaterial whether or not the

[3] EU Treaty, Art. 249 (ex 189); *Van Gend en Loos* case [1963] CMLR 105; *Defrenne* v. *Sabena* (No. 2) [1976] CMLR 98. An example concerning regulations is *R.* v. *Minister of Agriculture ex p. Cox* [1993] 2 CMLR 917.

[4] EU Treaty, Art. 249 (ex 189).

[5] *Van Duyn* v. *Home Office* [1975] Ch. 358 (ECJ); the *Marshall* case (below).

[6] *Marshall* v. *Southampton and South West Hampshire Area Health Authority* [1986] QB 401 (ECJ); (No. 2) [1994] QB 126 (ECJ); [1994] AC 530 (HL).

[7] See above, p. 202, and the decisions there cited.

[8] *Francovich* v. *Italian Republic* [1991] ECR I–5357, [1993] 2 CMLR 66 (ECJ) (above, p. 204). See [1993] *CLJ* 272 (R. Cantara). See also *Emmott* v. *Minister for Social Welfare* [1993] ICR 8 (Irish Republic's failure to implement directive: domestic time limit overridden).

directive has direct effect (in the Italian case it did not, since it was held to lack precision). The principle is simply that the state must bear the liability for its failure to embody the directive in national law. Even though governments may not always bear liability for violations of the Treaty or of Community regulations,[9] the generality of the propositions laid down by the Court points distinctly in that direction. These propositions are discussed below in the context of breach of duty, and they conflict with the Court of Appeal's decision that the government is not liable in damages for loss caused by a ministerial order which is invalid because of conflict with the EU Treaty.[10]

Despite the uncertainty which surrounds some important points, it is clear that the decisions of the European Court have opened up a wide new category of government liability. The Court is evidently determined to ensure that the principle of supremacy of European law is reinforced by a stringent system of remedies and that governments which default on their Community obligations shall be responsible for making reparation.

LIABILITY FOR BREACH OF HUMAN RIGHTS

Enforceable human rights

The Human Rights Act 1998 has opened up new vistas of liability for public authorities. In the long period between Britain's acceptance of the right of individual petition in 1966 and the incorporation of 'the Convention rights' into domestic law by the Act of 1998 the Convention had no more than the force of a treaty and could not create domestic legal liability. But the rights secured by it are now clothed with legal force by the Act, already explained generally together with the list of the protected rights.[11] The Act came fully into force only on 2 October 2000, although the courts, by intelligent anticipation, had woven parts of it into the doctrines of reasonableness and natural justice before its date of commencement.[12] After that date there began, as had been expected, a copious flow of proceedings against public authorities. In the Weekly Law Reports, for example, approximately one third of the reported cases raised questions under the Act, and in some of them the complainants succeeded.

[9] Alternative interpretations are discussed in [1993] *PL* 151 at 160 (C. Lewis and S. Moore). For useful discussion of the principles of liability see P. P. Craig in (1997) 113 *LQR* 67 and in Beatson and Tridimas (eds.), *New Directions in European Public Law*, ch. 6.

[10] Below, p. 775.

[11] Above, p. 166.

[12] See above, p. 393, for an example; and *R. (Mahmood)* v. *Home Secretary* [2001] 1 WLR 840 as discussed in *R. (Daly)* v. *Home Secretary* [2001] 1 WLR 840 (Lord Steyn).

Important heads of liability under the Act have been explained elsewhere in this book, both in the general account (chapter 7) and also in particular contexts such as the right to personal liberty (chapter 16), the right to a fair and impartial hearing (chapters 13 and 14) and the right to effective remedies (chapter 19). Other areas will be illustrated in this present chapter. Miscellaneous examples were given in chapter 6.

The Act makes comprehensive provision for remedies, in particular against public authorities, in the ordinary courts and at the instance of individual claimants, for breaches of Convention rights. The citizen may now make his claim against a public authority in the appropriate court or tribunal, and in any legal proceedings, provided that he satisfies the Convention's requirement of himself being a 'victim' of the alleged breach.[13] He must sue within a year unless the court or tribunal considers it equitable to extend the time.[14] A case against the U.K. may still be taken to Strasbourg on a complaint that domestic law fails to satisfy the Convention.

Remedies—general

The Act's specific provisions about remedies have their roots in Article 41 of the Convention which provides that the European Court 'shall, if necessary, afford just satisfaction to the injured party'. Since the Act requires domestic courts to 'take into account' the judgments, decisions and opinions of the European Court and of the (former) Commission,[15] domestic courts will normally follow European case law in the absence of good reasons for departing from it. The European Court commonly awards both compensation and costs, but is less liberal than domestic law in the case of the former, often holding that a decision in the claimant's favour amounts in itself to 'just satisfaction', particularly in the case of non-pecuniary loss. Nor has the European Court developed clear principles for the award of compensation. The Law Commission attempted to clarify the law and practice on damages in a full discussion published in 1998, but found difficulty in crystallising a mass of case law into positive rules and observed that there would be much scope for judicial discretion.[16]

In the case of any act (or proposed act) of a public authority the court may 'grant such relief or remedy, or make such order, within its powers as it considers just, and appropriate'.[17] Remedies which issue only from the High Court, such as certiorari and mandamus, will remain so restricted, but otherwise the whole field of remed-

[13] s. 7(1). For the 'victim' rule see above, p. 700.
[14] s. 7(5).
[15] s. 2(1).
[16] Law Com. No. 266, Cm. 4853.
[17] s. 8(1).

ies is open. A tribunal's power to provide 'an appropriate remedy' may be extended by ministerial order.[18] Damages may be awarded only where, allowing for any other relief, the court holds that this is necessary to afford 'just satisfaction', and account must be taken of the principles applied by the European Court.[19]

All the rulings and practices of the European Court whether before or after the Act, are now relevant material for enforcing it. The Convention provides that if the law of the Member State allows only partial reparation, the Court 'shall, if necessary, afford just satisfaction to the injured party'.[20] The Court habitually awards both damages and costs in a manner comparable with the practice of British courts, and these awards are binding under the Convention.[21] There are therefore many precedents for the claims that can be made under the Act. The Act provides, however, that damages for a judicial act (since courts and tribunals count as public authorities), if done in good faith, may not be awarded except as specifically provided in the case of unlawful detention;[22] nor may a judicial act be challenged otherwise than by way of appeal or judicial review or under ministerial rules (if any).[23]

Remedies—injunctions and possession orders

All remedies under the Act are discretionary. But the court's discretion is not unfettered and Convention principles require that remedies should be just and proportionate both to social needs and to individual circumstances. Thus the House of Lords allowed appeals against injunctive orders obtained by local authorities against gipsies using land for caravan sites in breach of planning control, remitting their cases to the High Court for reconsideration, which would require balancing of the need for planning control in the public interest against any resulting personal hardship and any failure to respect a person's home under Article 8.[24] In contrast, where a tenant's lease was terminated and he held over unlawfully, the House of Lords held by a majority that the premises factually remained his home, but that Article 8 would not help him since it could not defeat a legal owner's right to possession.[25] In this case there were powerful dissents by Lords Bingham and Steyn, who would have ordered reconsideration by a balancing exercise as in the case of the gipsies, Lord Steyn saying that the decision of the majority 'empties Article 8(1) of any or virtually any meaningful content', and fails to fit into the 'new landscape' of the HRA.

[18] s. 7(11).
[19] s. 8(3), (4).
[20] Art. 41.
[21] Art. 46.
[22] s. 9(3). Any award is to be made against the Crown (s. 9(4)). See above, p. 600 discussing the special provision in Art. 5 for compensation for detention.
[23] s. 9(1).
[24] *South Bucks DC* v. *Porter* [2003] 2 WLR 1547.
[25] *Harrow LBC* v. *Qazi* [2003] 3 WLR 792.

This sharp disagreement in the House of Lords turns on the question whether Article 8 can displace the established law about ownership and possession of property, which is itself protected in the First Protocol. The local authorities' claims to possession were subject to judicial review and subject also to the rule against evicting an occupier without a court order[26]—rules which themselves show the law's respect for the occupier's home, and under which, in any case, the court must act compatibly with Convention rights.[27] But to confer new property rights on an unlawful occupier is another matter altogether. As Lord Scott said, Article 8 was intended to deal with the arbitrary intrusion by state or public authorities into a citizen's home life and not to amend the social housing legislation of a member state. There is ample scope for that Article to operate within its proper sphere, but the right to remove unlawful occupiers is 'necessary in a democratic society . . . for the protection of the rights and freedoms of others'.[28] The narrow margin by which the House of Lords upheld this right illustrates the profound problems which the HRA can produce.

Remedies—damages

Infringements of human rights under the HRA may be regarded as a new species of tort or else as an additional form of breach of statutory duty or else as *sui generis*. This is merely a matter of words. Whatever classification is adopted, the Convention requirement of 'just satisfaction', as well as the special provision for compensation in Article 5, makes it clear that compensation equivalent to money damages may be awarded.

Rules and principles for the assessment of damages in the European Court are however conspicuous by their absence. The Law Commission's study, already mentioned, gave many examples from a variety of countries but led to few conclusions. Typical Strasbourg awards were of £12,000 against the UK for delays and maladministration in arranging the adoption of a child;[29] of sums totalling £43,000 against Italy for the arrest and maltreatment of a suspected Mafia member[30] and of £5,000 against France for distress and anxiety caused by delays in proceedings against a hospital.[31]

There have been relatively few reported English decisions on damages since the HRA came into force. In a group of eight cases where applicants to mental health review tribunals had suffered excessive delays the High Court awarded damages in

[26] Protection from Eviction Act 1977, s. 3.
[27] HRA s. 6(1), (3).
[28] Art. 8(2).
[29] *H.* v. *UK* (1987) 10 EHRR 95.
[30] *Labita* v. *Italy* (1995) 20 EHRR 535.
[31] *H.* v. *France* (1989) 12 EHRR 74.

six cases ranging from £750 to £4,000; but in two cases, following the common Strasbourg practice, it was held that a finding in the claimant's favour was sufficient just satisfaction without damages.[32] The court analysed the Strasbourg practice and concluded that English law could and should follow it. The case of each claimant was investigated in detail. The court found that there was no clear or consistent Strasbourg jurisprudence, but that the level of damages should so far as possible reflect that of English law.

Another group of cases resulted in a full opinion on damages under the HRA from a powerful Court of Appeal.[33] Three claims for damages, all based on maladministration and delay, had led to neglect of special needs, impoverishment and failure to allow entry to an accepted refugee's family. None of them succeeded, but the court made an important survey of the subject of damages and of a member state's obligations under Article 8. Although that article does not provide a right to a home, it may require the provision of welfare support, including housing, in special circumstances; and neglect of this duty may justify damages. The Strasbourg jurisprudence shows, however, that the Court will not regard mere delay as infringing Article 8 unless its consequences are serious; and regard must be had to resources. The court said:

> The remedy of damages generally plays a less prominent role in actions based on the articles of the ECHR than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages.

And again:

> There are good reasons why, where the breach arises from maladministration, in those cases where an award of damages is appropriate, the scale of such damages should be modest. The cost of supporting those in need falls on society as a whole. Resources are limited and payments of substantial damages will deplete the resources available for other needs of the public including primary care.

The court approved of the use in an earlier case of awards of the Local Government Ombudsman as comparators, though regarding them as 'right at the top end of the range'. That was the case where damages of £10,000 were awarded to a severely disabled woman and her husband and the High Court had in fact held that the full measure of damages in tort should be allowed.[34]

In this context it seems improbable that exemplary or aggravated damages will be awarded.

[32] *R. (KB)* v. *South London and South and West Region Mental Health Review Tribunal* [2003] 3 WLR 385.

[33] *Anufrijeva* v. *Southwark LBC* [2003] EWCA Civ. 1406 [2004] 1 All ER 833; [2004] 2 WLR 603 (CA), Lords Woolf LCJ and Phillips MR both sitting. The quotations are from para. [52] and para. [75].

[34] *R. (Bernard)* v. *Enfield LBC* [2002] EWHC 2282, [2003] HLR 27.

LIABILITY IN TORT GENERALLY

General principles[35]

Public authorities, including ministers of the Crown,[36] enjoy no dispensation from the ordinary law of tort and contract, except in so far as statute gives it to them. Unless acting within their powers, they are liable like any other person for trespass, nuisance, negligence and so forth. This is an important aspect of the rule of law. Similarly they are subject to the ordinary law of master and servant, by which the employer is liable for torts committed by the employee in the course of his employment, the employee also being personally liable. Examples are furnished by many classic cases. In *Cooper* v. *Wandsworth Board of Works*[37] the board was held liable in damages in an ordinary action of trespass: as has been seen, it was acting outside its powers because it caused its workmen to demolish a building without first giving the owner a fair hearing; therefore it had no defence to an action for damages for trespass. The famous cases which centred round John Wilkes in the eighteenth century, and which denied the power of ministers to issue general warrants of arrest and search, took the form of actions for damages against the particular servants who did the deeds, who were sued in trespass just as if they were private individuals.[38] The Governor of Jamaica, who had ordered the seizure of a ship chartered to the plaintiff and could show no legal justification, was held personally liable in damages for trespass.[39] Before 1948 the Crown itself was not legally liable for its servants' misdeeds, but the Crown would be the natural defendant today.[40] The plaintiff may sue the master or the servant or both, since both are liable, but in most cases he will naturally choose to sue the master. He must, however, be able to show some recognised legal wrong. Thus there was no remedy at common law for tapping of telephones, which was held not to be a tort,[41] though compensation may now be payable under the Interception of Communications Act 1985.[42]

[35] See Street, *Governmental Liability*, ch. 2; Hogg, *Liability of the Crown*, ch. 4; Harlow, *Compensation and Government Torts*; Arrowsmith, *Civil Liability and Public Authorities*; Aronson and Whitmore, *Public Torts and Contracts*; (1980) 98 *LQR* 413 (P. P. Craig). For an acute critique of what is seen as undue indulgence to plaintiffs see [1989] *PL* 40 (J. A. Weir).

[36] See below, p. 819.

[37] (1863) 14 CB (NS) 180; above, p. 480.

[38] *Entick* v. *Carrington* (1765) 19 St. Tr. 1030; *Leach* v. *Money* (1765) 19 St. Tr. 2002; *Wilkes* v. *Wood* (1763) 19 St. Tr. 1153.

[39] *Musgrave* v. *Pulido* (1879) 5 App. Ca. 102. Similarly *Mostyn* v. *Fabrigas* (1774) 1 Cowp. 161.

[40] Below, p. 821.

[41] *Malone* v. *Metropolitan Police Commissioner* [1980] QB 49.

[42] Above, p. 58.

There are some situations where an officer of central or local government has an independent statutory liability by virtue of his office, because the statute imposes duties upon him as a designated officer rather than on the public authority which appoints him. In that case the employee only will be liable. Thus an action failed against a local authority when their inspector of animals had seized supposedly infected sheep in a market, since the statutory order empowered the inspector but not the local authority to seize infected animals; and it made no difference that the local authority had a statutory duty to appoint the inspector and power to dismiss him.[43] But if the duties of the designated officer are in fact carried out by employees of the local authority, that authority may be liable in the same way as for its other employees. This last proposition was applied by the Court of Appeal where a junior employee of a local authority negligently certified that no local land charges were registered against land which was being sold, so that an incumbrancer lost a charge over the land, although the statutory duty of issuing certificates rested specifically upon the local authority's clerk as registrar.[44] In cases where the designated officer alone is liable, his employer (whether the Crown or a local authority) will normally indemnify him; but this is only a matter of grace.[45]

Another rule which emerged in the course of Wilkes's legal adventures was that oppressive or unconstitutional action by servants of the government could justify an award of exemplary or punitive damages, i.e. damages which take into account the outrageous conduct of the defendant and not merely the actual loss to the plaintiff. This is one of the special cases in which exemplary damages are allowed, according to the law as declared by the House of Lords.[46] So the position here is that the law is sterner with the government than with the citizen. Examples in the governmental area are rare, but one occurred when the Court of Appeal upheld an award of exemplary damages to a Sikh woman who had suffered sex and racial discrimination as an applicant for a post at a local authority college.[47] Such aggravated damages will not, however, be awarded in actions for public nuisance or negligence.[48]

[43] *Stanbury* v. *Exeter Cpn.* [1905] 2 KB 838.

[44] *Ministry of Housing and Local Government* v. *Sharp* [1970] 2 QB 223. For this case see below, p. 761.

[45] Same case, at 269, 275.

[46] *Rookes* v. *Barnard* [1964] AC 1129 at 1226; and see *Ashby* v. *White* (1703) 2 Ld. Raym. 938 at 956; *Broome* v. *Cassell & Co. Ltd.* [1972] AC 1027; *A.-G. of St Christopher* v. *Reynolds* [1980] AC 637; *Kuddus* v. *Chief Constable of Leicestershire Constabulary* [2001] 2 WLR 1789 (misfeasance in public office). For awards of exemplary damages against the police see *George* v. *Commissioner of Metropolitan Police*, The Times, 31 March 1984; *Connor* v. *Chief Constable of Cambridgeshire*, The Times, 11 April 1984; *Treadaway* v. *Chief Constable of West Midlands*, The Times, 25 October 1994. Nationalised industries were not 'governmental' for this purpose: *A.B.* v. *South West Water Services* (below).

[47] *Bradford CMC* v. *Arora* [1991] 2 QB 507.

[48] *A.B.* v. *South West Water Services Ltd.* [1993] QB 507.

Nuisance and inevitable injury

What is duly done under statutory authority is lawful action of which no one is entitled to complain. A public authority will therefore not be liable in tort where the injury is the inevitable consequence of what Parliament has authorised, as is the nuisance caused by the running of trains on a railway authorised to be operated on a particular line,[49] or by the erection of a barrier on a pavement.[50] But it is important to ascertain precisely what the statute authorises. The principle worked out in the railway cases in the last century was that if the empowering Act expressly authorised the use of locomotives and trains,[51] no action could lie for such nuisance as their use inevitably involved;[52] but that if the Act merely authorised the construction of the railway, without expressly providing for the use of trains, any nuisance caused by trains was actionable in the normal way.[53] The basis of the latter proposition was that the Act left the railway company at liberty to use trains, but without any privilege to commit nuisances.

This principle was invoked by the Court of Appeal where an oil company had obtained an Act of Parliament authorising the acquisition of specific land for a refinery.[54] The Act also authorised the construction and use of ancillary works, such as railways, with provision for compensation in case of damage. But, although it clearly contemplated the operation of the refinery, it did not authorise that expressly. Lord Denning MR made a persuasive case for applying the principle of the railway cases, holding that the absence of express authority was a deliberate omission, indicating an intention that the company was not to be exempted from the law of nuisance. But the House of Lords reversed, holding that the Act at least by necessary implication authorised the operation of the refinery and that neighbours who complained of excessive smell, vibration and noise would have no remedy in so far as the nuisance was the inevitable result of the authorised operation. The House made no mention of the principle of the railway cases[55] and their decision seems to have weakened, if not removed, the protection which it gave to persons injured by the operations of public authorities and bodies with statutory powers. As is pointed out later,[56] this is an injustice which Parliament has felt bound to remedy.

[49] *Hammersmith Rly Co.* v. *Brand* (1869) LR 4 HL 171. A claim for statutory compensation was also rejected: see below, p. 808.

[50] *Dormer* v. *Newcastle upon Tyne Cpn.* [1940] 2 KB 204.

[51] As did the Railway Clauses Consolidation Act 1845, s. 86.

[52] *Vaughan* v. *Taff Vale Rly Co.* (1960) 5 H & N 679.

[53] *Jones* v. *Festiniog Rly Co.* (1868) LR 3 QB 733.

[54] *Allen* v. *Gulf Oil Refining Ltd.* [1980] QB 156 (reversed [1981] AC 1001).

[55] Except in Lord Keith's dissenting speech.

[56] Below, p. 808. Lord Denning also proposed that it should be remedied by holding in future that Acts authorising the use of such works should not be construed as taking away the right of action for nuisance at common law, since the injustice was comparable to expropriation without compensation: *Allen* v. *Gulf Oil Refining Ltd.* (above).

Rights over property are similarly overridden where a public authority acquires land which is subject to some third party right such as a right of way or a restrictive covenant. No such right can prevent the authority from exercising its statutory powers;[57] and to the extent that the right is expropriated, there is, as mentioned below, a statutory claim to compensation.[58] But the right is not extinguished, and may be enforced in any situation where it does not conflict with action based on statutory authority. For example, the Air Ministry may set up an aerodrome on land compulsorily purchased, even though the land is subject to a covenant that it shall be used only for agriculture; but if the Ministry lets the aerodrome to a company for commercial flying, the company may be restrained by injunction from breaking the covenant.[59]

These are cases where private interests must suffer inevitably. But in many situations there is no such inevitability. If there is a choice of sites or methods, some of which will injure private rights and some of which will not, a public authority may have a duty to choose the latter. In each case the court has to consider whether Parliament presumably intended to permit the infringement. The presumption is that infringement is to be avoided unless reasonably necessary, and the onus of proving necessity is on the public authority.[60] In an early case where paving commissioners were empowered to carry out paving works as they should think fit, damages were awarded against them for raising a street so as to obstruct doors and windows, since they had acted, as Blackstone J said, 'arbitrarily and tyrannically'.[61]

A leading case was decided by the House of Lords under an Act which gave power to build hospitals in London for the benefit of the poor. A hospital was built at Hampstead for smallpox and other contagious diseases, and neighbouring residents obtained an injunction against it on the ground that, sited where it was, it was a nuisance.[62] The District Managers were unable to show that such a hospital in such a place was expressly or impliedly authorised by the Act: the Act gave no compulsory powers, it made no provision for compensation, and the inference was that it was not designed to permit interference with private rights. This principle may also apply even where the Act authorises a specific undertaking on a specific site. The Manchester Corporation was empowered to build and operate an electric power station on certain land outside the city, but this did not prevent a farmer from obtaining an injunction and damages on the ground that the Corporation

[57] *Kirby* v. *Harrogate School Board* [1896] 1 Ch. 437; *Re Simeon and Isle of Wight RDC* [1937] Ch. 525; *Marten* v. *Flight Refuelling Ltd.* [1962] Ch. 115.

[58] Below, p. 805.

[59] *Marten* v. *Flight Refuelling Ltd.* (above).

[60] See *Manchester Cpn.* v. *Farnworth*, below.

[61] *Leader* v. *Moxton* (1773) 3 Wils. KB 461.

[62] *Metropolitan Asylum District* v. *Hill* (1881) 6 App. Cas. 193; similarly *Fletcher* v. *Birkenhead Corporation* [1907] 1 KB 205 (local authority's waterworks pumped out silt from beneath plaintiff's house, causing subsidence); *Tate & Lyle Ltd.* v. *Greater London Council* [1983] 2 AC 509 (power to construct ferry terminal does not justify adoption of a design which diverts silt to plaintiffs' jetty).

had not used all reasonable diligence to prevent the creation of a nuisance by sulphurous fumes and contamination of grass.[63] Furthermore, the House of Lords held that the degree of nuisance which might have to be accepted as inevitable would vary with the state of scientific knowledge from time to time, so that the Corporation would have to keep abreast of the best current practice in this respect in order to discharge the onus lying upon them. Lord Dunedin said:[64]

> When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

This 'criterion of inevitability' will depend in each case on the true implications of the empowering statute, and this may pose difficult questions of construction. A contrasting case concerned a river authority which, in dredging a river, deposited the spoil along the banks and thus raised their height. This prevented the river, when in flood, from overflowing into its usual flood channels, and the diversion of flood waters caused the collapse of a bridge belonging to the plaintiff. But the plaintiff failed in an action for nuisance, since it was held that the injury 'was clearly of a kind contemplated by the Act'.[65] The depositing of soil along river banks was a normal accompaniment of dredging, and if any owner of land which would be injured thereby could obtain an injunction, the river authority could in many cases be prevented from exercising its powers.[66] It was said also that there was an important distinction between powers to execute particular works (such as the building of power stations or hospitals) and powers to execute a variety of works of specified descriptions (such as river drainage works); and that the principle of avoiding injury to private rights, except where demonstrably necessary, applied only to the former.[67] But the decisive point was probably that the Land Drainage Act 1930 gave a right to compensation for injury done, with the implication that this was intended to be in substitution for the ordinary remedies of private law.

If a public authority commits an unauthorised nuisance, it is no defence that it is taking the most reasonable action possible in the public interest, or that the injury done is relatively unimportant in relation to the benefit to the public. Thus an

[63] *Manchester Cpn.* v. *Farnworth* [1930] AC 171.

[64] At p. 183.

[65] *Marriage* v. *East Norfolk Rivers Catchment Board* [1950] 1 KB 284. Cf. *Lagan Navigation Co.* v. *Lambeg Bleaching etc. Co.* [1927] AC 226.

[66] This argument, which recurs through the cases (e.g. in *Allen* v. *Gulf Oil Refining Ltd.* above), may be fallacious, since injunction is a discretionary remedy which need not necessarily be granted in an action for damages at common law. See [1982] *CLJ* 87 (S. R. Tromans).

[67] At p. 307 (Jenkins LJ).

injunction was granted at the instance of an angling club whose fishing rights in the river Derwent were injured by pollution from the sewage works of the Derby Corporation.[68] The Corporation had a statutory duty to provide a sewerage system and had originally provided an adequate one. But the growth of the city had overloaded it, and the Corporation had taken to discharging inadequately treated sewage into the river. The Court of Appeal rejected the argument that the Corporation's duty to act in the public interest gave it some sort of immunity from injunctions. The court did, however, suspend the operation of the injunction for sixteen months so as to give the Corporation reasonable time to make better arrangements.

In the *Derby* case the Corporation itself caused the nuisance by discharging the effluent from its own plant. If it had reached the river merely by overflowing from the sewers, without any action on the Corporation's part, the Corporation would have done nothing to incur liability. This situation arose at Ilford through sewage overflowing through a manhole, due to the growth of the population and the overloading of what was previously an adequate sewerage system. A householder whose premises were flooded failed in an action for nuisance, since the Corporation themselves had committed no unlawful act.[69] This has nothing to do with the distinction between misfeasance and nonfeasance, mentioned below.[70] The point is simply that the cause of the injury is not any act of the Corporation but the use of the sewers by other people whom the Corporation has no power to prevent. If the overflow had been caused by a housing estate built by the Corporation, the result might have been different.[71] The Corporation would also have been liable if they had diverted the overflow from one man's land to another's, even though that minimised the injury.[72] For their failure to provide a more adequate sewage system there is only the statutory remedy of complaint to the minister.[73] The Public Health Act 1936 provides for compensation for injury caused by the exercise of powers of this kind;[74] but the exercise of some power must be the cause of the injury.

That Act, like many other Acts, also contains an express 'nuisance clause' providing that the local authority shall not create a nuisance.[75] Clauses of this kind may be interpreted as excluding strict liability, i.e. liability without fault, under the rule in *Rylands* v. *Fletcher* in case of accidents caused by the escape of noxious things

[68] *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese Ltd.* [1953] Ch. 149.

[69] *Smeaton* v. *Ilford Cpn.* [1954] Ch. 450. Confirmed in *Marcic* v. *Thames Water Utilities Ltd* [2003] 3 WLR 1603 (HL), paras. 55–56 (Lord Hoffmann).

[70] Below, p. 770.

[71] See the *Smeaton* case at 463.

[72] See at 465.

[73] See above, p. 740.

[74] s. 278.

[75] s. 31. See *Radstock Co-operative Society Ltd.* v. *Norton-Radstock Urban District Council* [1968] Ch. 605.

such as sewage or gas,[76] if indeed that rule applies at all to statutory authorities providing public services (see below). A provision that an authority shall not create a nuisance, or shall not be exonerated from liability for nuisance, does not affect its non-liability for nuisances inevitably resulting from the performance of its duties and the exercise of its powers.[77]

A public authority which itself deliberately creates a nuisance cannot escape liability by pleading that it was acting outside its powers.[78] But unauthorised action by its servants or agents, if outside the powers of the authority, might well be outside the scope of their employment. The principle of vicarious liability, explained below with reference to negligence, applies equally to nuisance and other torts.

The grant of planning permission, for example to build a factory, under the Town and Country Planning Acts confers no right to commit nuisances or to infringe private rights.[79] The scheme of the planning legislation is 'to restrict development for the benefit of the public at large and not to confer new rights on any individual members of the public, whether they live close to or far from the proposed development'. Planning permission merely removes a statutory impediment, and thus *pro tanto* restores to the successful applicant the liberty to develop his own property, subject to the rights of his neighbours, which he would otherwise enjoy at common law. But there may be some 'interplay between planning permission and the law of nuisance', since planning permission for a major development may lead to a change in the character of a neighbourhood and so alter the standard of amenity by which nuisance must be judged. This factor was decisive in a case where the local authority had granted planning permission for the operation of a commercial port, which necessarily involved heavy lorry traffic at night and disturbance to neighbours, and later sued on their behalf in nuisance. The claim was held to fail when judged 'by reference to the present character of the neighbourhood pursuant to the planning permission', despite the undoubted disturbance.[80] By observing that Parliament had delegated to the local planning authority the task of balancing the competing interests the judge seemed to imply that the planning permission legitimated the nuisance, but he stressed also the change in the character of the neighbourhood which should probably have been the sole criterion. There is a danger of confusing public policy with private interests in a doctrine which 'would transform a matter of legal right into one of administrative

[76] See *Smeaton* v. *Ilford Cpn.* (above) and cases there cited. For the rule in *Rylands* v. *Fletcher* see below, p. 772.

[77] See Public Utilities Street Works Act 1950 as applied in *Department of Transport* v. *North West Water Authority* [1984] AC 336.

[78] *Campbell* v. *Paddington Cpn.* [1911] 1 KB 869.

[79] *Buxton* v. *Minister of Housing and Local Government* [1961] 1 QB 278 (Salmon J), from which the quotation comes (at 283). See *Wheeler* v. *J. J. Saunders Ltd* [1996] Ch. 19 (malodorous pig farm not justified by planning permission); *Delyn BC* v. *Solitaire (Liverpool) Ltd.* (1995) 93 LGR 614 (planning permission for market does not authorise infringement of council's market rights).

[80] *Gillingham BC* v. *Medway (Chatham) Dock Co. Ltd.* [1993] QB 343, from which the quotation comes.

decision making',[81] and 'the court should be slow to acquiesce' in it.[82] It is unlikely that Parliament would have intended to authorise planning authorities to inflict uncompensated injury to the private rights of citizens.

A local authority may be liable in nuisance for failing to remove gipsies from its land[83] or for their depredations on the land of neighbours,[84] and for allowing trees in the highway to cause the subsidence of a neighbouring house.[85]

NEGLIGENCE AND STRICT LIABILITY

Negligence—ordinary cases

Unlike nuisance, negligence is never inevitable. No statute can be expected to authorise works to be carried out negligently, and the ordinary law of liability therefore has full scope. Discretionary decisions are another matter, as will be seen below.

The liability of statutory bodies for the negligence of their servants and agents, acting within the scope of their employment, was firmly established by the House of Lords in 1866. The plaintiff's ship had been damaged by hitting a mudbank which the harbour board's employees had negligently allowed to block the entrance of one of the docks. It was held that public bodies created by statute must in principle bear the same liabilities for the torts of their servants as were borne by private employers, subject only to any contrary statute.[86] The fact that the public body was acting solely for the public benefit and for no profit was immaterial. Nor was there any room for the defence that employer and employee were all alike holders of public offices with no vicarious liability. This argument exonerates an intermediate employee in a hierarchy such as the civil service.[87] But it cannot exonerate the true employer. In a later case the broad principle of liability was stated by Lord Blackburn:[88]

It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion

[81] Pill LJ in *Hunter* v. *Canary Wharf Ltd.* [1987] AC 655 at 668, where the question is discussed in the Court of Appeal, rejecting the relevance of planning permission, but not in the House of Lords.

[82] Peter Gibson LJ in the *Wheeler* case, above. See also *Ports of Auckland Ltd.* v. *Auckland City Council* [1999] 1 NZLR 601, not following 'the bungle of the *Gillingham* case'.

[83] *Page Motors Ltd.* v. *Epsom BC* (1981) 80 LGR 337.

[84] *Lippiatt* v. *South Gloucestershire Council* [2000] 1 QB 51.

[85] *Russell* v. *Barnet LBC* (1984) 83 LGR 152.

[86] *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1866) LR 1 HL 93.

[87] See below, p. 819.

[88] *Geddis* v. *Proprietors of Bann Reservoir* (1873) 3 App. Cas. 430 at 455.

damage to anyone; but an action does lie for doing what the legislature has authorised, if it be done negligently.

This was a case where a reservoir company had statutory power to make use of a certain stream but neglected to clean it out, so that their use of it caused flooding and made them liable.

Actions for negligence against government departments, local authorities, etc., are accordingly very common. Traffic accidents are one large class, but there are many others. The following are examples where liability was established and compensated in damages.

Post Office workmen left a manhole open in a street, covered with a tent and surrounded with warning lights. A child, tempted to investigate, knocked a lamp into the manhole causing an explosion which injured him.[89]

A district council built an air-raid shelter in a road but left it unlit at night, so that a motorist was injured.[90]

A small boy ran out from a county council's nursery school on to the road, and a lorry-driver, trying to avoid him, was killed.[91]

Local councils failed to repair a dangerous step in one requisitioned house and a dangerous ceiling in another, whereby the occupiers were injured.[92]

Surgeons and medical staff of a hospital, for whom the Ministry of Health were responsible, treated a patient's hand in such a way as to render it useless.[93]

A water board, supplying water through old lead pipes, neglected to warn or protect consumers who suffered lead poisoning.[94]

Police failed to warn prison authorities of the known suicidal tendencies of a remand prisoner, who committed suicide in prison.[95]

While a fire brigade was fighting a fire the officer in charge ordered the sprinkler system to be turned off, with disastrous results.[96]

A local authority's environmental health officer ordered the owner of a guest house to carry out far more extensive building works than the legislation required.[97]

An ambulance service was unjustifiably late in responding to 999 call, with severe consequences for patient.[98]

[89] *Hughes* v. *Lord Advocate* [1963] AC 837.

[90] *Fisher* v. *Ruislip-Northwood UDC* [1945] KB 584; cf. *Morrison* v. *Sheffield Cpn.* [1917] 2 KB 866; *Baldock* v. *Westminster CC* (1918) 120 LT 470.

[91] *Carmarthenshire CC* v. *Lewis* [1955] AC 549.

[92] *Hawkins* v. *Coulsdon & Purley UDC* [1954] 1 QB 319; *Greene* v. *Chelsea BC* [1954] 2 QB 127.

[93] *Cassidy* v. *Ministry of Health* [1951] 2 KB 343.

[94] *Barnes* v. *Irwell Valley Water Board* [1938] 1 KB 21. See also *Read* v. *Croydon Cpn.* [1938] 4 All ER 631 (typhoid).

[95] *Kirkham* v. *Chief Constable of Greater Manchester* [1990] 2 QB 283.

[96] *Capital & Counties Plc* v. *Hampshire CC* [1997] QB 1004 (below, p. 767).

[97] *Wetton* v. *North Cornwall DC* [1997] 1 WLR 570. See similarly *Lambert* v. *West Devon BC*, (1998) 75 P & CR 282 (unauthorised approval of building works).

[98] *Kent* v. *Griffiths* [2001] QB 36 (CA) (analogy between ambulance service and police and fire services rejected).

Public authorities are similarly liable for any injury caused by failure to take due care for the safety of persons coming onto their premises under the Occupiers' Liability Act 1957.

The court construes statutes, wherever possible, so as to preserve the general liability for negligence. It is not reduced merely because the authority also has more limited statutory duties.[99] Nor is it affected by a statutory provision which has been widely applied to local health and sanitary authorities and which protects them and their members from liability for anything done by them or their officers or servants if done bona fide for the purpose of executing the Act.[1] The court construes 'bona fide' as meaning 'bona fide and without negligence'.[2] An alternative construction is that protection is given only against personal and not against corporate liability.[3] But if a statute specifically authorises some dangerous activity, that by itself cannot create liability. In one case a railway company obtained an Act allowing it to maintain gateposts which had been erected in a public highway, but was held not liable for damage to a taxicab which collided with them, even though it had taken no steps to light them.[4]

In this last case Lord Parker restated the general rule:

> . . . it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered.

There are some situations, however, where there is no duty of care, for example when the Crown Prosecution Service is deciding whether to prosecute[5] and the police are applying for a search warrant.[6]

Negligence—special situations

There are infinite varieties of actionable negligence, an account of which belongs to the law of tort. But the courts have extended the principle of liability to certain acts of public authorities which are of a peculiarly governmental character and which require notice.[7]

In 1970 the House of Lords held the Crown (the Home Office) liable for damage done by escaping Borstal boys. These were boys with criminal records who had

[99] *Barnes* v. *Irwell Valley Water Board* (above); *Read* v. *Croydon Cpn.* (above).
[1] Public Health Acts 1875, s. 265, 1936, s. 305; National Health Service Act 1977, s. 125.
[2] *Bullard* v. *Croydon Hospital Management Committee* [1953] 1 QB 511.
[3] *Southampton and Itchen Bridge Co.* v. *Local Board of Southampton* (1858) 8 E & B 801.
[4] *Great Central Railway Co.* v. *Hewlett* [1916] 2 AC 511. Contrast *Fisher* v. *Ruislip-Northwood UDC* [1945] KB 584 (above).
[5] *Elguzouli-Daf* v. *Commissioner of Police for the Metropolis* (1994) 7 Admin. LR 421.
[6] *Simpson* v. *Attorney-General* [1994] 3 NZLR 667.
[7] See [1973] *PL* 84 (G. Ganz); (1976) 92 *LQR* 213, (1978) 94 *LQR* 428 (P. P. Craig).

been taken out on a training exercise in charge of Borstal officers who had instructions to keep them in custody but who neglected to do so; they escaped and damaged a yacht, the owner of which was the successful plaintiff.[8] Despite the novel nature of the claim, and the contention that there was no liability for the acts of persons other than servants or agents, it was held that the custody of these dangerous boys imposed a duty to take reasonable care that they could not injure the public. This was an application of the doctrine of the law of tort that a duty of care arises from a relationship of proximity where the damage done is the natural and probable result of the breach of duty. The required degree of proximity may exist, on the facts of such a case, only in the vicinity of the place of detention, so that liability may be limited to damage done locally in the course of the escape.[9] Crimes committed later and further afield would come within the principle that the loss resulting from criminal acts normally lies where it falls. Nevertheless in this decision the House of Lords took a noteworthy step towards spreading over the whole community the price that has to be paid for experimental penal policies, rather than requiring it to be borne by the individual victim.[10] In the same way a local authority was held liable for negligent custody of a boy, known to be an incendiary, who escaped and burned down a church.[11] The police may be liable for negligently allowing confidential information to be stolen if this results in injury to another person.[12] On the other hand, a health authority was not liable for the abuse and murder of a child by an outpatient at a hospital maintained by the authority as the damage was insufficiently proximate.[13]

Liability for negligence in administrative office work is illustrated by a planning case in which a government department successfully sued a local authority for damages.[14] A clerk of the local authority had negligently overlooked a compensation notice entered in the local land charges register, so that it failed to operate against a later purchaser of the land affected; and accordingly, when planning permission was granted and the compensation paid for a previous refusal should have been repayable, the ministry were unable to recover it. The Court of Appeal discussed the possibility that the local registrar, though an employee of the district council, might have been the party liable, as an independent statutory authority,

[8] *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] AC 1004 (discussed further below). See similarly *Whannel* v. *Secretary of State for Scotland* 1989 SLT 907 (attack by Borstal boy on prisoner). On the comparable French law, which now extends to prisoners released on licence, see (1969) 27 *CLJ* 273 (C. J. Hamson) and [1987] *PL* 465.

[9] See at p. 1070 (Lord Diplock).

[10] Contrast the Court of Appeal's attitude (below, p. 772).

[11] *Writtle (Vicar)* v. *Essex CC* (1979) 77 LGR 656.

[12] *Swinney* v. *Chief Constable of Northumbria Police* (No. 2) (1999) 11 Admin. LR 811 (informer's identity shown by papers stolen from locked car but no negligence found).

[13] *Palmer* v. *Tees HA* (2000) 2 LGLR 69 (CA).

[14] *Ministry of Housing and Local Government* v. *Sharp* [1970] 2 QB 223. But an official whose decisions are subject to appeal owes no duty of care: *Jones* v. *Department of Employment* [1989] QB 1 (social security adjudication officer). Statutory defences against personal liability were given by Land Charges Act 1972, s. 10(6) and Local Land Charges Act 1975, s. 10(6).

rather than the council itself, but in fact the council accepted legal liability for his functions.

It is not clear whether this last case should be considered an example of the tort of negligent misstatement, for which damages are recoverable where the plaintiff justifiably relied upon the misstatement.[15] That tort is now proving important as a head of government liability, particularly in connection with misleading official advice, the problems of which were explained earlier.[16] It has enabled a firm to recover damages from a government department which wrongly advised them that they were covered by export credit insurance against default by a foreign company;[17] and purchasers of land to recover damages from local authorities who overlooked proposals for a subway[18] and for road widening[19] in answering planning enquiries. Claims for loss caused by negligent mortgage valuations have also succeeded,[20] as have claims against district auditors by local authorities.[21] The principle has been extended to planning authorities who negligently grant invalid planning permissions under which the developer later suffers loss,[22] or valid permissions where the right to object is negligently denied to a neighbour.[23] At this point the cases merge with those of negligent discretionary decisions, discussed in the following section. They may be noted also as examples of actionable negligence causing economic loss only, as the House of Lords has recognised in its important decision noted below.[24]

[15] Recognised by the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] AC 465 and applied by the Court of Appeal in *Esso Petroleum Co. Ltd.* v. *Mardon* [1976] QB 801.

[16] Above, p. 336.

[17] *Culford Metal Industries Ltd.* v. *Export Credits Guarantee Dept.*, The Times, 25 March 1981. Other examples are *Windsor Motors Ltd.* v. *District of Powell River* (1969) 4 DLR (3d) 155 (municipality liable for negligence of inspector who recommended a car dealer to rent a site on which his business was forbidden by zoning byelaws); *Jung* v. *District of Burnaby* (1978) 91 DLR (3d) 592 (negligent misstatement about fire regulations); *Christchurch Drainage Board* v. *Brown*, The Times, 26 October 1987 (drainage board failed to warn applicant for building permit of flood danger); *Meates* v. *Attorney-General* [1983] NZLR 308 (government liable for negligent assurances about future subsidies to industry). A disclaimer of liability may be effective: *Hadden* v. *Glasgow DC* 1986 SLT 557; *Vaughan* v. *Edinburgh DC* 1988 SLT 191.

[18] *Coats Patons (Retail) Ltd.* v. *Birmingham Cpn.* (1971) 69 LGR 356 (disclaimer of liability held ineffective).

[19] *Shaddock & Associates Pty Ltd.* v. *Parramatta CC* (1981) 36 ALR 385, where Gibbs CJ and Stephen J held that the duty of care extends to public bodies which make a practice of supplying information. See likewise *Bell* v. *City of Sarnia* (1987) 37 DLR (4th) 438.

[20] *Westlake* v. *Bracknell DC* [1987] 1 EGLR 161; *Harris* v. *Wyre Forest DC* [1990] 1 AC 831 (disclaimer of liability held ineffective under Unfair Contract Terms Act 1977).

[21] *West Wiltshire DC* v. *Garland* [1995] Ch. 297. There was also liability for breach of statutory duty (below, p. 773).

[22] *Lambert* v. *West Devon Borough Council* (1997) 96 LGR 45.

[23] *Craig* v. *East Coast Bays CC* [1986] 1 NZLR 99 (breach of authority's duty, based on proximity, to notify neighbour whose view was spoiled: damages awarded).

[24] *Murphy* v. *Brentwood DC*, below.

Negligent inspection and controls

The House of Lords had to reverse itself in order to put an end to an excessive extension of the law of official liability, which was first made by the Court of Appeal in 1971. The Court held a local council liable in damages for the negligent inspection and passing of the foundations of a house, at the instance of a later purchaser.[25] The foundations were partly on the site of an old rubbish tip and should not have been passed by the council's inspector. The builder sold the house to a purchaser who then sold it to the plaintiff, who found that it subsided badly, and sued the council for the cost of repair and loss of value. The House of Lords later approved this startling decision in a closely similar case (*Anns*), where a block of flats developed cracks because it had been built on inadequate foundations.[26] The House held, on a preliminary issue, that the local authority owed a duty to future tenants of the flats (and their successors) to exercise reasonable care in inspecting the foundations, breach of which would enable the tenants to claim the costs of repair. The cause of action, it was held, would arise not at the time of the breach of duty but at the time when there was present or imminent danger to health or safety,[27] so that it would not be barred six years after the act of negligence.

There then followed a series of decisions which attempted to limit the wide duties of care so unexpectedly thrust upon local authorities. The building laws were 'public health measures', whose purpose was to protect the health and safety of occupiers, and of the public generally, but not to safeguard building developers, or anyone else, against economic loss.[28] The original owner, furthermore, was normally owed no duty of care by the local authority, since he himself had a duty to comply with the building laws.[29] Some of these decisions, which concerned mere economic loss as opposed to personal injury, were clearly inconsistent with the sweeping principles of liability laid down in *Anns*, and that case came under increasing criticism, most effectively perhaps from the High Court of Australia.[30]

[25] *Dutton* v. *Bognor Regis UDC* [1972] 1 QB 373.

[26] *Anns* v. *Merton LBC* [1978] AC 728. The decision was followed in Canada (*Kamloops* v. *Nielsen* [1984] 10 DLR (4th) 641, S Ct.) and New Zealand (*Invercargill City Council* v. *Hamlin* [1996] AC 624). In Australia it was at first rejected (*Sutherland Shire Council* v. *Heyman* (1985) 60 ALR 1) but the High Court later changed direction (*Bryan* v. *Maloney* (1995) 69 ALJR 375). In the *Invercargill* case the Privy Council recognised that the common law might vary in different jurisdictions.

[27] See also *Pirelli General Cable Works Ltd.* v. *Oscar Faber & Partners* [1983] 2 AC 1, holding that time runs from the date when the damage comes into existence, and continues to run against successive owners. The law was changed by the Latent Damage Act 1986, which allows an alternative period of three years running from the discovery of the cause of action or the time when it might reasonably have been expected to be discovered, with an overriding limit of fifteen years from the act of negligence.

[28] *Peabody Donation Fund Governors* v. *Sir Lindsay Parkinson & Co. Ltd.* [1985] AC 210.

[29] *Investors in Industry Commercial Properties Ltd.* v. *South Bedfordshire DC* [1986] QB 1034; *Richardson* v. *West Lindsay DC* [1990] 1 WLR 522.

[30] In the *Sutherland Shire Council* case, above. But see n. 22 (above).

In 1990, finally, a special House of seven Law Lords abandoned their former position and declared that *Anns*, together with all decisions depending upon it, and together with the initial decision of the Court of Appeal, was overruled.[31] In this case the local council had referred the plans of a house to consulting engineers, who had culpably failed to see their defects.[32] Twelve years later cracks appeared in the walls and foundations and the owner sold the house at a loss. His action to recover the loss from the council was dismissed by the House of Lords. It was held that it was wrong, as a matter of policy, to impose liability for pure economic loss resulting from the negligent passing of the plans. It was not decided, however, whether negligence in administering building regulations or byelaws might entail liability in case of personal injury or impaired health or damage to some different property. Since in all the cases so far reported the loss has been purely economic (costs of repair or fall in value), the overruling of *Anns* has relieved local authorities of much the greater part of the novel liability created by that decision. It indicates also the House of Lords' preference for developing the categories of negligence 'incrementally by analogy with established categories' rather than by 'massive extension of a prima facie duty of care',[33] and their recognition of the merits of a pragmatic policy in an area where general principles are elusive and indefinable. It does not affect established categories of liability for economic loss, either in ordinary cases of careless damage to property or in special cases such as those of the escaping Borstal boys or cases of negligent misstatement, as discussed above, or other cases where 'a special relationship of proximity' exists, usually involving 'an element of reliance'.[34]

Negligent discretionary decisions

In holding the Home Office liable for the negligent custody of Borstal boys, as explained above, the House of Lords related the degree of negligence to the degree of unreasonableness which will render a discretionary decision ultra vires. Lord Reid put this as follows:[35]

> When Parliament confers a discretion . . . there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a

[31] *Murphy* v. *Brentwood DC* [1991] 1 AC 398. For discussion and criticism see [1991] *CLJ* 58 (D. Howarth).

[32] The Court of Appeal held the council responsible for the engineers' negligence [1991] 1 AC at 407, 435) but the House of Lords did not decide that question (see at 472, Lord Keith).

[33] Quotations from Brennan J in the *Sutherland Shire Council* case above.

[34] See *Murphy* v. *Brentwood DC* (above) at 481 (Lord Bridge).

[35] At 1031. See also 1068–69 (Lord Diplock); 1037 (Lord Morris). And see the *Writtle* case, above, p. 761.

stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person exercising the discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that. The present case does not raise the issue because no discretion was given to these Borstal officers. They were given orders which they negligently failed to carry out.

The same point was made by Lord Wilberforce when he said that 'in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of the power'.[36] But it is difficult to see how these statements amount to more than the truism that what is done within the limits of statutory authority is not actionable. They do not supply an answer to the difficult question, which is how far into the concentric circles of authority should legal liability penetrate. They have since been justly criticised by Lord Browne-Wilkinson, saying that it is neither helpful nor necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence.[37] The real problem is when some public authority, whether or not acting within the ambit of its power, commits some act of culpable carelessness or inadvertence.

A more serviceable criterion may be found in the distinction, also made by Lord Wilberforce,[38] between 'the area of policy or discretion', where there is a choice of courses of action, and 'the operational area' where a chosen course of action is carried out, saying that 'the more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care'.[39] Taking an example from a well-known American case, he pointed to the difference between a decision whether or not to build a lighthouse and a failure, after one had been built, to keep the light in working order.[40] Lord Grieve in the Court of Session said similarly that the duty of care in exercising a statutory power 'does not arise until the discretionary stage of its exercise has ceased and the executive stage has begun'.[41] Two cases illustrate these different stages. A chief constable was held not liable in negligence for not equipping his force with a particular CS gas device which might have avoided damage to the plaintiff's shop; but he was liable for failing to have fire-fighting equipment on hand when the use of a more danger-

[36] *Anns* v. *Merton LBC* [1978] AC 728 at 758.

[37] See the *X (Minors)* case, below, p. 767 at 736.

[38] *Anns* v. *Merton LBC* (above), at 754. The distinction was described as 'promising' and 'a guide' in deciding whether the issue is justifiable in *Barrett* v. *Enfield LBC* (below (Lord Slynn, 567) discussed below, p. 777.

[39] For criticism see [1986] *CLJ* 430 (S. H. Bailey and M. J. Bowman) and the speeches of Lord Hoffmann in *Stovin* v. *Wise* [1996] AC 923 (below, p. 770) and of Lord Browne-Wilkinson in *X (Minors)* v. *Bedfordshire CC* [1995] 2 AC 633.

[40] *Indian Towing Co.* v. *US* (1955) 350 US 61.

[41] *Bonthrone* v. *Secretary of State for Scotland* (1981) reported in 1987 SLT 34 (no liability for alleged official negligence in encouraging vaccination of infants without adequate warning of risk).

ous CS gas device set the shop on fire.[42] On a motion to strike out pleadings it was held that the government could not be liable for adopting a policy of immunisation against whooping cough, but could be liable for negligent or misleading advice about the performance of inoculations.[43] Failure to act on inspectors' reports of an airline's breaches of safety regulations in Canada rendered the government liable for deaths in an air crash, since this was clearly operational negligence.[44]

On the other hand the House of Lords predictably dismissed an action by the mother of a girl murdered by the 'Yorkshire ripper', based on allegations of negligence in the efforts of the police to capture him, since the police owed no duty of care to individual members of the public in such circumstances.[45] It was held also that in the investigation and suppression of crime the police are immune on grounds of public policy from actions for negligence, except where there is a special degree of proximity. When the Court of Appeal treated this qualified immunity as absolute, and struck out a claim by the victim of a mentally deranged teacher, the European Court of Human Rights found, in a decision, which has since been several times disapproved,[46] that the right to a fair trial had been violated, since the victim was denied the opportunity of showing special proximity, which possibly existed.[47]

[42] *Rigby* v. *Chief Constable of Northamptonshire* [1985] 1 WLR 1242 (police siege of gunsmith's shop occupied by violent psychopath). See similarly *Minister for Administering Environmental Planning* v. *San Sebastian Pty Ltd.* [1983] 2 NSWLR 268 (no state liability for negligently prepared development plan); *Sasin* v. *Commonwealth of Australia* [1984] 52 ALR 299 (government not liable for approval of design of aircraft seat belt). Contrast *Just* v. *The Queen in right of British Columbia* (1989) 64 DLR (4th) 689 (highway inspection system 'operational': injury caused by rockfall may ground action for damages).

[43] *Department of Health and Social Security* v. *Kinnear*, The Times, 7 July 1984; and see *Ross* v. *Secretary of State for Scotland* 1990 SLT 13 (policy of vaccination not challengeable).

[44] *Swanson* v. *The Queen in right of Canada* (1991) 80 DLR (4th) 741. And see *Brewer Bros.* v. *The Queen in right of Canada* (1991) 80 DLR (4th) 321 (failure to take adequate security from grain elevator company: government liable for financial loss on company's bankruptcy). Contrast *Philcox* v. *Civil Aviation Authority*, The Times, 8 June 1995 (claim for negligent inspection of aircraft failed).

[45] *Hill* v. *Chief Constable of West Yorkshire* [1989] AC 53. See also *Elguzouli-Daf* v. *Commissioner of Police of the Metropolis* [1995] QB 335 (Crown Prosecution Service: no duty of care); *Swinney* v. *Chief Constable of Northumbria Police Force* [1997] QB 464 (police immunity discussed but not decided); *Kinsella* v. *Chief Constable of Nottinghamshire*, The Times, 24 August 1999 (property damaged during search: immunity upheld). Contrast *Costello* v. *Chief Constable of Northumbria Police* [1999] 1 All ER 550 (immunity negated by assumed responsibility). The police owe no duty of care in disciplinary investigations: *Calveley* v. *Chief Constable of Merseyside* [1989] AC 1228. The public policy that justifies absolute immunity in regard to evidence given by police officers and others in court, does not extend to wrongdoing, such as fabrication of evidence, in the course of investigation: *Darker* v. *Chief Constable of the West Midlands Police* [2001] 1 AC 435 (HL) and DJ case, below.

[46] See above, p. 445. In addition to the cases there discussed see *Z* v. *UK* (2002) 34 EHRR 3 (*Osman* to be 'reviewed'), and *D* v. *East Berkshire NHS Trust* [2003] EWCA Civ. 1151; [2004] 2 WLR 58 (CA).

[47] *Osman* v. *United Kingdom* [1999] 1 FLR 193. The European Court in effect decided what should be the limits of the English law of negligence rather than any issue of procedural rights under ECHR Art. 6. See the criticism of Lord Browne-Wilkinson in *Barrett* v. *Enfield LBC* [2001] 2 AC 550 (HL) and compare the same court's attitude to ouster clauses, above, p. 725 which may be open to similar criticism. See also Lord Hoffmann's criticism in (1999) 62 *MLR* 159 (1999) 59 CLJ 4 (T. Weir) and *Palmer* v. *Tees Health Authority* (2000) 2 LGLR 69.

A distinction is now drawn by the Human Rights Court between an immunity from suit which denies the litigant access to the court and a substantive rule of law which is wholly a matter for domestic law.[48]

The police may be liable in negligence for the suicide of a prisoner known to be suicidal.[49] No duty of care is owed by a fire brigade in answering a call or in fighting a fire, except in so far as some additional danger is created by the brigade's own negligence. There was no liability, therefore, when the brigade left the scene of several fires without making sure that they were all extinct,[50] but another brigade were liable when they mistakenly ordered the sprinkler system to be turned off and so created a new danger.[51]

Nearer to the 'policy' end of the spectrum there have been attempts to sue regulatory bodies for negligence, but these have mostly been unsuccessful.[52] When depositors who had lost money in a bank failure in the Isle of Man sued the Treasurer and members of the Finance Board for failure to supervise the bank effectively, their claim was struck out by the Privy Council as untenable.[53] The same fate befell depositors with a finance company in Hong Kong, whose claims were based on the failure of the Commissioner of Deposit-taking Companies to refuse the company registration or to revoke its licence.[54] The Privy Council pointed out the 'very difficult choice' confronting a regulator who must choose between intervention 'with immediate and probably disastrous effect' and non-intervention based on hopes of recovery. As Lord Browne-Wilkinson has said 'the courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoing of others'.[55] And Clarke J has said:[56]

> ... the exercise of the powers and duties of a supervisor in this field involves the balancing of many different factors in the interests both of the public generally and of both existing

[48] *Z* v. *UK*, above.

[49] *Reeves* v. *Commissioner of Police of the Metropolis* [1999] 3 WLR 363 (HL) (damages reduced because of contributory fault).

[50] *Capital & Counties Plc* v. *Hampshire CC* [1997] QB 1004, reporting four such cases decided together. The law is similar for coastguards: *OLL Ltd.* v. *Secretary of State for Transport* [1997] 3 All ER 897.

[51] Ibid.

[52] The one spectacular success was achieved not through the courts but through the Parliamentary Commissioner: above, p. 97.

[53] *Davis* v. *Radcliffe* [1990] 1 WLR 821, emphasising the delicacy and difficulty of such decisions, militating against the imposition of a duty of care. See also *Minories Finance Ltd.* v. *Young* [1989] 2 All ER 105 (Bank of England not liable for failure to supervise collapsed bank).

[54] *Yuen Kun Yeu* v. *A.-G. of Hong Kong* [1988] AC 175.

[55] *X (Minors)* v. *Bedfordshire CC* [1995] 2 AC 633 at 751, discussing and supporting the Privy Council's decision. See also *Harris* v. *Evans* [1998] 1 WLR 1285 (no liability for Health and Safety Executive's notice prohibiting bungee jumping). Cf. *Phelps* v. *Hillingdon LBC* [2001] 2 AC 618 (liability in particular circumstances for educational psychologist's failure to diagnose dyslexia), discussed below, p. 777.

[56] *Three Rivers DC.* v. *Bank of England* (No. 3) [1996] 3 All ER 558 at 601. For this case, where the law of misfeasance was invoked, see below, p. 784. See also *Bennett* v. *Commissioner of Police for the Metropolis* (1997) 10 Admin. LR 245.

and future depositors. The interests of these and other different groups may conflict so that it makes no real sense to hold that a duty of care or a statutory duty is owed to only one or some of those groups.

In contrast, the Court of Appeal of New Zealand decided that a minister's refusal of consent to a financial transaction rendered him liable in negligence where he plainly should have taken legal advice and by neglecting to do so made an unlawful decision.[57] But the Privy Council reversed them, holding that the minister had not acted negligently in the circumstances, and that, in any case, it was questionable whether liability for negligence ought to be imposed in such cases in addition to the existing liability for acting in bad faith.[58]

It is not every careless decision, therefore, which will involve liability, even if damage is caused. A statutory power of decision may include power to decide wrongly and even negligently. A minister or official making a decision is allowed a margin of error which is not allowed, for example, to the driver of a motor vehicle. The distinction between the 'policy' and 'operational' areas is evident, although the Privy Council were sceptical of its value as a touchstone of liability. They inclined rather to suggest that ministers' decisions on such matters as the allocation of scarce resources or the distribution of risks were altogether unsuitable for actions in negligence.[59]

Although important questions remain to be answered, there is a clear tendency, in England at least, against applying the ordinary law of negligence to discretionary administrative decisions. The decisions of licensing authorities, for example, may be held ultra vires and quashed if proper attention is not given to the case. But there is no indication that actions for damages will lie for any resulting loss, merely because negligence can be shown.[60] The Court of Appeal has held that there is no liability in tort for the negligent handling of a planning application, even though this is plainly in the 'operational' class.[61] So far the English courts have progressed no further than suggesting that an action may succeed if a licence or permission is

[57] *Takaro Properties Ltd.* v. *Rowling* [1986] 1 NZLR 22. The minister had refused consent for the sale of the company's shares to a Japanese firm on the ground that its undertaking (a high-class tourist lodge) ought not to pass into foreign ownership. This ground was held to be irrelevant to the minister's statutory power: [1975] 2 NZLR 62. See also *Lonrho Plc* v. *Tebbit* [1992] 4 All ER 280 (claim based on minister's negligence in failing to release company from statutory undertaking held to be arguable and fit for trial).

[58] *Rowling* v. *Takaro Properties Ltd.* [1988] AC 473. See similarly *Knop* v. *Johannesburg CC* 1995 (2) SA 1 (negligent planning decision—no duty of care).

[59] Citing Craig, *Administrative Law*, 1st edn., 534–38.

[60] See below, p. 775.

[61] *Strable* v. *Dartford BC* [1984] JPL 329, and see *Ryeford Homes Ltd* v. *Sevenoaks DC* 46 BLR 34. Contrast the New Zealand planning cases cited above, p. 763. See also *Jones* v. *Department of Employment* [1989] QB 1 (no liability for negligent decision of social security adjudication officer). In *Revesz* v. *Commonwealth of Australia* (1951) 51 SR (NSW) 63 an importer was held to have no remedy for the negligent loss and delay of an import licence which should have been issued to him by the customs department, with the result that he later had to pay higher rates of import duty. For the duty to deal with applications fairly and in a reasonable time, see above, p. 536.

refused maliciously, i.e. if it is a case of misfeasance.[62] Legislative functions probably impose no duty of care at all, being essentially 'policy'.[63]

No duty of care is owed by soldiers to one another in operations of war.[64]

The immunity which operates in the case of judicial functions is explained later.[65]

Non-exercise of powers

It used to be a familiar proposition that mere failure to exercise a power was not actionable. A sharp contrast was thus made between exercising a power negligently and not exercising it at all, however negligent the latter course might in fact be. There was a corresponding contrast between failure to exercise a power and failure to perform a duty. The former by itself was not actionable, but the latter might be.[66] But the decisions discussed in the preceding section show that these contrasts are no longer so sharp. Failure to exercise a discretionary power, if sufficiently negligent, may involve breach of a duty of care and consequent liability. The House of Lords has categorically rejected the notion of 'an absolute distinction in the law between statutory duty and statutory power—the former giving rise to possible liability, the latter not, or at least not doing so unless the exercise of the power involves some positive act creating some fresh or additional damage'.[67]

Accidents in ill-lit streets formerly provided many illustrations of the 'absolute distinction' which used to be made. If the local authority had a statutory duty to provide lighting, and failed to do so negligently, an injured wayfarer might obtain damages.[68] But if it had a mere power, there was no remedy. Thus the injured plaintiff failed in a case where the Act said merely that the local authority 'may provide' such lighting 'as they may think necessary', even though the authority was in fact in the habit of providing lighting at the dangerous place during certain hours.[69] But permissive words such as 'may' were not an infallible guide, since what appeared to be a mere power might be held to involve duty, as explained elsewhere.[70]

[62] See below, p. 781.

[63] *Wellbridge Holdings Ltd.* v. *Greater Winnipeg* [1970] 22 DLR (3d) 470 (city not liable in negligence for procedural mistakes invalidating planning byelaw in reliance on which builder expended money and suffered loss).

[64] *Mulcahy* v. *Ministry of Defence* [1996] QB 732.

[65] Below, p. 788.

[66] See below, p. 770.

[67] *Anns* v. *Merton LBC*, above (Lord Wilberforce).

[68] *Carpenter* v. *Finsbury Borough Council* [1920] 2 KB 195.

[69] *Sheppard* v. *Glossop Cpn.* [1921] 3 KB 132.

[70] Above, p. 233.

The House of Lords has now reassessed one of its decisions which turned upon the former distinction between power and duty.[71] A river catchment board had taken an excessive time to repair a sea-wall, so that land which need only have been flooded for fourteen days remained flooded for 178 days. The board had merely a power to repair sea-walls, so that had they done nothing they could not (under the former law) have been held liable. The House of Lords held that the true cause of the loss was the flood, and that the board were not liable for their slowness because this was mere inaction. But Lord Atkin, dissenting, held that, once the board had undertaken the repair, they were under the ordinary duty of care which a man owes to his neighbour, and that their breach of this duty was the cause of the damage. The House of Lords has since made it clear that it approves Lord Atkin's analysis and that, in any case, there is no longer an absolute immunity for failure to exercise a power.[72] That plaintiffs will not easily succeed, however, is shown by a highway case where a motor cyclist was injured at a road junction which was known to be dangerous because visibility was restricted by a bank of earth. Difficulties and delays had prevented action by the local council. A divided House of Lords held that since the council had a discretionary power to carry out road improvements, which would amount to a duty only if it would have been irrational not to have exercised it, and since there was no indication that the statute contemplated remedies for injured individuals, the claim must fail.[73] Negligent failure to perform a statutory duty, on the other hand, may sometimes support a successful action for damages, as is illustrated below.

Nonfeasance and misfeasance in highway cases

Although the principal ingredient of negligence is usually mere inaction, the courts refused to allow the liability of public authorities to be undermined by the distinction between misfeasance and nonfeasance which was a longstanding anomaly of the law of highways. The old law was that the public highway was repairable by the parish; and that since the duty was owed to the public, non-repair should be enforced by criminal prosecution of the inhabitants at large and not by civil action

[71] *East Suffolk Rivers Catchment Board* v. *Kent* [1941] AC 74.

[72] *Anns* v. *Merton LBC* [1978] AC 728. Lord Wilberforce thought that the full effect of *Donoghue* v. *Stevenson* [1932] AC 562 had not then been fully recognised. Lord Salmon expressed his agreement with Lord Atkin. See also *Parramatta City Council* v. *Lutz* (1988) 12 NSWLR 293 (council liable for failure to execute demolition order causing plaintiff's house to be destroyed by fire).

[73] *Stovin* v. *Wise* [1996] AC 923. Lords Slynn and Nicholls, dissenting, held that the conditions for liability were fulfilled. A large number of academic and other authorities are cited in Lord Nicholls's speech. For the suggested doctrine of 'general reliance', derived from Australian decisions, see Lord Hoffmann's speech at 415. *Stovin* v. *Wise* has been followed by the High Court of Australia: *Pyrenees Shire Council* v. *Day* (1998) 151 ALR 147.

by any individual.[74] But an individual had a remedy in damages against anyone who caused him injury by creating a danger on the highway. These rules crystallised into the illogical distinction between misfeasance and nonfeasance which expressed the liability of the local authorities to which responsibility for highways was transferred by statute.[75] If they merely neglected the highway (nonfeasance), an injured traveller had no remedy.[76] But if they opened a manhole or dug a trench and left it inadequately protected (misfeasance), they were liable for any injury.[77] This distinction would have been correct if the highway authority had merely a power; but in fact it was a case of duty. The courts confined the immunity for nonfeasance to the narrowest possible area,[78] and rejected arguments for extending it into other areas so as to create a general defence of inactivity.[79]

The immunity for nonfeasance was abolished in 1961 (with effect from 1964), since when highway authorities have been made equally liable for the exercise or non-exercise of their powers, and for neglect of their duties, subject to a statutory defence of showing that they have used reasonable care in all the circumstances.[80] Although their duty to maintain the highway is absolute[81] (as in the case with statutory duties generally),[82] the statutory defence makes it in effect a liability for negligence only; and in any case there is no breach of the duty if the highway authority could not, in a difficult situation, be blamed for non-performance.[83] Even if a breach of duty is shown, the authority's liability is limited to personal injury or damage to property resulting from the dangerous condition of the road, thus excluding loss of profit to a business.[84]

[74] *Russell* v. *Men of Devon* (1788) 2 Term Rep. 667.

[75] The Highways Act 1959 finally abolished the duty of the inhabitants at large to repair and imposed on highway authorities a duty to maintain public highways. Duties had been imposed from the Highway Act 1835 onwards.

[76] *Cowley* v. *Newmarket Local Board* [1892] AC 345.

[77] *Newsome* v. *Darton UDC* [1938] 3 All ER 93.

[78] See, e.g., *Skilton* v. *Epsom & Ewell UDC* [1937] 1 KB 112; *A.-G.* v. *St Ives RDC* [1961] 1 QB 366.

[79] *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese Ltd.* [1953] Ch. 149.

[80] Highways (Miscellaneous Provisions) Act 1961, s. 1. See now Highways Act 1980, s. 58.

[81] *Griffiths* v. *Liverpool Cpn.* [1967] 1 QB 374.

[82] Below, p. 775.

[83] *Haydon* v. *Kent CC* [1978] QB 343, where the statutory defence was not pleaded. The majority of the Court of Appeal held that 'maintain' went further than 'repair', so as to impose liability for failure to remove snow and ice; but Lord Denning MR held that the Act of 1961 removed the former immunity for non-repair only, so that there was no liability in damages for non-maintenance in other respects. No culpable breach of duty was proved, and a claim for injury from a fall on an icy footpath failed. So for the same reason did a claim by the widow of a driver killed on icy roads which the defendant's workers, being on strike, refused to grit: *Bartlett* v. *Department of Transport* (1984) 83 LGR 579. Contrast *Goodes* v. *East Sussex CC* [1999] RTR 210 (council liable for failure to de-ice road). See also *Cross* v. *Kirklees MBC* [1998] 1 All ER 564 (council not liable for failure to grit footpath).

[84] *Wentworth* v. *Wiltshire CC* [1993] QB 654.

Strict liability—Rylands *v.* Fletcher

Even in the absence of negligence the law of tort imposes liability on those who create situations of special danger. This strict liability is imposed by the rule in *Rylands* v. *Fletcher*[85] on 'the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes', if the operation involves abnormal risk; and this rule has been held to cover many situations where damage has been done by such things as chemicals, fire and electricity.[86] Considering how many dangerous operations are undertaken by public authorities, it is curious that few cases under this rubric have been reported. Statute has made special provision in a number of cases, as in the Gas Act 1965,[87] the Nuclear Installations Act 1965[88] and the Deposit of Poisonous Waste Act 1972.[89]

The Court of Appeal has held that a public authority, since it acts for the public benefit, does not act 'for its own purposes' within the meaning of the above rule, and is therefore not liable in the absence of negligence.[90] This is an unfortunate example of literal verbal interpretation, treating the rule like a clause in an Act of Parliament rather than as a statement of principle. A leaky water main had washed away the soil supporting a gas main, which then broke and caused an explosion. It was said that the provision of services such as gas, water and electricity, being well-nigh necessities of modern life, ought not to impose liability without fault on suppliers acting under powers approved by Parliament.[91] But where the suppliers are acting for the benefit of the community, it would be altogether fairer to require them to bear liability for accidents irrespective of fault, for then the cost would be spread equitably over the users of the service instead of being charged wholly upon the unfortunate person injured. French law long ago achieved this socially just result,[92] which accords with the requirement of the rule of law that public

[85] (1868) LR 3 HL 330. See now *Cambridge Water Co.* v. *Eastern Counties Leather Plc* [1994] 2 AC 264.

[86] See *Salmond and Heuston on Torts*, 21st edn., ch. 13.

[87] s. 14 (underground storage of gas).

[88] s. 12, as amended by Nuclear Installations Act 1969.

[89] s. 2.

[90] *Dunne* v. *North Western Gas Board* [1964] 2 QB 806; *Pearson* v. *North Western Gas Board* [1968] 2 All ER 669, suggesting that the House of Lords might have other views; *Lloyde* v. *West Midlands Gas Board* [1971] 2 All ER 1240. *Lowery* v. *Vickers Armstrong Ltd.* [1969] 8 KIR 603 at 606 suggests the possibility of liability in nuisance without negligence but *RHM Bakeries (Scotland) Ltd.* v. *Strathclyde Regional Council* 1985 SLT 214 (HL) denies it. In the Aberfan Disaster report (1966 HC 553, para. 74) Edmund-Davies LJ treated *Rylands* v. *Fletcher* as incontestably applicable to the National Coal Board.

[91] The Law Commission's Report No. 32 (1970), para. 15, attributes the decision to the fact that the gas board were acting under statutory duty and not mere power. But the decision probably rested upon broader grounds. The Royal Commission on Civil Liability recommended a statutory code for dangerous operations, Cmnd. 7054–I (1978), para. 1641. See also (1980) 96 *LQR* 419 (P. P. Craig).

[92] See CE 28 Mar. 1919, *Regnault-Desroziers*, Rec. 329; CE 22 Nov. 1946, *Commune de Saint-Priest-La Plaine*, Rec. 279; Vedel and Delvolvé, *Droit administratif*, 12th edn., i, 598; [1985] CLP 330 (R. Errera).

authorities should bear the same legal responsibilities as ordinary citizens unless dispensed by statute. The argument that a statutory 'nuisance clause' implies no liability without fault is also unconvincing.[93] The anomaly is all the more glaring in that the Crown has, it seems, been duly made liable to the rule in *Rylands* v. *Fletcher* under the Crown Proceedings Act 1947.[94]

There are signs that Parliament is alive to this injustice. The Water Act 1981[95] makes water authorities liable without fault for damage caused by the escape of water from their mains and pipes, subject to the ordinary law about contributory negligence and limitation of actions and except where the damage is wholly the fault of the injured party. There ought to be general legislation on the same lines.

BREACH OF DUTY AND MISFEASANCE

Breach of statutory duty

Where a statute imposes a duty, it is sometimes to be inferred that any person injured as the result of breach of the duty shall have a remedy in damages, even in the absence of negligence.[96] This is therefore another form of strict liability. It applies in private law to employers who fail to fulfil statutory duties to fence dangerous machinery or to maintain factory floors, gangways etc. in a safe condition. Where a motor car is used without the third-party insurance required by statute, an injured person may recover damages against the owner of the car who has allowed an uninsured person to drive it.[97] But everything depends upon the true intent of the statute, which will often be difficult to divine when it says nothing.[98] Some guidance may be obtained from the nature of the duty, which may be intended for the benefit of the public generally or for the benefit of particular persons. The court is usually sympathetic to an action for damages if the statute has no scheme of its own for penalties and enforcement: 'for, if it were not so, the statute would be but a pious aspiration'.[99] But where the statute provides penalties,

[93] Above, p. 757.

[94] Below, p. 821.

[95] s. 6.

[96] See Harding, *Public Duties and Public Law*, ch. 7; *Salmond & Heuston on Torts*, 21st edn., ch. 10. For valuable discussion see (1984) 100 *LQR* 204 (R. A. Buckley); [1998] *PL* 407 (Sir R. Carnwath).

[97] *Monk* v. *Warbey* [1935] 1 KB 75. Leading cases include *Groves* v. *Lord Wimborne* [1898] 2 QB 402 (factory safety law enforceable by action for damages despite criminal penalties); *Lonrho Ltd.* v. *Shell Petroleum Co. Ltd.* (No. 2) [1982] AC 173.

[98] Lord Denning MR called the dividing line 'so blurred and so ill-defined that you might as well toss a coin to decide it': *Ex p. Island Records Ltd.* [1978] Ch. 122.

[99] *Cutler* v. *Wandsworth Stadium Ltd.* [1949] AC 398 (Lord Simonds). See *Thornton* v. *Kirklees BC* [1979] QB 626 at 639; *Booth* v. *National Enterprise Board* [1978] 3 All ER 624; *West Wiltshire DC* v. *Garland* [1995] Ch. 297 (district auditor's liability to local authority).

there is prima facie no civil remedy, for otherwise crimes would too freely be turned into torts. Thus a bookmaker failed in an action against the proprietors of a dog-racing track for failure to provide him with facilities as required by the Betting and Lotteries Act 1934, which made this an offence punishable with fine and imprisonment.[1]

In public law there is a clearer principle of liability, which depends not upon statutory interpretation but upon a general rule of law. It was stated as follows by the House of Lords in 1842:[2]

> When a person has an important duty to perform, he is bound to perform that duty; and if he neglects or refuses to do so, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained.

Similarly in 1873 Bovill CJ said:[3]

> It is a general rule of law that, when a ministerial duty is imposed, an action lies for breach of it, without malice or negligence.

In this case the Court of Common Pleas held that a candidate who lost a municipal election because the officer in charge of the polling station failed to provide proper ballot papers had a right of action against the officer for damages, irrespective of negligence or malice. This was breach of an implied statutory duty under the Ballot Act 1872. Under the general rule damages were awarded in many cases, as where a postmaster failed to deliver letters for ten days,[4] where the managers of a statutory lottery failed to declare the right winner,[5] where a customs officer refused to clear goods except on payment of excessive duty,[6] and where a local authority failed to remove refuse from a workhouse.[7] The liability in damages of a gaoler who made a false return to a writ of habeas corpus may rest on the same principle.[8] A

[1] *Cutler*'s case (above).

[2] *Ferguson* v. *Kinnoul (Earl)* (1842) 9 Cl. & F. 251 at 280 (Lord Lyndhurst LC), Lords Brougham and Campbell concurring (at 289 and 310) (Scots presbytery liable in damages for refusal to accept presentee to a church.) For early antecedents see *Couch* v. *Steel* (1854) 3 E & B 402 at 411; Coke's note in 12 Co. Rep. 100; Holt's note in 6 Mod. 27; *Turner* v. *Sterling* (1672) 2 Vent. 25.

[3] *Pickering* v. *James* (1873) LR 8 CP 489 at 503 (see also Brett J at 509).

[4] *Rowning* v. *Goodchild* (1773) 2 W. Black. 906 (misfeasance in a 'great public trust').

[5] *Schinotti* v. *Bumstead* (1796) 6 TR 646.

[6] *Barry* v. *Arnaud* (1839) 10 Ad. & E 646 (Lord Denman CJ at 671 restates the general rule).

[7] *Holborn Union* v. *Vestry of St Leonard Shoreditch* (1876) 2 QBD 145.

[8] See *Brasyer* v. *Maclean* (1875) LR 6 PC 398, where the sheriff of New South Wales made a false return on a writ of *capias ad respondendum* without malice or want of probable cause, so that the plaintiff was committed for contempt. Held: he was liable in damages for misfeasance in the exercise of his powers and the discharge of his duty as a public ministerial officer. The gist of the action seems to have been the misfeasance rather than the imprisonment.

'ministerial duty' meant simply an administrative duty which was not discretionary or judicial.[9] Failure to perform the duty was commonly called nonfeasance or misfeasance.

On this principle the Court of Appeal awarded damages for misfeasance against a local authority which failed to mark the site of a fireplug accurately, so that the delay in finding it caused the loss of the plaintiff's building. Farwell LJ said:[10]

> The breach of a statutory duty created for the benefit of an individual or a class is a tortious act, entitling any one who suffers special damage therefrom to recover such damages against the tortfeasor . . . The breach of the statute is sufficient cause of action, because the tortious act, being done in breach of the statute, becomes by legal intendment an act done with intent to cause wrongful injury, just as a false and libellous statement is by legal intendment made maliciously. The act done or omitted may, apart from the statute, be innocent, or its omission may be not actionable, but the enactment makes it actionable.

In fact the jury had found that there was negligence, and that would probably be the basis of the action today.[11] The extensive modern tort of negligence may disguise the face that behind it lies the liability for mere breach of statutory duty, without either malice or negligence.

That stricter liability is still, however, enforceable. A child injured by an unsafe glass door in a school was awarded damages on the footing of the county council's absolute liability for breach of the safety regulations.[12] A county borough council was liable in damages for breach of its duty to supply pure water to a householder who caught typhoid fever.[13] If a local authority closes schools, contrary to its duty under the Education Act 1944 to make them available, it may be liable in damages to parents whose children thereby suffer,[14] though this and some similar decisions must now be doubtful.[15] But in this area many cases are difficult and unpredictable. The House of Lords overruled earlier decisions holding that a local authority may be liable in damages for failing to provide accommodation for a homeless person in breach of its statutory duty.[16] Schemes of social welfare serving the general public interest were, it was held, unlikely to create private rights of action, particularly where judgment had to be exercised.

[9] *Ferguson* v. *Kinnoul* (above) at 290 (Lord Brougham); *Tozer* v. *Child* (1857) 7 E & B 377 at 382; *Partridge* v. *General Medical Council* (1890) 25 QBD 90.

[10] *Dawson & Co.* v. *Bingley Urban District Council* [1911] 2 KB 149 at 156, distinguishing (at 159) *Atkinson* v. *Newcastle Cpn. Waterworks Co.* (1887) 2 Ex. D 441 (company failed to maintain water pressure required by statute; plaintiff's house burnt down; no liability).

[11] As in *Carpenter* v. *Finsbury Borough Council* [1920] 2 KB 195; above, p. 769. This case was based on both breach of duty and negligence and the two categories will often overlap.

[12] *Reffell* v. *Surrey County Council* [1964] 1 WLR 358. Negligence was also found, but as an alternative basis of liability. See similarly *Ching* v. *Surrey CC* [1910] 1 KB 736.

[13] *Read* v. *Croydon Cpn.* [1938] 4 All ER 631, finding also actionable negligence but rejecting a claim in contract.

[14] *Meade* v. *Haringey LBC* [1979] 1 WLR 637 (Lord Denning MR).

[15] See below.

[16] *O'Rourke* v. *Camden LBC* [1988] AC 188.

This is one of two decisions of the House of Lords which, it is suggested, confirm that

> the House has set itself firmly against damages as a remedy for breach of statutory duty in public law. In future, where Parliament fails to specify a particular remedy for breach of a public duty the presumption will be that judicial review is the normal and exclusive means of enforcement. It is difficult now to see any scope for extending the application of the tort of breach of statutory duty in the public field.[17]

In the other decision (*X (minors)*) the House of Lords disposed of a large number of child welfare cases in a consolidated proceeding in which the whole subject of breach of statutory duty was extensively surveyed by Lord Browne-Wilkinson.[18] He held that failure by local authorities in their statutory duties of identifying children in need or at risk of abuse or with special educational needs did not give rise to any claim for damages in private law. Legislation setting up a regulatory system or a scheme of social welfare was to be treated as intended for the benefit of society in general rather than for the benefit of individuals, except where the statutory duty was very limited and specific. But a claim could succeed if it were 'based on a free standing common law cause of action, whether in trespass, nuisance or breach of a common law duty of care'.[19] In the *Dorset Yacht* case,[20] for example, there was a breach of a common law duty of care, not a statutory duty. But there can be no such duty of care in a matter of policy, such as a decision to close a school. Breach of statutory duty does not, therefore, by itself give rise to any private law cause of action.[21] That can arise only where the statute was enacted for a limited class of the public and it appears that Parliament intended to confer a right of action on members of that class.[22] If the statute provides for its own enforcement, that may tell against private right but may not be conclusive. A common law duty of care could not be imposed if it was inconsistent with, or had a tendency to discourage, the due performance of a statutory duty. But local

[17] See [1988] *PL* 407 (Sir R. Carnwath), advocating more generous rules and making comparisons with relief available from the Parliamentary Commissioner and in European law.

[18] *X (minors)* v. *Bedfordshire CC* [1995] 2 AC 633 (appeals against striking out orders). See similarly *E (minor)* v. *Dorset CC* (1994) 92 LGR 484; *Attorney-General* v. *Prince & Gardner* [1998] 1 NZLR 262; and *Phelps* v. *Hillingdon LBC* [2001] 2 AC 619 (failure to diagnose dyslexia).

[19] Thus the House of Lords allowed a common law claim for neglect of the interests of a child in care to go to trial, stressing the dangers of striking out claims on assumed facts which may prove to be wrong, *Barrett* v. *Enfield LBC* [2001] 2 AC 550 (HL). For analysis and comment see [1999] *PL* 626 (P. Craig and D. Fairgrieve); [2000] *CLJ* 35 (S. Bailey and M. Bowman).

[20] *Dorset Yacht Co.* v. *Home Office* [1970] AC 1004, for which see above, p. 761.

[21] 'The breach of a public law right by itself gives rise to no claim for damages' (Lord Browne-Wilkinson in the *Bedfordshire* case (above) at 730).

[22] As in *Groves* v. *Lord Wimborne* [1898] 2 QB 402, above, p. 773. See also *K.A. Feakins Ltd.* v. *Dover Harbour Board* (1998) 10 Admin. LR 665 (shipping of live animals refused on account of protests: no relief).

authority employees, such as doctors and psychiatrists, were subject to the normal professional duty of care at common law. Only claims under this last head were allowed by the House of Lords to proceed to trial, all the other claims being dismissed. This decision is now the leading authority on breach of statutory duty. It is replete with acute comment and criticism, but it seems to justify the quotation at the head of this paragraph.

Since *X (minors)* claimants have, unsurprisingly, had little success in actions for breach of statutory duty. But there has been success in holding the local authorities liable for the negligence of their employees, the courts sometimes restricting the impact of that case to the decision to take a child into care and not its treatment thereafter.[23] Thus, in applying these principles, the House of Lords refused to strike out, as disclosing no cause of action, a claim based on the authority's failure to protect a child taken into care from physical and psychological harm.[24] In a subsequent decision of the House of Lords, an educational psychologist, employed by an authority, was held to owe a duty to the children whom she assessed for dyslexia (in addition to her duty to her employer). Where there was an absence of due skill in that assessment, the authority was held vicariously liable for the negligence of its employee.[25]

Another possibility is that statutory duties may be held to be merely directory, so that there is no liability for disregard of them. On this ground it has been held that neither the police regulations[26] nor the prison rules[27] give any right of action for violation of them in disciplinary proceedings, and that Parliament cannot be supposed to have had any such intention in passing the legislation. Nor do the rules of mental health tribunals protecting privacy give any remedy for unauthorised publication, for the same reason.[28] There are also statutory exceptions: persons performing functions under the Mental Health Act 1983 are protected unless they act in bad faith or without reasonable care, and an action lies only with leave of the court.[29]

[23] The Court of Appeal has remarked that in child care matters the *X (minors)* case 'cannot survive the Human Rights Act' (the *East Berkshire* case, below, para. 85 (Lord Phillips MR)) portending the eclipse of the common law here.

[24] *Barrett* v. *Enfield LBC* [2001] 2 AC 550 (HL).

[25] *Phelps* v. *Hillingdon LBC* [2001] 2 AC 619 (HL). Similar principles applied to teachers that failed to exercise reasonable skill and care (ibid.). See *Bradfort-Smart* v. *West Sussex CC* [2002] EWCA Civ. 7 (liability for failing to prevent bullying recognised in principle) and *D* v. *East Berkshire Community NHS Trust* [2003] EWCA Civ. 1151; [2004] 2 WLR 58 (CA) (false allegations of child abuse; duty owed to child, not parents). Cf. *A* v. *Essex CC* [2003] EWCA Civ. 1848 (no duty owed to prospective adopters of children in care). See also *S.* v. *Gloucestershire CC* [2001] 2 WLR 909 (CA) (victim of child abuse by foster parents established breach of duty by local authority).

[26] *Calveley* v. *Chief Constable of Merseyside Police* [1989] AC 1228.

[27] *R.* v. *Deputy Governor of Parkhurst Prison ex p. Hague* [1992] AC 58. But see below, p. 869.

[28] *R.* v. *Liverpool Daily Post Plc* [1991] 2 AC 370.

[29] s. 139. See *Winch* v. *Jones* [1986] QB 296.

Other remedies for the non-performance of duties, such as mandamus, are discussed in Chapter 18.

Breach of duty under European Union law

Member States of the European Union and their public authorities have many duties under the Treaties and subordinate Community legislation. These duties are to be given legal effect in the United Kingdom, and enforced by the courts, under the European Communities Act 1972.[30] In a general sense, therefore, all these duties are statutory. But that does not mean that they will be governed by English law, since their operation is a matter of European Union law under principles laid down by the European Court of Justice, notably in two decisions of 1996. Previously the House of Lords held in the *Garden Cottage Foods* case[31] that the duty imposed by Article 86 (now 82) (not to abuse a dominant position) was to be categorised in English law as a statutory duty and gave a strong hint that breach of it should be remediable in damages. The Court of Appeal, however, held in the *Bourgoin* case[32] that a minister's duty under Article 30 (now 28) (not to impose restrictions on imports) was not a statutory duty under the above analysis, and that an invalid restriction imposed by the minister should be classified as 'a simple excess of power', with no remedy in damages.

The decisions of 1996 were two cases decided and reported together. In the first, a French brewery company lost its market in Germany because its beer did not meet the standards of purity required by German legislation, but those standards had earlier been held by the European Court to be unduly stringent and so an unlawful restriction on imports.[33] In the second case that Court held that restrictions imposed by the Merchant Shipping Act 1988 as to the nationality, residence and domicile of the owners of fishing vessels infringed the commercial freedom required by community law, Spanish shipowners having in the meantime suffered heavy losses by losing their fishing rights.[34] The question then was whether the French brewers and the Spanish ship-owners could recover damages from

[30] s. 2(1).

[31] *Garden Cottage Foods Ltd.* v. *Milk Marketing Board* [1984] AC 130 (allegation of discriminatory supply of bulk butter; application for interim injunction failed since damages, if obtainable, would be an adequate remedy. Lord Wilberforce dissented, holding that the remedy might be injunction but not damages). See also *An Board Bainne* v. *Milk Marketing Board* [1984] 2 CMLR 584 (above, p. 668).

[32] *Bourgoin SA* v. *Ministry of Agriculture, Fisheries and Food* [1986] QB 716 (Ministry's order prohibiting import of French turkeys held unlawful by European Court. Plaintiff's claim to damages held to show a cause of action for misfeasance in public office if the minister knew that he had no power so to act, but not for breach of statutory duty. Oliver LJ dissented on the latter point, agreeing with Mann J at first instance). For this case see further below, p. 786.

[33] *Brasserie du Pêcheur SA* v. *Federal Republic of Germany*, C46/93 [1996] QB 404 (ECJ).

[34] *R.* v. *Secretary of State for Transport ex p. Factortame Ltd.* (No. 4), C48/93 [1996] QB 404 (ECJ).

Germany and Britain respectively. In upholding their claims the Court of Justice laid down three conditions of liability:

1. The Community law infringed must be intended to confer rights on individuals.
2. The breach must be sufficiently serious, in that the member state has manifestly and gravely disregarded the limits on its discretion.
3. There must be a direct causal link between the breach and the damage sustained.

It was then for the national court, obeying Community law, to decide whether these conditions were satisfied. But the Court of Justice made it clear what the decision should be and gave further directions. The reparation must be commensurate with the loss and the rules must be not less favourable than for similar domestic claims. It was immaterial that the loss resulted from legislation. There was no requirement of fault (beyond 'manifestly and gravely') such as intention or negligence. There should be reparation for loss of profit, and there might be exemplary damages. The House of Lords in due course awarded full but not exemplary damages against the government, holding that their deliberate adoption of discriminatory legislation was a manifest and grave breach of fundamental treaty obligations.[35]

The House was applying the Court of Justice's criterion, that a breach is 'sufficiently serious' if the national authority has 'manifestly and gravely disregarded the limits on the exercise of its powers'.[36] This is the same test as that for abuse of power by the EU organs themselves, as explained earlier.[37] It was again enforced against the British government when on grounds of cruelty to animals it had refused licences for the export to Spain of live animals for slaughter, in violation of the treaty provision against quantitative restrictions on exports between member states and the Court of Justice ordered reparation.[38] But the Court later exonerated Britain for failure to implement a community directive about procurement contracts, since the directive was capable of different interpretations, even though the British interpretation was held to be wrong; the breach was therefore not 'sufficiently serious'.[39]

The decisions discussed in these pages show that English law and Community law are evolving in opposite directions.[40] The House of Lords 'has set itself firmly against damages as a remedy for breach of statutory duty in public law'.[41] Community law, on the other hand, provides a comprehensive remedy in reparation against national governments for breach of their duties, irrespective of fault and

[35] *R.* v. *Secretary of State for Transport ex p. Factortame Ltd.* (No. 5) [1999] 3 WLR 1062.
[36] See *Factortame* (No. 3) [1996] QB 404 at 499 (ECJ).
[37] Above, p. 208.
[38] *R.* v. *Ministry of Agriculture, Fisheries and Food ex p. Hedley Lomas (Ireland) Ltd.* [1997] QB 139.
[39] *R.* v. *HM Treasury ex p. British Telecommunications Plc* [1996] QB 615 (ECJ).
[40] For full discussion see (1997) 113 *LQR* 67 (P. P. Craig); C. Lewis in Forsyth and Hare (eds.), *The Golden Metwand*, 319.
[41] As quoted above, p. 776.

limited in effect only by the 'sufficiently serious' requirement. The obvious difficulty in the Court of Appeal's decision in the *Bourgoin* case is that, since it was a matter of Community law, it should have been decided under the positive Community rules and not the negative English rules.[42] How far these contradictory rules will be able to co-exist is questionable. It seems likely that under Community pressure the English law will eventually have to conform. It has long been criticised for its grudging attitude to the remedy of damages in public law;[43] and a learned judge has recently observed with good reason:[44]

> In principle ... where serious harm has been caused to individuals by illegal action by public authorities, or by failure to carry out legal duties or obligations imposed upon them for the benefit of individuals, justice demands a suitable remedy for breach. For past failures the only efficient remedy in most circumstances is monetary compensation. As the European Court of Justice has recognised, failure to afford such a remedy impairs the effectiveness of the law.

Here, therefore, is another situation where English law may be under pressure to conform.

Liability for subordinates

Public officers may also be responsible for their subordinates. Lord Denning MR has thus described their position, speaking of a registrar of local land charges:[45]

> He is a public officer and comes within the settled principle of English law that, when an official duty is laid on a public officer, by statute or by common law, then he is *personally* responsible for seeing that the duty is carried out. He may, and often does, get a clerk or minor official to do the duty for him, but if so he is answerable for the transgression of the subordinate: see *Sanderson* v. *Baker*,[46] where Blackstone J states the position of the sheriff. Sometimes it is an *absolute* duty, in which case he must see that it is performed *absolutely*: see the instances given by Holt CJ in *Lane* v. *Cotton*.[47] At other times it is only a duty to use *diligence*, in which case he must see that due diligence is used: see the celebrated judgment of Best CJ in *Henly* v. *Lyme Corporation*.[48] But, in any event, if the duty is broken, and injury done thereby to one of the public, then the public officer is answerable. The injured person

[42] See *Kirklees MBC* v. *Wickes Building Supplies Ltd.* [1993] AC 227 at 281.

[43] See Lord Wilberforce (dissenting) in *Hoffmann–La Roche & Co.* v. *Secretary of State for Trade and Industry* [1975] AC 295: 'an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action ... the subject requires protection against action taken against him or his property under administrative orders which may turn out to be invalid'.

[44] Sir R. Carnwath (as above, n. 11).

[45] *Ministry of Housing and Local Government* v. *Sharp* [1970] 2 QB at 266.

[46] (1772) 3 Wils. 309, 317.

[47] (1701) 1 Ld. Raym. 646, 651 (postmaster general held not liable for packet lost by subordinate, Holt CJ dissenting; subordinate held liable).

[48] (1828) 5 Bing. 91, 107–09 (corporation liable to repair sea-walls under Crown grant liable in damages for non-repair).

can sue him in the civil courts for compensation . . . Our English law does not allow a public officer to shelter behind a droit administratif.

Lord Denning held that the registrar of local land charges had an absolute duty, so as to make him liable for a subordinate clerk's negligent search of the register, which caused loss to a purchaser of land; Salmon and Cross LJJ held that the registrar had no such absolute duty.

Misfeasance in public office

Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrongdoing.[49] There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration and perhaps also other unlawful acts causing injury.[50] To the credit of public authorities it must be said that there are remarkably few reported English decisions on this form of malpractice.

The famous case of *Ashby* v. *White* (1703)[51] is the best known of the English examples, arising as it did from the disputed Aylesbury election which brought the two Houses of Parliament and the courts of law into such sharp conflicts that they were resolved only by the dissolution of Parliament.[52] The plaintiff was one of the electors who was wrongfully prevented from voting and who sued the borough constables in charge of the poll for £200 damages, pleading their fraud and malicious intent. There seems to have been no breach of ministerial duty.[53] The plaintiff failed in the Court of King's Bench, Holt CJ vigorously dissenting; but the House of Lords (involved as it was in the controversy, on the plaintiff's side) reversed the judgment by a majority of fifty to sixteen. Holt CJ's opinion is a classic instance of invoking the principle *ubi jus, ibi remedium*:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[54]

[49] See [1964] *CLJ* 4 (A. W. Bradley); [1964] *PL* 367 (G. Ganz); (1972) 5 NZULR 105 (B. C. Gould); [1979] *CLJ* 323 (J. McBride); 14th Report of the Public and Administrative Law Reform Committee, New Zealand (1980). There may also be criminal liability: *R.* v. *Llewellyn-Jones* [1968] 1 QB 429.

[50] It is also a crime at common law: *R.* v. *Bowden* [1996] 1 WLR 98.

[51] (1703) 2 Ld. Raym. 938, 3 Ld. Raym. 320; 1 Smith's *Leading Cases*, 13th edn., 253, with notes supplementing the defective reports.

[52] The events are summarised in Smith's *Leading Cases*, 13th edn., at 281.

[53] See *Tozer* v. *Child* (below) at 382.

[54] 2 Ld. Raym. at 953. Compare Denning LJ (dissenting) in *Abbott* v. *Sullivan* [1952] 1 KB 189 at 200: 'I should be sorry to think that, if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on.'

But the true gist of the action for damages was later held to have been malice, and similar actions failed where malice could not be established.[55] Otherwise, it was said, 'the officer could not discharge his duty without great peril and apprehension, if, in consequence of a mistake, he became liable to an action'.[56] Actions for damages for breach of official duty at elections were abolished by statute in 1949, since when there are only criminal penalties.[57] But the principle of *Ashby* v. *White* might be applied in many other situations.

Almost equally celebrated among modern cases is that in which the Supreme Court of Canada awarded damages against the Prime Minister of Quebec personally for directing the cancellation of a restaurant-owner's liquor licence solely because the licensee provided bail on many occasions for fellow-members of the sect of Jehovah's Witnesses, which was then unpopular with the authorities.[58] The Prime Minister had no legal power to interfere with the liquor commission which on his directions nevertheless cancelled the licence, and the cancellation was an abuse of discretion based on irrelevant and illegal grounds. It was indeed said that an allegation of good faith would be no defence for such a flagrant abuse of power, there being in fact no power at all; but it seems right to regard the case as one of malicious abuse of power because of the deliberate intent to injure without legal justification. Rand J said:[59]

> 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? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

But in an earlier case the same court had taken a step further, holding that the wrongful withdrawal of a pilot's licence by a port authority entitled him to damages:[60] there was no malice in the above sense, but there was a deliberate withdrawal of the licence on grounds of neglect and incompetence, without legal justification and in breach of natural justice—in other words, a plain case of ultra vires.

According to the nearest comparable English authority, such an action will

[55] *Cullen* v. *Morris* (1819) 2 Stark. 577; *Tozer* v. *Child* (1857) 7 E & B 377; and see *Drewe* v. *Coulton* (1787) 1 East 563, note. Holt CJ's opinion and other early authorities are discussed by Clarke J in the *Three Rivers* case, below.

[56] *Cullen* v. *Morris* (above) at 587.

[57] Representation of the People Act 1949, s. 50.

[58] *Roncarelli* v. *Duplessis* (1959) 16 DLR (2d) 689 (damages of $33,123 awarded).

[59] At 706.

[60] *McGillivray* v. *Kimber* (1915) 26 DLR 164. In *Polley* v. *Fordham* [1904] 2 KB 345 at 348 Wills J said: 'No such thing was ever heard of as an action for making an order against a person without jurisdiction. If the order is not followed by consequences against the individual, it comes to nothing.' But the meaning of this is obscure: see *Farrington* v. *Thomson* (below).

succeed only on proof of malice. The Court of Appeal so held in dismissing an action by a dentist who had been struck off the register without being given a hearing but without malice.[61] In a later case, where it was alleged that a local authority had refused to pass building plans out of spite towards the applicant, with whom they had been in litigation, it was even held that no action for damages would lie for malice, and that the only remedies were mandamus or certiorari.[62] But that unsatisfactory decision was not followed by the Privy Council, which decided that an action might lie for the malicious refusal of a licence for a cinema in Ceylon.[63] Likewise the House of Lords has held that an action for damages might proceed against the clerk of a local authority personally on the ground that he had procured the compulsory purchase of the plaintiff's property wrongfully and in bad faith (though in fact the bad faith was not proved).[64] In a Scottish case ship owners sued the Shetland Islands Council for attempting to ban their ship from entering a harbour by denying mooring and other facilities which the Council could not lawfully deny for this purpose. Since it was found that the Council and the harbourmaster had acted in good faith, the claim failed.[65] The House of Lords, in dismissing a claim, has added 'or (possibly) without reasonable cause' to the requirement of bad faith,[66] but that obiter dictum must be doubted.[67]

'Misfeasance in public office' is the name generally given to this tort of deliberate abuse of power. It has been mostly discussed in cases where claims have failed, but an illustration of the award of damages comes from the Supreme Court of Victoria.[68] Purporting to exercise a power which they knew they did not possess, a licensing inspector and a police officer ordered the plaintiff to close his hotel and cease supplying liquor. He obeyed, and sued for the resultant loss.[69] In awarding damages Smith J referred to a wide statement by Best CJ in 1828:[70]

[61] *Partridge* v. *General Medical Council* (1890) 25 QBD 90. The plaintiff had been restored to the register by mandamus. See also *Ross* v. *Secretary of State for Scotland* 1990 SLT 13 (injury from unauthorised vaccination not actionable unless in bad faith).

[62] *Davis* v. *Bromley Cpn.* [1908] 1 KB 170 (CA, no authority cited). And see *Bassett* v. *Godschall* (1770) 3 Wils. KB 121, another example of the fallacy that because there is no right to be granted a licence there is therefore no right to a proper determination of the application—the same fallacy as in *Nakkuda Ali* v. *Jayaratne* (above, p. 487).

[63] *David* v. *Abdul Cader* [1963] 1 WLR 834. See similarly *Ballantyne* v. *City of Glasgow Licensing Board* 1987 SLT 745 (action for wrongful refusal of liquor licences; malice not alleged; action dismissed).

[64] *Smith* v. *East Elloe Rural District Council* [1956] AC 736; *Smith* v. *Pyewell*, The Times, 29 April 1959. See also *R.* v. *Secretary of State for the Environment ex p. Ostler* [1977] QB 122.

[65] *Micosta SA* v. *Shetland Islands Council* 1986 SLT 193.

[66] *Calveley* v. *Chief Constable of Merseyside Police* [1989] AC 1228.

[67] It is rejected in *Whithair* v. *Attorney-General* [1996] 2 NZLR 45.

[68] *Farrington* v. *Thomson* [1959] VR 286, discussing the shadowy English case of *Wood* v. *Blair*, The Times, 3, 4, 5 July 1957 (CA), where a local authority had unlawfully prohibited the sale of milk by a dairy farmer, but without malice, and liability in damages appears to have been conceded.

[69] No regard was paid to the argument that a void order need not be obeyed: above, p. 334.

[70] *Henly* v. *Lyme Cpn.* (1858) 5 Bing. 91 at 107.

> Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them.

This and other authorities, including the last-mentioned decision of the House of Lords, were held to establish that the tort of misfeasance in public office goes at least to the length of imposing liability on a public officer who does an act which to his knowledge amounts to an abuse of his office and which causes damage. A later example was where a mental patient was unlawfully detained to the knowledge of the hospital authorities, and recovered damages.[71]

A very thorough examination of this tort and of the authorities was undertaken in a case where plaintiffs who had lost money in a bank failure claimed damages from the Bank of England, which had powers of regulation over banks.[72] The claimants alleged misfeasance in public office in that the Bank of England had either wrongly granted a licence to the failed bank or else wrongly failed to revoke it. Since the Bank of England was protected both by a statutory immunity, except in case of bad faith,[73] and also by the decisions about regulators, explained earlier, negativing a duty of care,[74] the plaintiffs attempted to show misfeasance, alleging that the Bank knew that it was acting unlawfully or else that it was reckless in so acting. Preliminary issues were tried on these assumed facts. It was held as first instance that the plaintiffs must fail for lack of causation between the misfeasance and the injury and their pleadings were struck out (as also was an attempt to invoke EU law). The House of Lords considered that it was so certain that there was no liability in EU law that it refused to make a preliminary reference to the ECJ under the doctrine of acte clair. The Court of Appeal affirmed the first instance judgment by a majority, dissecting the tort into two varieties, both based upon deliberate and dishonest abuse of power. One was where the tortfeasor acted outside his powers (whether consciously or not) with the object of injuring the plaintiff. The other was where he knew that he had no power and actually foresaw the injury. The House of Lords confirmed that there were two varieties of the tort but that the Court of Appeal had gone too far in basing the second of the two varieties on knowledge that the decision *would* cause damages to the plaintiffs.[75] The correct test was that of knowledge that the decision would *probably* damage the plaintiffs. This was more that a test of foreseeability of damage, which by itself was not

[71] *B.* v. *Forsey* 1988 SLT 572 (HL).

[72] *Three Rivers DC* v. *Bank of England* [1996] 3 All ER 558 (Clarke J), [2000] 2 WLR 15 (Hirst and Robert Walker LJJ, Auld LJ dissenting on the ground that there was an arguable case both in English and in EU law).

[73] Banking Act 1987, s. 1(4).

[74] Above, p. 767.

[75] *Three Rivers DC* v. *The Governor and Company of the Bank of England* (No. 3) [2000] 2 WLR 1220 (HL).

enough. The requisite knowledge could be imputed from recklessness, in the sense of not caring whether the consequences happen or not. The correct test 'represents a satisfactory balance between two competing policy considerations, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions.' These propositions are taken from the speech of Lord Steyn, supported by the speeches of the other law lords. Lord Millett added that the tort could not be committed negligently or inadvertently; that the core concepts were abuse of power, bad faith or improper purpose; and that the tort was one of misfeasance, not nonfeasance. Its two varieties, as expressed by Lord Steyn, are as follows:

> First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.[76]

In the result the litigation continues with the claimants producing fresh pleadings to reflect the authoritative statement of the law. There has been a further hearing[77] before the House of Lords and several hearings in other courts on procedural issues.[78] The final outcome is still years away but at least the law has been clarified. The marshalling and analysis of multifarious issues in the judgments of the Court of Appeal and in the speeches in the House of Lords has done much to establish the tort of misfeasance on a solid basis.

All indications now are that the courts will not award damages against public authorities merely because they have made some order which turns out to be ultra vires, unless there is malice or conscious abuse. Where an Australian local authority had passed resolutions restricting building on a particular site without giving notice and fair hearing to the landowner and also in conflict with the planning ordinance, the Privy Council rejected the owner's claim for damages for depreciation of his land in the interval before the resolutions were held to be invalid.[79] 'The well-established tort of misfeasance by a public officer', it was

[76] And see Lord Hope's description of the requirements in *Three Rivers DC* v. *The Governors and Company of the Bank of England* (No. 3) (second hearing) [2001] UKHL 16; [2003] 2 AC 1, paras. 41–46.

[77] *Three Rivers* (No. 3) (second hearing) [2001] UKHL 16; [2003] 2 AC 1.

[78] *Three Rivers* (No. 4) [2002] EWCA Civ. 1182; [2003] 1 WLR 210; (No. 5) [2003] EWCA Civ. 474; [2003] QB 1556.

[79] *Dunlop* v. *Woollahra Municipal Council* [1982] AC 158. See also *R.* v. *Knowlsley MBC ex p. Maguire* [1992] COD 499 (taxi licences wrongly refused, later granted: interim loss not recoverable). Claims similarly failed in *Park Oh Ho* v. *Minister for Immigration* (1989) 88 ALR 517 and *Chan Yee Kin* v. *Minister for Immigration* (1991) 103 ALR 499.

held, required as a necessary element either malice or knowledge by the council of the invalidity of its resolutions. In New Zealand, also, a company failed in a claim for damages resulting from a minister's refusal of permission for it to obtain finance from a Japanese concern.[80] The minister's refusal was quashed as ultra vires, but it was held that this alone was not a cause of action.[81] Nor does it appear that claims of this kind can be strengthened by pleading breach of statutory duty.[82]

It was for the same reasons that the Court of Appeal refused relief in the *Bourgoin* case, as mentioned earlier.[83] A ministerial revocation order had prohibited the import of turkey meat from France and was held unlawful by the European Court as being in breach of Article 30 (now 28) of the Treaty of Rome. French traders who had suffered losses then sued the ministry for damages. On preliminary issues it was held that they had no cause of action merely for breach of statutory duty, as already related.[84] Likewise there was no cause of action merely because the minister's order was unlawful: it could be quashed or declared unlawful on judicial review, but there was no remedy in damages for 'a simple excess of power'.[85] Since that decision, however, it has become clear that the rules of Community law are more generous and that, since Community law was in question, there may have been a right to damages enforceable in the British court without proof of malice.[86] According to this doctrine the government's liability for infringing Community law will be much wider than it is for acting ultra vires in domestic law, since innocent infringements are common but malicious infringements are rare.

The principles of liability seem now to be emerging clearly. It can be said that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations:

1. if it involves the commission of a recognised tort such as trespass, false imprisonment or negligence;[87]

[80] *Takaro Properties Ltd.* v. *Rowling* [1978] 2 NZLR 314. The Court of Appeal (NZ) later awarded damages for negligence but was reversed by the Privy Council: above, p. 768.

[81] The so-called *Beaudesert* principle, that there is liability in tort for 'unlawful, intentional and positive acts', laid down by the High Court of Australia in *Beaudesert Shire Council* v. *Smith* (1966) 120 CLR 145 but never applied since, was rejected by the House of Lords in *Lonrho Ltd.* v. *Shell Petroleum Co. Ltd.* [1982] AC 173 and overruled by the High Court of Australia in *Northern Territory* v. *Mengel* (1995) 69 ALJR 527.

[82] See above, p. 775.

[83] *Bourgoin SA* v. *Ministry of Agriculture, Fisheries and Food* [1986] QB 716. Art. 28 (ex 30) prohibits quantitative restrictions on imports. See also *An Bord Bainne Co-operative Ltd.* v. *Milk Marketing Board* [1988] 1 FTLR 145, where the Court of Appeal held that there was no remedy in damages for alleged failure by the minister to ensure the due observance of Community law.

[84] Above, p. 778.

[85] Parker and Nourse LJJ treated this as a self-evident proposition, without citing authority. Oliver LJ dissented. In fact the government paid £3.5 m. in compensation: [1989] *PL* at 47 (J. A. Weir). The European Court had found the government to be in default: see [1986] QB at 725.

[86] See above, p. 778.

[87] Above, p. 751.

2. if it is actuated by malice, e.g. personal spite or a desire to injure for improper reasons;[88]
3. if the authority knows that it does not possess the power to take the action in question or is recklessly indifferent to its existence;[89]
4. if the case is governed by Community law and that law would allow reparation.[90]
5. if human rights have been infringed entitling the victim to 'just satisfaction'.[91]

The decisions suggest that there is unlikely to be liability in the absence of all these elements, for example where a licensing authority cancels a licence in good faith but invalidly, perhaps in breach of natural justice or for irrelevant reasons. Since loss of livelihood by cancellation of a licence is just as serious an injury as many forms of trespass or other torts, it may seem illogical and unjust that it should not be equally actionable in damages; and in *obiter dicta* in a dissenting judgment Denning LJ once suggested that it was.[92] Some cases of this kind may involve breach of statutory duty, but that head of liability is now confined as explained above.[93] In general it seems probable that public authorities and their officers[94] will be held to be free from liability so long as they exercise their discretionary powers in good faith and with reasonable care. Losses caused by bona fide but mistaken acts of government may have to be suffered just as much when they are invalid as when they are valid. This unjust doctrine is in need of reform.

A comparable, but not identical, doctrine prevails in the European Court, based upon the provision of the Treaty that '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'.[95] It is held that the mere illegality of regulations made by the Council of the EC gives no cause of action to traders who have suffered loss by obeying them,[96] but that damages must be paid for loss suffered if a Community authority

[88] *Ashby* v. *White, Roncarelli* v. *Duplessis, Smith* v. *East Elloe Rural District Council, David* v. *Abdul Cader* (above); and see the review of authorities in *Takaro Properties Ltd.* v. *Rowling* (above). The court will not allow misfeasance to be used to evade the requirements of malicious prosecution: *Silcott* v. *Commissioner of Police of the Metropolis* (1996) 8 Admin. LR 633 overruled in part in *Parker* v. *Chief Constable of the West Midlands Police* [2001] 1 AC 435 (HL), and see *Gizzonio* v. *Chief Constable of Derbyshire*, The Times, 29 April 1998 (no liability for refusal of bail).

[89] *Farrington* v. *Thomson* (above); the *Bourgoin* case (above); the *Three Rivers* case (above).

[90] The *Factortame* case, above, p. 768.

[91] Above, p. 749.

[92] *Abbott* v. *Sullivan* [1952] 1 KB 189 at 202; and see *Davis* v. *Carew-Pole* [1956] 1 WLR 833. Contrast *Hlookoff* v. *Vancouver City* (1968) 67 DLR (3d) 119.

[93] Above, p. 775.

[94] Misfeasance by an officer outside the course of employment will not render the authority liable: *Weldon* v. *Home Office* [1992] 1 AC 58 at 164; *Racz* v. *Home Office* [1994] 2 AC 45.

[95] Treaty of Rome, Art. 288 (ex 215).

[96] *Bayerische HNL Vermehrungsbetriebe* v. *Council and Commission* [1978] 3 CMLR 566; *Koninklijke Scholten Honig NV* v. *Council and Commission of the European Communities* [1982] 2 CMLR 590; *Mulder* v. *Council and Commission* [1992] ECR I–3061 (with examples on both sides of the line).

has 'manifestly and gravely disregarded the limits on the exercise of its powers'.[97] This test is, as mentioned earlier, the same as that applied to breaches of Community law by Member States.[98] Since it lacks the element of malice or conscious abuse which is essential in the British doctrine of misfeasance, it comes nearer to providing just reparation for unlawful but innocent executive action. The non-liability for mere illegality committed by Community organs is justified by 'the exercise of a wide discretion essential for the implementation of the common agricultural policy'—a ground reminiscent of the House of Lords' 'policy or operational' distinction in the law of negligence, where 'policy' also restricts liability.[99]

IMMUNITIES AND TIME LIMITS

Judicial immunity

Judges in courts of law enjoy special immunity from actions in tort. The object is to strengthen their independence, so that their decisions may not be warped by fear of personal liability.

> It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act though it be alleged to have been done maliciously and corruptly.[1]

The fact that the judge may have exceeded his jurisdiction is irrelevant. But a judge may be liable in damages, like any other judicial officer, if in bad faith he does what he knows he has no power to do. Lord Bridge has said:[2]

> If the Lord Chief Justice himself, on the acquittal of a defendant charged before him with a criminal offence, were to say: 'That is a perverse verdict', and thereupon proceed to pass a sentence of imprisonment, he could be sued for trespass.

In the case of judges of inferior courts, meaning courts which were subject to control by mandamus, certiorari and prohibition,[3] it used to be the law that they were liable if they acted maliciously and without reasonable and probable cause, even though within their jurisdiction.[4] For acts done outside their jurisdiction

[97] As in *Deutsche Getreideverwertung* v. *Council and Commission* [1979] ECR 3017.
[98] Above, p. 778.
[99] Above, p. 765.
[1] *Fray* v. *Blackburn* (1863) 3 B & S 576 at 578 (Crompton J) (unsuccessful action against Blackburn J). See also *Anderson* v. *Gorrie* [1895] 1 QB 668. A judge wrongfully refusing a writ of habeas corpus was by statute made personally liable for a penalty of £500.
[2] *Re McC.* [1985] AC 528 at 540.
[3] This includes the Crown Court except in relation to trial on indictment: Supreme Court Act 1981, s. 29(3).
[4] The authorities seem to be *obiter dicta*, e.g. *Cave* v. *Mountain* (1840) 1 M & G 257 at 263.

they had no protection at all, and were liable in damages for any injury so caused.[5] In reaffirming the latter rule, though not the former, the House of Lords explained that legislation had to some extent restricted the liability of justices of the peace and provided for them to be indemnified at public expense where they had acted reasonably and in good faith.[6] Now, however, justices of the peace are exempted by statute from liability for acting outside their jurisdiction, except only where they act in bad faith; and for acting within their jurisdiction they have full immunity.[7]

In this context 'jurisdiction' is used in a wider sense than for the purposes of the ultra vires doctrine, where errors of many kinds may destroy jurisdiction. It requires 'some gross and obvious irregularity of procedure, as for example if one justice absented himself for part of the hearing and relied on another to tell him what had happened during his absence', or a flagrant breach of the rules of natural justice, as opposed to 'some narrow technical ground' such as an error of jurisdictional fact[8] or a minor violation of natural justice.[9] Earlier examples of inferior courts exceeding jurisdiction in this sense were where the judge of the Court of the Marshalsea, having jurisdiction over members of the king's household, imprisoned someone who was not a member of it;[10] where a county court judge in Lancashire committed for contempt a party in Cambridgeshire who was outside the judge's territorial jurisdiction;[11] and where a revising barrister wrongly expelled a plaintiff from his court.[12] In all these cases the judges were held personally liable in damages for the false imprisonment and assault, even where they had acted in good faith; and officers executing their judgments were liable similarly.[13]

The rules of common law which benefit magistrates ought also to benefit statutory tribunals which operate like courts, by finding facts and applying law, as do for example social security tribunals and employment tribunals. At the other end of the scale, it seems obvious that judicial immunity will not extend to an administrative authority merely because its function is denominated judicial or quasi-judicial for the purposes of the rules of natural justice or of control by certiorari;[14] for in

[5] Examples concerning magistrates are *Jones* v. *Gurdon* (1842) 2 QB 600; *Clark* v. *Woods* (1848) 2 Ex. 395; *R.* v. *Manchester Magistrates' Court ex p. Davies* [1989] QB 631; and see *Beaurain* v. *Scott* (above, p. 477). But honest mistake of fact was a defence: *Pease* v. *Chaytor* (1861) 1 B & S 658; *London Corporation* v. *Cox* (1867) LR 2 HL 239 at 263.

[6] *Re McC.* [1985] AC 528.

[7] Courts and Legal Services Act 1990, s. 108. Provision for indemnity is made by Justices of the Peace Act 1997, as amended by Access to Justice Act 1999, s. 99.

[8] See *Pease* v. *Chaytor* (above).

[9] *Re McC.* (above) at 546–7. But see the *Manchester City Justices* case (above) holding that failure to consider a statutory requirement was actionable.

[10] *Marshalsea Case* (1613) 10 Co. Rep. 68b.

[11] *Houlden* v. *Smith* (1850) 14 QB 841.

[12] *Willis* v. *Maclachlan* (1876) 1 Ex. D. 376.

[13] *Marshalsea Case* (above); *London Cpn.* v. *Cox* (above).

[14] See, e.g., *Cooper* v. *Wandsworth Board of Works* (1863) 14 CB (NS) 180 (above, p. 480).

those cases the function is basically administrative. Thus no immunity should be enjoyed by an inspector holding a public inquiry. The same might apply to licensing agencies such as planning authorities. Such bodies have only limited opportunities for committing torts, since they possess no powers of arrest or detention. Mental health review tribunals possess such powers, but their members have statutory protection provided that they act in good faith and with reasonable care.[15] Where there is neither judicial immunity nor statutory protection, tribunals will have the same liability as other administrative authorities, as explained in the preceding sections.[16]

A principle which might prove important was propounded in the House of Lords in 1921 in a case where it was held that there could be no liability for negligence on the part of a justice of the peace or guardian in making an order for the detention of a lunatic, provided that the justice or guardian was honestly satisfied that it was a proper case for the order.[17] Lord Moulton said:[18]

> If a man is required in the discharge of a public duty to make a decision which affects, by its legal consequences, the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected.

This wide statement ought probably to be confined to decisions made within jurisdiction, since at the time it was made there was undoubtedly liability for interference with personal liberty or property where there was no jurisdiction.[19] It probably means no more than that members of a tribunal which acts within its jurisdiction and in good faith are not personally liable to actions for negligence or for acting on no evidence.[20] In this case the House of Lords were aware of the need to define judicial immunity with reference to the growing adjudicatory powers of administrative authorities, 'a fresh legal problem of far-reaching importance';[21] but they did not attempt to do it.

Time limits for actions in tort

Until 1954 there were specially short statutory periods within which actions against public authorities (including the Crown) had to be brought. A limitation period of six months was laid down by the Public Authorities Protection Act

[15] See above, p. 776.
[16] For the position of arbitrators and valuers see *Arenson* v. *Arenson* [1977] AC 405.
[17] *Everett* v. *Griffiths* [1921] AC 631. Compare *Welbridge Holdings Ltd.* v. *Greater Winnipeg Cpn.* (1970) 22 DLR (3d) 470 at 476.
[18] At 695.
[19] See above, p. 788.
[20] See *Cave* v. *Mountain* (1840) 1 M & G 257.
[21] [1921] AC at 659 (Lord Haldane).

1893[22] (replacing many earlier enactments) for 'any action, prosecution, or other proceeding' against any person for

> any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority.

This gave public authorities very favourable treatment in comparison with private persons, against whom actions in tort were not barred for six years. In 1939 the period under the Act of 1893 was extended to one year,[23] and in 1954 the legislation was repealed.[24] Actions in tort against public authorities and their servants or agents are now governed by the ordinary period of limitation for actions in tort generally, which is three years for actions based on personal injury and six years in other cases,[25] with an alternative, in the case of latent damage, of three years from its manifestation.[26] Discrimination in favour of public authorities was thus abolished, in conformity with the policy of making them subject to the ordinary law—the same policy which was embodied in the Crown Proceedings Act 1947. At the same time the Act of 1954 abolished special three-year periods of limitation which had been enacted in favour of nationalised industries such as coal, electricity, gas and transport.[27]

For the purposes of computing the time limit where a public authority has acted in some way outside its powers, time runs from the tortious act committed, e.g. entry on land (trespass), detention of a person (false imprisonment), or seizure of goods (trespass), rather than from the time of any invalid determination or order under which the action was taken. This is because an invalid determination or order by itself inflicts no injury: the right of action necessarily accrues only when there is some injurious result which the invalid determination or order does not excuse. In one case Wills J said:[28]

> No such thing was ever heard of as an action for making an order against a person without jurisdiction. If the order is not followed by consequences against the individual, it comes to nothing.

He therefore held that an action for illegal distress on non-payment of a fine was not statute-barred since time ran from the taking of the goods and not from the order of conviction.

[22] s. 1. For the Act, its effects and its repeal, see M. J. Beloff, QC, in Forsyth and Hare (eds.), *The Golden Metwand* at 267. See also *Bradford Corporation* v. *Myers* [1916] 1 AC 242; *Griffiths* v. *Smith* [1941] AC 170.

[23] Limitation Act 1939, s. 21.

[24] Law Reform (Limitation of Actions, etc.) Act 1954, s. 1. See *Arnold* v. *Central Electricity Generating Board* [1988] AC 228 (no revival of claims previously barred).

[25] Limitation Act 1980, ss. 2, 11.

[26] Latent Damage Act 1986 (above, p. 763).

[27] Act of 1954, sched.

[28] *Polley* v. *Fordham* [1904] 2 KB 345; above, p. 781.

LIABILITY IN CONTRACT

Basis of ordinary law

English law, unlike that of France and other countries,[29] has no special legal regime governing contracts made by public authorities.[30] Formerly the Crown had a special legal position, and to some extent it still has; but, as explained in the following chapter, it has for most practical purposes been put into the same position as an ordinary litigant by the Crown Proceedings Act 1947. Central government departments normally make contracts in their own names but as agents of the Crown, so that the enforcement of such contracts is governed by the Act. Other governmental bodies such as local authorities are subject to the ordinary law of contract which applies to them in the same way as to private individuals and corporations (though with one important exception).[31] They are, as also are government departments, restricted in certain ways by rules of administrative law, such as the rules which prevent their contracts from fettering their discretionary powers[32] and from creating estoppels in some cases.[33] European Union law, moreover, has imposed a special regime for procurement contracts, designed to ensure fair competition and non-discrimination. This regime applies primarily, but not exclusively, to public authorities, as explained below.

The Crown is free to make contracts (though not to spend public money) without statutory authority since it enjoys the powers of a natural person.[34] Local authorities, on the other hand, are wholly statutory bodies and and can bind themselves by contract only in so far as statute permits.

Contractual obligations are not enforceable by judicial review,[35] unless the question is whether the contracting authority has exceeded its powers. So much of the territory of government is now administered through contracts that this exclusionary rule may allow wide regions of administrative power to escape from judicial control, contrary to constitutional principles.[36] It does not yet seem that the courts are alive to this danger.

[29] For the French regime, which applies to certain kinds of contracts only according to complicated rules, see Brown and Bell, *French Administrative Law*, 5th edn. (1998), 202.

[30] See Mitchell, *The Contracts of Public Authorities* (1954), dealing also with the USA and France; Turpin, *Government Procurement and Contracts* (1989); Arrowsmith, *Civil Liability and Public Authorities* (1992), chs. 2–4; Arrowsmith, *The Law of Public and Utilities Procurement* (1996).

[31] See below, p. 792.

[32] Above, p. 330.

[33] See above, p. 237.

[34] See above, p. 216.

[35] See above, p. 635.

[36] See [1994] *PL* 86, [1998] *PL* 288 (M. Freedland); Murray Hunt in Taggart (ed.), *The Province of Administrative Law*, 21.

In practice, as opposed to law, there are many special aspects of public authorities' contracts which, though interpreted and enforced according to the ordinary law, may be regarded as the subject of a distinct body of rules.[37] Rates of profit on central government contracts are subject to review, either upwards or downwards, and either generally or for particular contracts, by the Review Board for Government Contracts. This advisory body was set up in 1969 by agreement between the Treasury (since replaced by the Department of Defence) and the Confederation of British Industries, after revelations of exorbitant profits made in defence and health service contracts. Common form clauses such as the 'Standard Conditions of Government Contracts for Stores Purchases'[38] and 'General Conditions of Government Contracts for Building and Civil Engineering Works'[39] are employed by government departments so as to produce a high degree of uniformity in contracts for procurement and public works. Widely drawn 'break clauses' allow the government to terminate the contract, subject to the payment of compensation to the contractor. Local authorities are subject to legislation on competitive tendering.[40] Local authorities are represented on the Joint Contracts Tribunal, an unofficial body which settles the terms of the commonly used standard form of building contract.

Contracts of service with public authorities rest on the same 'ordinary law' basis as other contracts, except in the case of the Crown, as explained earlier.[41]

At common law a contract could be made by a corporate body, such as a local authority, only under its common seal. This inconvenient rule was abolished by the Corporate Bodies Contracts Act 1960.

Government by contract

Contracts are widely used by public authorities as instruments both of policy and of administration.[42] It is by this means that the government in the past regulated tobacco advertising and sponsorship, by 'voluntary agreement' with traders' representative bodies,[43] and secures compensation for the victims of accidents caused by uninsured drivers, by agreement with the Motor Insurers' Bureau.[44] Government contracts formerly incorporated the Fair Wages Resolution of the House of

[37] See Turpin (as above), chs. 6–8.
[38] Form GC/Stores/1 (1979 edn.).
[39] Form GC/Works/1 (1998 edn.).
[40] Local Government, Planning and Land Act 1980, s. 7; Local Government Act 1988, s. 4.
[41] Above, p. 61.
[42] See Turpin, *British Government and the Constitution*, 5th edn. (2002), 437; Harden, *The Contracting State*, [1994] *PL* 86, [1998] *PL* 288 (M. Freedland).
[43] See 29 HC Deb. 437 (WA) (27 Oct. 1982).
[44] See *Hardy* v. *Motor Insurers' Bureau* [1964] 2 QB 745, where the defence that a third party could not enforce the contract was deliberately not pleaded and the claimant succeeded. The current Agreement is that of 1999. See also *Sharp* v. *Pereira* [1999] 1 WLR 195.

Commons, designed to prevent government contractors from undercutting wages and exploiting 'sweated labour'. The first such resolution dated from 1891, but the system was abandoned in 1982.[45] Another example is the 'pay control clause' which the government inserted into its standard forms of contract in the period 1975–78, when it was attempting to control wages without recourse to legislation. This clause took various forms, but basically it was an undertaking to comply with the government's guidelines on wages, backed by a power of cancellation if the minister was not satisfied. The government's contractual business is now so vast that it is easily tempted to use it for ulterior purposes, as mentioned earlier.[46] It is a source of great power, which has been called a 'new prerogative'.[47] Contracts have now come to play a large part in the mechanism of public services, for example in the national health service, in the social and educational services and in prison administration, under policies of decentralisation and privatisation and under the wide contracting powers described below. So pervasive is the technique of administration by contract that it has been called 'a revolution in the making' and 'the cutting edge of administrative law'.[48] Contract, it is said, 'has replaced command and control as the paradigm of administration'.[49] Such contracts will not always be designed for enforcement by legal sanctions, since in many cases administrative pressure will be the natural remedy.

Local authorities may make use of their statutory contract powers for ulterior purposes of policy. In the planning field they have wide powers to enter into agreements for 'restricting or regulating' the development or use of land.[50] They are often able to induce applicants for planning permission to agree to concessions which they would have no power to impose by way of statutory conditions. The legality of this practice has been questioned but it has been held to be legitimate.[51] Administrative collaboration between local authorities and other public bodies may be arranged by contract, so that one may perform services on behalf of another under statutory powers.[52]

Government departments let many contracts by competitive tender, in accordance with a policy of testing the market wherever possible.[53] Local authorities have

[45] 34 HC Deb. 499 (16 Dec. 1982).

[46] Above, p. 385.

[47] [1979] CLP 41 (T. C. Daintith); and see Jowell and Oliver (eds.), *The Changing Constitution*, 3rd edn., 209 (T. C. Daintith); (1990) 106 *LQR* 277 (S. Arrowsmith).

[48] Harlow and Rawlings, *Law and Administration*, 2nd edn., 207, providing much further detail.

[49] Murray Hunt (as above), 21.

[50] Town and Country Planning Act 1990, s. 106.

[51] *Good* v. *Epping Forest DC* [1994] 1 WLR 376; *Tesco Stores Ltd.* v. *Secretary of State for the Environment* [1995] 1 WLR 759 (HL).

[52] Local Government Act 1972, s. 101.

[53] See, e.g., *R.* v. *Lord Chancellor ex p. Hibbit and Saunders* [1993] COD 326 (above, p. 642). See generally Harlow and Rawlings, *Law and Administration*, 2nd edn., chs 12–14; Arrowsmith, *The Law of Public and Utilities Procurement*, ch. 13.

been compelled to do the same, so that their own works departments may be exposed to commercial competition. Services such as ground maintenance, refuse collection and vehicle maintenance are examples which have been subjected to 'compulsory competitive tendering'. Successive Local Government Acts empowered the Secretary of State to extend the list and to give directions to recalcitrant authorities which might be 'banning orders' restricting or regulating their powers.[54] This draconian regime was relaxed in 1999 in a change of policy, which imposed a duty to secure 'best value' as explained earlier.[55]

Delegation and contracting out

The potentiality of 'government by contract' has been extended almost *ad infinitum*, both for central and local government, by sweeping statutory powers conferred in 1994 and 1997. Primarily these powers enable ministerial and local government functions, if authorised by ministerial order, to be exercised by any person or that person's employees, thus clearing the way for numerous official functions to be 'contracted out' into the private sector in accordance with the government's 'private finance initiative'.[56]

Under the Deregulation and Contracting Out Act 1994 any statutory function of a minister which is exercisable by an officer of his (either by statute or by rule of law)[57] may, if an order of the minister so provides, be made exercisable by any person (or employee) authorised by either the officer or the minister. There are corresponding provisions for local government, except that a ministerial order is still required and authorisation must be given by the local authority itself. Ministerial orders are subject to positive Parliamentary resolution. They cannot apply to judicial or legislative functions, or to powers affecting personal liberty or search or seizure of property (though there is a list of exemptions from those restrictions) nor can they endure for more than ten years.[58] But they may be limited, or subject to conditions, they are revocable and they do not denude the authorising body of the function in question. Any act or omission of the authorised person (or employee) is to be 'treated for all purposes' as that of the authorising body, except as regards so much of any contract as relates to the exercise of the function or any criminal proceedings.[59] The responsibility of central and local government is thus preserved.

[54] Local Government Planning and Land Act 1980, Pt. III; Local Government Act 1988, Pts. I, II (now partly repealed). Local Government Act 1992, Pt. I. See *Secretary of State for the Environment ex p. Haringey LBC* (1994) 92 LGR 538 (Secretary of State's banning order upheld).

[55] Local Government Act 1999.

[56] See Harlow and Rawlings, *Law and Administration* (as above).

[57] As under the *Carltona* doctrine, above, p. 320.

[58] Extended to forty years for certified contracts of local authorities (explained below): Local Government (Contracts) Act 1997, s. 9.

[59] s. 72.

The Act of 1994 was supplemented, as regards local authorities, by the Local Government (Contracts) Act 1997. It is there provided that every statutory function of a local authority includes power to enter into a contract with another person for the provision of assets or services or both in connection with the function, and also to contract with any person financing the contractor. This is a wide power of procurement but it does not authorise delegation of functions as does the Act of 1994. The machinery of the latter Act is therefore still necessary for many purposes of contracting out.

Validity of local government contracts

Since a local authority can act validly only within its statutory powers, any contract made in excess of its powers is wholly void: neither party can sue under it and money paid may be irrecoverable. In order to protect creditors the Local Government Act 1972 provided that a person lending money to a local authority should not be concerned with the legality of the borrowing and should not be prejudiced by any illegality.[60] But this provision did not cover all cases. After further disasters[61] the Local Government (Contracts) Act 1997 has provided for a system of 'certified contracts' under which contracting parties will have legal remedies even if the contract proves to be ultra vires.

The contract has to be certified by the local authority itself within six weeks, and the certificate must state its purpose and its intended period of operation, which must be at least five years. Short-term contracts are therefore excluded. The statutory authority must be cited and the detailed requirements of regulations complied with. It is then provided that the contract shall have effect as if the local authority had had power to enter into it and had done so properly. If, however, the legality of those steps is disputed on judicial review, or under the audit procedure whereby expenditure can be challenged, the provision as to validity is suspended. If the court finds that the contract was ultra vires it may nevertheless validate it if it considers this to be right, having regard to the likely consequences for the financial position of the local authority and for the provision of services to the public. If the contract makes provision for 'discharge terms' in case of legal challenge, those terms remain effective even where the contract is invalid. In the absence of such terms, the contractor is entitled to whatever payments would have been due up to the date of the court's order and then to damages as for a repudiatory breach by the local authority.

In this way the Act attempts a compromise between validating unlawful contracts, which is objectionable on public policy grounds, and doing justice to

[60] 13th sched., para. 20.

[61] As in *Hazell* v. *Hammersmith and Fulham LBC* [1992] AC 1 (unlawful rate swap transaction); *Credit Suisse* v. *Allerdale BC* [1997] QB 306 (unlawful development scheme).

contractors who are entitled to expect that local authorities will act lawfully and properly. Only where there are countervailing grounds of public policy will an unlawful contract be validated. If it is not, the contractor will still have remedies.

EU procurement law

European Union law imposes an elaborate and strict regime on the procurement contracts of public authorities, if they exceed a certain value, in order that competition may be free and fair and without discrimination.[62] The limit of value is set at a point which is thought to be high enough to attract bids from other countries, and if that point is passed there are detailed rules about advertising and tendering and about the award of the contract, which must be non-discriminatory and based on objective criteria. The value limit varies according to the public authority concerned and the type of contract, three types being distinguished: contracts for works, for supplies and for services. The values are set in ECUs, and for central government contracts they currently correspond approximately with £4,016,000 for works contracts and £104,000 for the others.

The rules are laid down in directives of the EU Council, and are given effect by regulations made under the European Communities Act 1972.[63] 'Public authorities' is given an extended meaning, including not only ministers, government departments and local authorities but also 'bodies governed by public law'. The scope of this definition is therefore similar to that of judicial review. The regulations specify many of the authorities affected, but the list is not exclusive. Certain utilities, even if not public authorities, are subject to the same regime, e.g. suppliers of water, electricity, gas, telecommunications and transport systems. The regulations pose many problems of definition and application, and their efficacy is uncertain.[64]

Proposals for contracts, if they fall within the regulations, must be notified to the EU authorities, who then advertise them. Bids must be considered objectively and without discrimination, and in accordance with specified criteria. Dissatisfied tenderers may apply to the High Court to have an award set aside, or for an injunction or for damages, and disputes may ultimately be referred to the ECJ. Since contractual and commercial relationships are outside the scope of judicial review procedure, disputes will be litigated in the ordinary way.[65]

[62] See generally Arrowsmith (as above), ch. 3.
[63] See SI 1991 No. 2680, SI 1993 No. 3228, SI 1995 No. 201, SI 1996 No. 2911.
[64] Harlow and Rawlings (as above), 249.
[65] See, e.g., *Matra Communications SAS* v. *Home Office* [1999] 1 WLR 1646; *R.* v. *Tower Hamlets LBC ex p. Luck* [1999] COD 294.

LIABILITY TO MAKE RESTITUTION

Payments exacted unlawfully

If a public authority wrongfully demands a payment, perhaps by imposing some charge or rate which is ultra vires, can a person who pays it later recover his money when the demand later turns out to have been illegal? In the past this question has been treated as a matter of the ordinary law which governs private transactions,[66] in much the same way as contract. There were no special rules for public authorities,[67] and few reported cases of much importance, strange though this seems. The explanation may be partly that public authorities are often willing to make restitution voluntarily when they have acted unlawfully, as witness the case of the television licences where the Home Office mounted an elaborate operation to repay all the surcharges which they had wrongly levied.[68] No litigation was reported after the House of Lords' decision in 1981 that a rate of over £100 m. levied by the Greater London Council was ultra vires.[69] In 1992, however, the House of Lords, in the *Woolwich Building Society* case, laid down[70] new and fairer rules for recovery of money from public authorities; and in 1998, in the *Kleinwort Benson* case,[71] the House redressed injustices to contractors by abolishing the rule that mistake of law is a bar to recovery. The background to those cases was the ordinary law of restitution (formerly called quasi-contract).

Earlier law

Until 1998 the primary rule of the ordinary law was that there could be no recovery of money paid voluntarily under a mistake of law, as opposed to a mistake of fact.[72] In some situations this is a sound rule, since otherwise innumerable transactions might be reopened by parties who later discover that they might have acted more advantageously.[73] It was formerly applied in favour of public authorities in a

[66] For this subject see Goff and Jones, *The Law of Restitution*, 6th edn. (2002), chs. 4, 5 and 9; Gareth Jones, *Restitution in Public and Private Law*; Burrows, *The Law of Restitution*, 2nd edn. (2002), ch. 12; Law Commission Report No. 227 (1994), and Williams, *Unjust Enrichment and Public Law—A Comparative Study of France, England and the EC* (2004). Formerly claims against the Crown lay by petition of right and now they lie under Crown Proceedings Act 1947, s. 1. See further Appendix Two for the power to award restitution in judicial review.

[67] *Twyford* v. *Manchester Cpn.* [1946] Ch. 236 at 241.

[68] See above, p. 362.

[69] Above, p. 400.

[70] *Woolwich Equitable Building Society* v. *Inland Revenue Commissioners* [1993] AC 70.

[71] *Kleinwort Benson Ltd.* v. *Lincoln CC* [1999] AC 153.

[72] Goff and Jones (as above), 217.

[73] See *Rogers* v. *Ingham* (1876) 3 Ch. D 351 at 357 (Mellish LJ).

number of cases, for example where a taxpayer established in litigation with the Inland Revenue that the tax was not due, but was unable to recover earlier payments made under similar assessments;[74] and where a local authority miscalculated a water rate and was overpaid.[75] Rates overpaid to local authorities were as a rule not recoverable, but they could be set off against later demands.[76] Even where there has been no mistake of law any voluntary payment will be irrecoverable,[77] provided that there has been no mistake of fact and no duress.

Indiscriminate application of the primary rule could operate inequitably and unethically,[78] and in some jurisdictions it has been abolished.[79] In the past judges have sought escape from it by two different routes. One, always a judicial favourite, was to represent mistakes of law as mistakes of fact.[80] The other was to exploit the doctrine of 'duress'. That doctrine holds that the payment does not count as voluntary, and is therefore recoverable, if it in fact has to be made to secure the performance of some duty or service due to or sought by the payer, such as the return of property[81] or the grant of a licence or permission.[82] 'Duress' was carried far beyond its natural meaning and to the point of protecting the payer where he was not upon equal terms or not equally to blame (in pari delicto) with the recipient for any reason, such as where the latter declined to grant him a lease unless he paid an unlawful premium.[83] On the other hand, the mere threat to sue for the payment was not duress, even when it was backed by a statutory penalty clause, provided that there was no collateral withholding (actual or threatened) of something from the payer.[84] Nor did it help the payer that he paid under protest.[85]

[74] *William Whiteley Ltd.* v. *R.* (1909) 101 LT 741 (tax on male servants). See similarly *National Pari-Mutuel Association Ltd.* v. *R.* (1930) 47 TLR 110 (betting tax).

[75] *Slater* v. *Burnley Cpn.* (1888) 59 LT 636. See similarly *Hydro Electric Commission of Nepean* v. *Ontario Hydro* (1982) 132 DLR (3d) 193 (overcharge for supply of electricity).

[76] See *R.* v. *Tower Hamlets LBC ex p. Chetnik Development Ltd.* [1988] AC 858.

[77] See the *Woolwich* case (below), at 165 (Lord Goff).

[78] In the *Tower Hamlets* case, above, Lord Bridge observed (at 877) that 'although it is a course permitted to an ordinary litigant it is not regarded by the courts as a "high-minded thing" to do, but rather as a "shabby thing" or a "dirty trick" and hence is a course which the court will not allow one of its own officers, such as a trustee in bankruptcy, to take.'

[79] As in Canada and in parts of Australia and the United States: Goff and Jones (as above), 217.

[80] As in *Cooper* v. *Phibbs* (1867) LR 2 HL 149; *George Jacobs Enterprises Ltd.* v. *City of Regina* (1964) 44 DLR (2d) 179 (mistake as to validity of byelaw held mistake of fact); Goff and Jones (as above), 251. Compare below, p. 943.

[81] *Irving* v. *Wilson* (1791) 4 TR 485.

[82] *Morgan* v. *Palmer* (1824) 2 B & C 729 (liquor licence); *Brocklebank Ltd.* v. *R.* [1925] 1 KB 52 (licence to sell ship); *South of Scotland Electricity Board* v. *British Oxygen Co. Ltd.* [1959] 1 WLR 587 (electricity supply) (a 'duress' case: see Lord Merriman at 607); *Hooper* v. *Exeter Cpn.* (1887) 56 LJQB 457 (unjustified harbour dues) evidently belongs to this class, since the payment was held to be involuntary. So would *A.-G.* v. *Wilts. United Dairies Ltd.* (1921) 37 TLR 884 if, as Atkin LJ said, the payments were recoverable, since it was a licensing case.

[83] *Kirri Cotton Co. Ltd.* v. *Dewani* [1960] AC 192.

[84] *William Whiteley Ltd.* v. *R.* (above); *Mason* v. *New South Wales* (above).

[85] *William Whiteley Ltd.* v. *R.* (above); *Twyford* v. *Manchester Cpn.* (above).

Statute provided for relief in some cases. Taxes administered by the Board of Inland Revenue under the Taxes Management Act 1970 are subject to a provision requiring that in respect of error or mistake in a tax return or associated statement the board shall make such repayment 'as is reasonable and just'.[86] This provision appears to cover mistake of law,[87] but a proviso excludes it in cases where the prevailing revenue practice is correctly observed at the time but later turns out to be wrong. There are corresponding, but by no means identical, provisions in the case of a number of other taxes.[88] Under the General Rate Act 1967, furthermore, a rating authority may, in their discretion, repay rates overpaid.[89] This power was conferred upon them in order to remedy cases of injustice, and if they refuse a refund where it is equitable to grant it, the court may quash the decision and order it to be reconsidered according to law.[90] But it is otherwise where the payment is in accordance with established practice.[91]

The Woolwich *case*

This decision of the House of Lords[92] greatly improved the prospects of recovering money paid to public authorities under unlawful demands.[93] Essentially it was a reaction against the injustice, and also the constitutional impropriety, of enforcing the mistake of law rule in such cases—although, since the claimant had made no such mistake, it was rather the voluntary payment rule which was under attack.

The Building Society had successfully challenged transitional provisions in income tax regulations about building societies. In order to avoid adverse publicity, and also penalties in case they should be wrong, they had paid the tax demanded 'without prejudice'. After the invalidity of the regulations had finally been established the Inland Revenue repaid the tax in question with interest from the date of the High Court judgment which the House of Lords had upheld. The society, however, claimed that it had from the first been entitled to restitution, so that interest was due from the dates of its payments, not from the date of the judgment. Some £6.7 m. was at stake. In a 3–2 decision the House of Lords upheld the society's claim as a matter of common law, the statutory provisions about overpaid tax

[86] s. 33(2).
[87] Goff and Jones (as above), 221.
[88] For details see Law Commission CP 120 at 74.
[89] s. 9, providing for various cases, including that where the person paying was not liable to make the payment.
[90] *R.* v. *Tower Hamlets LBC ex p. Chetnik Developments Ltd.* [1988] AC 858 (above, p. 390).
[91] *R.* v. *Richmond-upon-Thames LBC ex p. Stubbs* (1988) 87 LGR 637.
[92] *Woolwich Equitable Building Society* v. *Inland Revenue Commissioners* [1993] AC 70, discussed in [1993] *PL* 580 (P. B. H. Birks), (1993) 109 *LQR* 401 (J. Beatson). See also *Westdeutsche Landesbank Girozentrale* v. *Islington LBC* [1996] AC 669. Contrast *Morgan Guaranty Trust Co.* v. *Lothian Regional Council* 1995 SLT 299.
[93] Voluntary payment under void contracts are another matter: see above, p. 796.

being inapplicable. The gist of this revolutionary decision is that there is now a prima facie right to restitution of money paid to a public authority under an unlawful demand.

In Lord Goff's leading speech for the majority the theme of constitutional impropriety is prominent. Under the Bill of Rights 1688 taxation levied without the authority of Parliament is illegal—'one of the most fundamental principles of our law', so that 'the retention by the state of taxes unlawfully exacted is particularly obnoxious'.[94] He emphasised also the 'common justice' of the taxpayer's claim and the inequality of his position vis-à-vis the state, with its coercive and penal powers, amounting to 'implied duress', as Holmes J put it in a famous American case.[95] But ultimately this was not the decisive factor: 'In the end, logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the simple fact that the tax was exacted unlawfully should prima facie be enough to require its repayment'.[96] The task of the House was to do justice between the parties, undeterred by accusations of judicial legislation. Therefore the law must be reformulated[97] so as to allow recovery of any tax or levy wrongly exacted by a public authority either by an ultra vires demand or under some misunderstanding of the law.[98] Under such a liberal rule the fact that the Society paid under protest becomes irrelevant. A payment made without protest will normally be recoverable, and the defences of mistake of law and voluntary payment will cease to be available. There is then a clear benefit in public policy, since the law will no longer set a trap for the citizen if he acts on the principle of 'pay now, sue later', which is plainly a becoming attitude vis-à-vis the state.

The Kleinwort Benson *case*

The long-standing and much criticised rule against recovery for error of law was abrogated by the House of Lords in another 3–2 decision in 1998.[99] A bank had claimed restitution from a number of local authorities of monies paid to them under rate swap transactions which in an earlier decision[1] the House had declared to be beyond their powers and void. All these transactions had been fully performed according to their terms. The bank had already recovered its more recent payments,[2] as to which the six-year period of limitation had not expired, but its

[94] At 172.

[95] *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor* 223 US 280 at 285 (1912).

[96] At 173.

[97] Lord Goff and Lord Browne-Wilkinson regard this as a change in the law. Lord Slynn regarded the previous law as not precluding his decision.

[98] The 'misunderstanding' alternative is suggested rather than decided. But since mistake of law is now a form of ultra vires (above, p. 264), the two alternatives coalesce.

[99] *Kleinwort Benson Ltd.* v. *Lincoln CC* [1999] 2 AC 349.

[1] The *Hazell* case, above, p. 796.

[2] As for total failure of consideration: *Westdeutsche Landesbank Girocentrale* v. *Islington LBC* [1996] AC 669.

earlier payments could be reclaimed only with the extension of time allowed by the Limitation Act 1980, in an 'action for relief from the consequences of a mistake', until the mistake was, or could with reasonable diligence have been, discovered.[3] In this also the bank succeeded, although it was accepted that many long-dormant claims might thus be revived. The dissentient lords held that the problem of dormant claims would be better resolved by Act of Parliament. They held also that the bank had made no mistake, having acted in accordance with the law as understood at the time—and so they rejected the theory of absolute retrospectivity of judgments, as explained in an earlier chapter.[4] The majority view was that the judgment retrospectively revealed a mistake of law, and that the bank had a cause of action in mistake.

In abolishing the former rule, which neither party attempted to defend, the House of Lords established a general right to recover money paid under mistake, whether of fact or law, subject to defences recognised in the law of restitution such as estoppel, change of position and compromise. But they rejected alleged defences of 'settled understanding of the law', 'honest belief in a right to retain the money' or 'contract fully performed'.

LIABILITY TO PAY COMPENSATION

Compensation and expropriation

Compensation will often have to be paid by a public authority even though it has committed no tort or breach of contract, for instance where it takes land by compulsory purchase. The duty to pay is normally imposed by statute, but this is not invariably so. In 1964 the House of Lords held that the government had a duty at common law to pay compensation to an oil company for the destruction in 1942 of its installations in Burma, then about to fall to the Japanese; this was carried out on the orders of the Crown in the lawful exercise of its prerogative power to provide for the defence of British territory.[5] It was held that there was no common law right to compensation for damage inflicted by the Crown's forces while actually fighting the enemy; but that destruction of property for the purpose of denying its use to the enemy did give rise to such a right. In other words, there was a general rule that seizure or destruction of property within the realm under prerogative powers, even in grave national emergency, could be done only on

[3] s. 32(1).

[4] Above, p. 298.

[5] *Burmah Oil Co. Ltd.* v. *Lord Advocate* [1965] AC 75. On the pleadings it had to be assumed that the Crown was acting lawfully under the prerogative. Contrast *In re a Petition of Right* [1915] 3 KB 649, now no longer good law.

the footing that compensation was payable. This had been so with the ancient prerogative rights of purveyance and angary,[6] which respectively empowered the requisition of supplies for the royal household and of neutral property such as ships in time of war. Today prerogative powers of this kind are confined to time of war, and even then they have for the most part been replaced by statute. When provision has to be made for mobilising the whole resources of the country for wartime purposes, statutes and regulations naturally cover virtually everything.[7]

The House of Lords' decision, reached by a narrow majority, was immediately nullified by the War Damage Act 1965, which prevented the payment of compensation in that or any similar case. It provided in sweeping terms that no compensation should be payable at common law for damage or destruction of property caused by acts lawfully done by or on the authority of the Crown during or in contemplation of war, whether before or after the Act. By this unusual measure of retaliation Parliament demonstrated that it can, when it wishes, expropriate without compensation and in violation of existing legal right, in a manner not permitted in some other countries which enjoy the protection of written constitutions and bills of rights.[8] A further example was the Leasehold Reform Act 1967,[9] which gave no compensation to the expropriated owners of reversionary rights in houses let on long leases at ground rents, the tenants being empowered to purchase the property compulsorily at site value only. In this case the expropriation was claimed not to have been for public purposes, since its object was merely to enrich certain tenants at the expense of their landlords. The article in the European Convention on Human Rights, which provides that 'no one shall be deprived of his possessions except in the public interest',[10] was held by the European Court of Human Rights, nevertheless, to allow the government sufficiently wide discretion to justify the legislation.[11] The US Supreme Court, likewise, has been liberal in allowing 'public use' to extend to almost any legislative purpose. A 'public purpose' or 'public interest' limitation is so commonly included as a fundamental right in British Commonwealth constitutions that it deserves to be respected as an inviolable constitutional principle.[12] But courts will naturally be inclined to treat it as satisfied by any kind of general legislation, leaving it to Parliament to decide where the public interest lies.

[6] See the *Burmah* case at 102 (Lord Reid). Purveyance was also used to obtain military supplies: see the *Saltpetre Case* (1606) 12 Co. Rep. 12.

[7] See *A.-G.* v. *De Keyser's Royal Hotel Ltd.* [1920] AC 508.

[8] e.g. United States of America (5th amendment, also 14th amendment as interpreted); Federal Republic of Germany (Art. 14). Both constitutions also require that expropriation shall be for public purposes only.

[9] Extended so as to include flats as well as houses by Housing and Urban Development Act 1993.

[10] First Protocol (1952), Art. 1.

[11] *James* v. *United Kingdom* (1986) 8 EHRR 123.

[12] For a wide survey of this aspect, with British, Commonwealth and American authorities, see Taggart, 'Expropriation and Public Purpose' in Forsyth and Hare (eds.), *The Golden Metwand*, 91.

Presumption in favour of compensation

Despite occasional departures of the kind just illustrated, Parliament has in the past usually respected the principle that compensation should be paid. It has accordingly become an established presumption that 'an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms'.[13] On this ground the House of Lords invalidated a government scheme for assessing compensation on an ex gratia basis for property taken under wartime regulations, holding that there was a legal right to have compensation assessed in the ordinary way under the Lands Clauses Act 1845.[14] For the same reason the Privy Council held that an Australian statute vesting Melbourne Harbour in commissioners did not override private rights which had been acquired over part of the land.[15] Where there are no provisions for compensation, therefore, it may be presumed that existing rights are not to be infringed. The House of Lords applied this principle in a planning case where the local authority, in granting permission for the use of a caravan site, had imposed conditions which materially cut down the pre-existing rights of the owner.[16] Although the local authority were empowered to impose such conditions as they thought fit, it was presumed that Parliament could not have intended to infringe rights already existing, particularly since there were other powers under which this could be done, subject to payment of compensation.

This presumption does not, however, empower the court to award compensation for administrative acts authorised by Act of Parliament, unless the Act itself so provides. The planning legislation as a whole is in effect an extensive system of expropriation without compensation, since no compensation is payable in the great majority of cases where permission to develop land is refused, even though the land is then greatly reduced in value.[17] The most that can be done with the aid of the presumption is to place a narrower interpretation on administrative powers where no compensation is provided for interference with rights of property. The French Conseil d'État has in some cases spontaneously awarded compensation for lawful interference under statutory powers;[18] but no such remedy is known in Britain.

[13] *Central Control Board* v. *Cannon Brewery Co. Ltd.* [1919] AC 744 (Lord Atkinson). See also *Manitoba Fisheries* v. *R.* (1978) 88 DLR (3d) 462.

[14] In the *Central Control Board* case (above).

[15] *Colonial Sugar Refining Co. Ltd.* v. *Melbourne Harbour Trust Commissioners* [1927] AC 343.

[16] *Hartnell* v. *Minister of Housing and Local Government* [1965] AC 1134; see above, p. 405.

[17] But this is regulation rather than 'taking' of property: *Belfast Corporation* v. *O.D. Cars Ltd.* [1960] AC 490 (a decision that planning restrictions did not conflict with s. 5 of the Government of Ireland Act 1920, prohibiting legislation for the taking of property without compensation).

[18] As in CE 14 Jan, 1938. Société La Fleurette, Rec. 25 (compensation awarded to manufacturers of synthetic cream put out of business by legislation); CE 25 Jan. 1963, Bovero Rec. 53 (compensation awarded to landlord for loss caused by regulation giving security of tenure to soldiers serving in Algeria). See [1985] CLP 157 (R. Errera).

Compensation on compulsory purchase

The machinery for making, confirming and executing orders for the compulsory purchase of land was briefly mentioned earlier.[19] Compensation has to be assessed after the service of a 'notice to treat' and in accordance with the Land Compensation Acts 1961 and 1973. Any dispute over compensation is decided by the Lands Tribunal, from which appeal lies direct to the Court of Appeal. Compensation used to be assessed as at the date of the notice to treat, but the unfairness of this rule when there has been delay and a fall in the value of money has led the House of Lords to hold that the correct time is when the compensation is assessed or when possession is taken.[20]

Before 1845 each Act contained its own provisions for assessing compensation, as did for instance the Defence Act 1842. The Lands Clauses Act 1845 introduced a standardised system, though with such vague provisions that the courts were able to interpret them generously in the interests of landowners, taking the full value to the owner as the basis and making additions as compensation for disturbance[21] and for the compulsory nature of the transaction, the latter usually being assessed at 10 per cent.[22] The Acquisition of Land (Assessment of Compensation) Act 1919 forbade this last addition and established the basis of assessment as open market value with a willing seller, subject to certain qualifications; where there was no ascertainable market, because of the purpose for which the land was used, compensation might (and still may) be assessed on the basis of the reasonable cost of equivalent reinstatement.[23]

Radical changes were made by the Town and Country Planning Act 1947, which substituted a new basis of existing use value, i.e. a value which took no account of possibilities of development. The theory of that legislation was that the value of development rights was in future to be the property of the community, all development rights then existing being extinguished by a once-for-all payment of compensation. This system was modified in 1954 and abandoned in 1959, when the basis of open market value was restored by the Town and Country Planning Act 1959. But since it was impossible in many cases to assess the open market value without knowing what development might be permitted by the planning authorities, rules were laid down as to the assumptions to be made. In certain cases application might be made to the local planning authority (with a right of appeal to the minister) for a 'certificate of appropriate alternative development' specifying what planning permission 'might reasonably have been expected to be granted',

[19] Above, p. 70.

[20] *West Midland Baptist Association* v. *Birmingham Cpn.* [1970] AC 874; and see *Chilton* v. *Telford Development Corporation* [1987] 1 WLR 872.

[21] As explained in *Palatine Graphic Arts Co. Ltd.* v. *Liverpool CC* [1986] QB 335.

[22] Cripps, *Compulsory Acquisition of Land*, 11th edn., 695.

[23] See now Land Compensation Act 1961, s. 5(4), and the *West Midland* case (above).

and it might be assumed that additional permission would be granted where this was reasonable. The Community Land Act 1975 changed the formula to cases where permission 'would have been granted',[24] thus excluding hypothetical assumptions which might be unrealistic. Value which would have been added by the acquiring authority's own scheme had to be left out of account; but it was to be assumed that planning permission would be granted for such development as that scheme would involve.

During this phase, therefore, the owner was given the benefit of the development to be carried out on the land acquired from him, but not of the rest of the scheme, e.g. the development of a new town on the surrounding land.[25] The statutory rules were consolidated in the Land Compensation Act 1961. The system remained based on open market value, but with allowance for the fact that the owner, like all other owners, might suffer from uncompensated planning restrictions. A large part of the benefit of development value was taken away by the Development Land Tax Act 1976, so that this element in the compensation was once again partially expropriated.

Community Land and Development Land Tax

Yet another attempt (the fifth in the last century)[26] to expropriate development value for the benefit of the community was made by the Community Land Act 1975 and the Development Land Tax Act 1976, both soon repealed. The scheme of the Act of 1975 was that local authorities should acquire all land required for development of many kinds, buying the land at current use value and disposing of it, before or after development, at full market value.[27] The local authority would thus make a profit equal to the development value, part of which they would keep, part of which would be paid to the central government, and part of which would be transferred to a fund for the benefit of local authorities generally. But acquisition at current use value was not to be the rule until the 'second appointed day' under the Act of 1975, which never arrived. Meanwhile the Act of 1976 imposed a heavy tax on realised development value.

The principle that development value is the property of the community remains accepted, despite the repeal of the Act of 1975. It was given partial effect through the continuance of the levy on development gains imposed by the Act of 1976; but that levy was abolished in 1985.[28]

[24] s. 47, re-enacted by Local Government, Planning and Land Act 1980, s. 121.
[25] See *Myers* v. *Milton Keynes Development Cpn.* [1974] 1 WLR 696, where the rules are explained by Lord Denning MR.
[26] See *Inland Revenue Commissioners* v. *Metrolands Ltd.* [1981] 1 WLR 637.
[27] For this see the 6th edn. of this book at p. 197.
[28] Finance Act 1985, s. 93.

Additional rules

Where land in a clearance area, i.e. an area of houses unfit for human habitation, was purchased compulsorily by a local authority for clearance under the Housing Act 1985, compensation was limited to 'cleared site value', being the value of the site cleared of buildings and available for development,[29] and disregarding any increase which might flow from the clearance of adjacent land.[30] But since this value might easily exceed the previous open market value of the land (with bad houses and protected tenants), compensation was limited also to the latter value, if it was in fact the lower.[31] The Secretary of State might require the local authority to make an additional payment if he was satisfied, after inspection, that a house within the clearance area had been well maintained.[32] The local authority must also pay compensation in respect of well-maintained houses which are required to be demolished under demolition or clearance orders or which are purchased compulsorily as unfit for human habitation.[33] In certain conditions also compensation is payable in respect of the house in any event, in order that owner-occupiers and others may not suffer undue loss.[34]

On a compulsory purchase the owner is also entitled to compensation for 'injurious affection' of his remaining land, if its value is impaired by severance or by the use made of the land taken from him.[35] If part of his land is taken for a motorway, for example, he may claim compensation for any fall in the value of his adjacent land caused by the noise and disturbance of traffic. Formerly, however, compensation under this head was limited to the proportion of the noise etc., attributable to the land actually taken from him, so that if only a small piece of his land was taken the compensation might be little or nothing.[36] This restriction was removed by the Land Compensation Act 1973, in accordance with its policy as explained below. Injurious affection of retained land is now assessed by reference to the whole of the works causing it.

[29] s. 585.
[30] See *Davy* v. *Leeds Corporation* [1965] 1 WLR 445.
[31] Land Compensation Act 1961, s. 10 and 2nd sched.
[32] Housing Act 1985, 23rd sched.
[33] Ibid.
[34] Housing Act 1985, 24th sched.
[35] Compulsory Purchase Act 1965, ss. 7, 10, replacing provisions of the Lands Clauses Consolidation Act 1845, as interpreted in *Buccleugh (Duke)* v. *Metropolitan Board of Works* (1872) LR 5 HL 418. The same applies on purchase by agreement: *Kirby* v. *Harrogate School Board* [1896] 1 Ch. 437. The principle covers subsidiary rights such as rights of way and restrictive covenants: *Re Simeon and Isle of Wight Rural District Council* [1937] Ch. 525.
[36] *Edwards* v. *Minister of Transport* [1964] 2 QB 134. It was assessed 'by some alchemy which I do not understand' (Harman LJ).

Compensation for nuisance and disturbance

It used to be the general rule that no compensation was payable to a person from whom no land was taken, however injuriously affected his property might be as a consequence of public works lawfully executed and operated, e.g. a motorway or an airport. An action for nuisance at common law is of no avail against the lawful exercise of statutory powers.[37] In addition, there is the unrealistic rule that ordinary user of the highway is not a nuisance,[38] and aircraft are exempted by legislation.[39] There was therefore an artificial contrast between those from whom part of their land was taken, and who were compensated for the injury to the remainder, and those from whom nothing was taken but who might suffer heavy uncompensated loss. This was an inducement to many people to resist projects for roads, airports and other public works by every possible means, thus causing many lengthy public inquiries into objections. Parliament made repeated attempts to secure for the community the increase of land values created by social development.[40] But the loss of land values inflicted for the benefit of the community had to be borne in a great many cases by the owners upon whom it happened to fall, 'for the greater good of the greater number'.[41] In a leading case of 1869 the House of Lords held that the owner of a house beside a new railway, from whom no land was taken, had no right to compensation for damage caused by vibration from the trains.[42] The legislation in question was so obscure[43] that there was ample room for the issue of personal sacrifice versus public benefit to be considered. It was said that the common law contained the principle of sacrifice, since any landowner could dedicate a highway beside his neighbour's land, and ordinary user of the highway was not a nuisance. With this unconvincing analogy the House of Lords paved the way for technological progress at the expense of individual rights. Nor does their attitude appear to be different today.[44]

Not until a century later did Parliament take steps to remedy the injustice. Under the Land Compensation Act 1973 compensation is now payable by public authorities and other bodies where the value of an interest in land is depreciated by 'physical factors caused by the use of public works', whether highways, aerodromes,

[37] Above, p. 753.

[38] *Hammersmith Railway Co.* v. *Brand* (1869) LR 4 HL 171 at 196. But see *Gillingham BC* v. *Medway (Chatham) Dock Co. Ltd.* [1993] QB 343, above, p. 757, where the possibility of exceptions is suggested. Unreasonable use of the highway by noisy vehicles was held to be a nuisance in *Halsey* v. *Esso Petroleum Co. Ltd.* [1961] 1 WLR 683.

[39] Civil Aviation Act 1949, ss. 40, 41.

[40] See below, p. 810 (planning restrictions).

[41] *Edwards* v. *Minister of Transport* (above), at 144 (Harman LJ).

[42] *Hammersmith Rly Co.* v. *Brand* (above). This fundamental question was decided by 2 votes to 1 and against the advice of the majority of the judges.

[43] The amalgam of statutory obscurity and judicial elucidation, deriving from Lands Clauses Consolidation Act 1845 and Railway Clauses Consolidation Act 1845, was deliberately preserved: see Compulsory Purchase Act 1965, ss. 7, 10, especially s. 10(2).

[44] See *Allen* v. *Gulf Oil Refining Ltd.* [1981] AC 1001; above, p. 753.

or other works on land provided or used under statutory powers.[45] The 'physical factors' in question are noise, smell, fumes, smoke, artificial lighting, and the discharge of any substance onto the land. The 'interest in land' must be that of a freeholder or of a leaseholder with at least three years of his term unexpired (both may claim simultaneously); but if the land is not a dwelling, the interest must be that of an owner-occupier and, unless agricultural, its rateable value must not exceed a prescribed sum.[46] No claim may be made until twelve months after the nuisance began (this is the 'settling down' period) and then it must be made within the ensuing six years.[47] The Act is retrospective in that the nuisance may have begun on or after 17 October 1969, and retrospective claims could be made until 23 June 1975.[48] A claimant must have acquired his interest before the nuisance began[49] (as opposed to 'coming to the nuisance') unless he took it by inheritance from someone who so acquired it.[50] Similar rules apply in cases where the nuisance arises from alterations or changes of use in public works, but in the case of aerodrome alterations only where a runway or apron is altered.[51] Compensation is assessed at prices current on the first day when a claim could be made and is the whole amount of the depreciation, subject to certain assumptions about planning permission[52] and to provisions about overlapping compensation and other matters.[53] No compensation is payable if the amount does not exceed £50,[54] or in respect of highway or aircraft accidents.[55] Disputed claims are adjudicated by the Lands Tribunal.

The same Act made provision, *inter alia*, for 'home loss payments',[56] 'farm loss payments' and 'disturbance payments',[57] as well as for higher compensation in some cases of compulsory purchase. It has therefore done much to shift the true social cost of public works and developments from the shoulders of individual victims onto the broader shoulders of the community at large. But there are still cases where the social cost may fall heavily on individuals, for example where a business is ruined because a through road is turned into a cul-de-sac.[58]

[45] s. 1. See (1974) 90 *LQR* 361 (K. Davies).
[46] s. 2.
[47] Under the Act of 1973 this period was two years. After many complaints and criticism by the Parliamentary Commissioner for Administration the Local Government, Planning and Land Act 1980, s. 112, adopted the normal period for statutory claims, i.e. six years (Limitation Act 1980, s. 9). By s. 113 special provision is made for the revival of time-barred claims in respect of roads managed by the central government where the right to claim was given inadequate publicity.
[48] ss. 1(8), 14.
[49] s. 2(1).
[50] s. 11.
[51] s. 9.
[52] s. 5.
[53] ss. 4, 5, 6.
[54] s. 7.
[55] s. 1(7).
[56] An example is *Greater London Council* v. *Holmes* [1986] QB 989.
[57] An example is *Prasad* v. *Wolverhampton BC* [1983] Ch. 333.
[58] As in *Jolliffe* v. *Exeter Cpn.* [1967] 1 WLR 993.

Planning restrictions

Compensation is sometimes payable to a landowner for restrictions imposed by the Town and Country Planning Acts on his liberty to use his land as he wishes.[59] The rules are highly involved, and have been subject to sharp changes arising from Parliament's repeated attempts to find a workable method of expropriating for the benefit of the community the development rights in land held in private ownership.

The Town and Country Planning Act 1947 was the first of these attempts. It required virtually all important development or change of use of land to be authorised by planning permission, which could be refused in discretion by the local planning authority, subject to appeal to the minister. The general rule was that no compensation was payable for refusal of permission, even though this might greatly depreciate the land. But a fund of £300 m. was provided for compensating the owners of all development rights existing on 1 July 1948 who made their claims within the ensuing year. From 1948 onwards development rights were to be the property of the community, and this was secured by levying a 'development charge' on those to whom planning permission was granted, representing the full difference between the existing use value and the value with the benefit of the permission. But before any payments had in fact been made from the £300 m. fund, radical changes were made by the Town and Country Planning Acts 1953 and 1954. Development charge was abolished as from 18 November 1952. Claims against the fund, instead of being paid outright, were turned into a kind of credit balance, to be drawn upon only when the planning law actually caused loss. Against this credit, development charges already paid could be recovered, as could be also the development value of land compulsorily purchased at existing use value. The remainder of the credit was carried forward as 'unexpended balance of established development value', to be drawn upon if permission for certain types of development was refused in future, or in case of compulsory purchase before the return to open market value in 1959. Thus established claims to the 'once-for-all' compensation could still be lingering on, and the complicated rules were preserved by the Town and Country Planning Act 1990.[60] But the Planning and Compensation Act 1991 finally swept them away.[61]

Apart from such remnants of the original scheme for buying out development value, there is in general no right to compensation for refusal of planning permission. To a large extent, therefore, the planning legislation is a system of expropriation without compensation, the element expropriated being the development value of the land. This principle has been maintained continuously since it was introduced by the Act of 1947, even during the period (1958–75) when

[59] For this legislation see above, p. 71.
[60] Pt. V.
[61] s. 31.

compensation upon compulsory purchase was based upon open market value—nor was this contradictory, since open market value was assessed only with the benefit of such planning permission as was reasonably probable. For half a century it has been recognised that the value of land to the owner is subject to social policy, which may restrict it severely.

Nevertheless there are a few cases of particularly stringent control in which the law provides for compensation.[62] The most important instances are where a planning authority exercises its overriding powers of requiring some lawful use of land to be discontinued or some building to be removed or of revoking[63] or modifying a planning permission already given (drastic powers of interference with vested rights which are normally exercisable only with the consent of the Secretary of State).[64]

Compulsory sale to public authorities

There are certain situations in which the owner of land can turn the tables on a public authority and make a compulsory sale to them. In effect this is a form of compensation for the blighting effect of planning schemes and controls, generally known as 'planning blight'. The procedure is sometimes called compulsory purchase in reverse. One such situation is where land has become 'incapable of reasonably beneficial use in its existing state' after the refusal, revocation or modification of planning permission or after an order requiring discontinuance of an existing use or the removal of a building.[65] The owner may then serve a notice calling on the local authority to purchase the land, subject to confirmation by the Secretary of State if the local authority resists. If the notice is confirmed, compulsory purchase by the local authority is deemed to be authorised, and a notice to treat is deemed to have been served.[66] The owner may then compel the local authority to complete the purchase. This procedure may also be invoked where a building listed as of special architectural or historic interest is similarly blighted by refusal, revocation or modification of permission.[67] All these provisions apply equally in the case of restrictive conditions attached to a permission, as they do in the case of refusal.

'Planning blight' has become the statutory name for the special kind of injury which can be inflicted by the mere existence of overall plans for some area, quite

[62] Town and Country Planning Act 1990, Pt. IV.

[63] See e.g. *Pennine Raceway Ltd.* v. *Kirklees LBC* [1983] QB 382 (licensee entitled to claim).

[64] Town and Country Planning Act, 1990, ss. 97, 102. Compensation for refusal of permission for 'existing use development' and for alteration of listed buildings was abolished by Planning and Compensation Act 1991, s. 31.

[65] Town and Country Planning Act 1990, s. 137. See e.g. *Plymouth Cpn.* v. *Secretary of State for the Environment* [1972] 1 WLR 1347; *Colley* v. *Secretary of State for the Environment* [1998] COD 491.

[66] Town and Country Planning Act, 1990, s. 143.

[67] Planning (Listed Buildings and Conservation Areas) Act 1990, ss. 32–7.

apart from questions of planning permission. If, for example, a structure plan or local plan shows the land as being intended for a new road, or a municipal car park, there is likely to be no market for it. Owners of land affected in such ways may serve a 'blight notice' on the potential acquiring authority, which will be the Department of the Environment in the case of a trunk road or motorway and the local authority in the case of the car park.[68] The owner must show that he has made reasonable endeavours to sell his interest since the blight occurred and has been unable to do so except at a substantial loss. If he satisfies the various statutory conditions, which are numerous and technical, he may then compel the appropriate authority to acquire his interest at its unblighted value. The authority may object on a number of specified grounds, which if disputed are adjudicated by the Lands Tribunal. The authority may stave off the compulsory purchase altogether by giving notice that they do not intend to acquire the land or, in a group of cases including land earmarked for governmental authorities and highways, by declaring that they do not propose to proceed within fifteen years.[69] The Land Compensation Act 1973[70] extended the scope of this system in various ways, for example by including blight inflicted by plans not yet in force and compulsory purchase orders advertised but not confirmed.

Miscarriage of justice and criminal injury

Compensation has long been paid to victims of miscarriages of justice, but only as a matter of grace and without any legal entitlement. A measure of legal right was however introduced by the Criminal Justice Act 1988, so as to accord with the International Covenant on Civil and Political Rights[71] and with the European Convention on Human Rights and Fundamental Freedoms.[72] The provisions of the Covenant, the Convention and the Act are in closely similar terms.

The Act applies where a conviction has been quashed or a pardon granted 'on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice'.[72a] The Secretary of State (in practice the Home Secretary) is then required to pay compensation to the person who has suffered punishment, provided that the non-disclosure of the unknown fact was not attributable to him, and to appoint an assessor to determine the amount. Whether there is a right to compensation is to be determined by the Secretary of State. The Act applies only to cases based on new facts, and not (for example) to a

[68] Town and Country Planning Act 1990, ss. 149, 171.
[69] s. 151(4).
[70] Pt. V, extended to urban development areas by Local Government, Planning and Land Act 1980, s. 147, replaced by Town and Country Planning Act 1990, s. 149.
[71] Art. 14.
[72] 7th Protocol, Art. 3.
[72a] See now Appendix Two.

case of unfair trial. For cases outside the Act the system of ex gratia compensation remains in operation.[73]

The Criminal Injuries Compensation Scheme was introduced in 1964 in order to provide compensation at public expense for injuries to victims of violent crime. Originally it was an ex gratia scheme, based on no statute and no legal right and constituted merely administratively. The Home Secretary presented the scheme to Parliament and Parliament annually voted the money for it and claims were adjudicated by the Criminal Injuries Compensation Board, but all without legislation of any kind. The courts nevertheless undertook to review the Board's decisions, applying the scheme as if it were law, thus making their first breakthrough into non-legal territory, as already explained.[74] The Criminal Justice Act 1988 (s. 133) provided for the scheme to become statutory, but the Home Secretary refused to bring the Act into force, having meanwhile decided to change to a new 'tariff scheme' which would save public money by substituting fixed payments for specified injuries instead of the ordinary measure of damages and which, like the old scheme, would be operated merely administratively. When the House of Lords (as related earlier) held this course to be unlawful,[75] the government procured legitimation of the tariff scheme under the Criminal Injuries Compensation Act 1995. The Board has become the Authority and the scheme, now statutory, was approved in draft by both Houses of Parliament. The Authority's decisions, like those of the Board, are subject to judicial review.

The scheme is lengthy and is framed in great detail. Criminal injury means personal injury directly attributable to a crime of violence or to an attempted arrest or to preventive action or to helping a constable so engaged. Under a controversial rule compensation is refused where the victim and the assailant were living in the same household as members of the same family unless the assailant has been prosecuted and the parties have ceased to live in the same household.[76] Claims to compensation are determined by claims officers and there are internal procedures for review and appeal and oral hearings may be allowed as regulations prescribe. The lengthy tariff of injuries lists more than 300 sorts with standard maximum amounts against them, to which may be added compensation for loss of earnings. In fatal cases there is provision for dependents.

A corresponding scheme (non-statutory) is operated by the Ministry of Defence for members of the armed forces injured overseas, but it excludes injury caused by warlike or military conduct.[77]

[73] See *R.* v. *Home Secretary ex p. Garner* (1999) 11 Admin. LR 595 (Home Secretary's published policy statement reviewed and decisions refusing compensation quashed). See Appendix Two.

[74] Above, p. 640.

[75] Above, p. 391.

[76] Scheme of 1995, Art. 16. The earlier version of this rule was upheld on judicial review in *R.* v. *Criminal Injuries Compensation Board ex p. P* [1995] 1 WLR 845.

[77] See *R.* v. *Ministry of Defence ex p. Walker* [2000] 1 WLR 806 (HL).