



Sixteenth Edition

Constitutional & Administrative Law

A W Bradley, K D Ewing
& C J S Knight

CONSTITUTIONAL AND ADMINISTRATIVE LAW

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CONSTITUTIONAL AND ADMINISTRATIVE LAW

Sixteenth edition

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PREFACE

The inconclusive outcome of the general election in May 2010 became known at a time when the previous edition of this book was in production. The election led to the formation of the first Coalition government since the Second World War. But any thoughts that the new government might slow the pace on constitutional matters were soon laid to rest, with the Coalition's programme for government announcing the need for 'fundamental political reform'.

In the event, not all of the proposed reforms were implemented, with major initiatives for House of Lords reform, a smaller House of Commons and a new voting system being lost or defeated, though for different reasons. But other developments have taken place since 2010, some of the most notable relating to the United Kingdom's relationship with Europe.

The dark clouds on the cover of this book may thus be symbolic of present uncertainty. Not only is the constitution in constant flux, but it appears also to be in the eye of more than one political storm. Britain's relationship with Europe is clearly one such storm: so too is the very structure of the United Kingdom in the light of the referendum on Scottish independence in September 2014.

Whatever happens in that referendum, it is likely to presage yet more constitutional adjustment. In addition, the general election in May 2015 may have a decisive impact on the legal protection of human rights, a matter on which influential voices in the Coalition parties appear to be deeply divided.

Developments since 2010 have consequently required major revisions to be made to this book. We have also taken the opportunity in this edition to make some more radical changes, partly to reduce the length of the book and partly as the discipline develops, to reflect the evolving interests of teachers and students of public law.

As a result, the treatment of some topics has been reduced, while the treatment of others has been expanded, and there has been some reorganisation of material within a reduced number of chapters. Our most difficult decision, which we took only after consulting widely, was to discontinue the coverage of certain topics. We have noted that some issues (such as military law, on the one hand, and immigration law, on the other) are increasingly complex and covered by voluminous specialist texts.

In these areas, however, we have, where possible, retained a discussion of some of the leading cases which often illuminate other areas of the law. So although – for example – we have not included the chapter on military law in this edition, some important cases in the field are concerned with the territorial application of the Human Rights Act, and are dealt with there. One direct result is that Part II, which in previous editions dealt with both the institutions of government, as well as several of the activities of government, is now concerned almost exclusively with the former.

Numerous developments since 2010 are covered in this edition. They include the European Union Act 2011, designed to give more parliamentary and popular control over decisions affecting the European Union, and the Fixed-term Parliaments Act 2011, which removed a significant Prime Ministerial power by declaring the date of the next general election and those thereafter.

An expanded chapter on human rights considers more fully the current debate around the European Convention on Human Rights and the Human Rights Act, as well as examining the evolving relationship between the Strasbourg court and the UK Supreme Court, the latter now fully established since 2009.

Other changes relate to financing the monarchy and the rules of succession; the creation of the National Crime Agency and the introduction of police and crime commissioners; the controversy about the right to privacy as a result of both intrusive journalism, and equally intrusive police methods; and the Protection of Freedoms Act 2012.

In this edition, we are pleased to welcome a third author, Christopher Knight. Now practising as a barrister in public law at 11 King's Bench Walk, London, Christopher has published widely in administrative law. While the three of us have joint responsibility for the whole book, AWB has revised chapters 1–5 and 9; KDE has revised chapters 6–8 and 10–20, and CJK has revised chapters 21–6.

Case references are, where possible, to the main law reports, failing which to WLR or All ER, failing which the more specialist law reports. For cases since 2001, the footnotes include the neutral case citation which enables cases to be read online on the website of the British and Irish Legal Information Institute (BAILII). The latter is a remarkable and important resource, much taken for granted.

We emphasise again that the bibliography is not a complete list of books in public law. It is a list of books cited, designed to enable the reader to follow up any discussion in the text. It does not include entries for the many journal articles cited, nor for official publications in the form of royal commission and select committee reports; though the latter, in particular, are invaluable sources that may be consulted on www.parliament.uk.

In preparing this addition, we have benefited from the advice of many friends and colleagues, including Andrea Biondi, Nicola Countouris, Chris Himsworth, Richard Kay, Alastair Mowbray, and Cesare Pinelli. We have enjoyed the benefits of the Maugham Library at King's College London, the Bodleian Library, Oxford, the Squire Law Library, Cambridge, and the Inner Temple Library, London.

We express our thanks to Pearson Education, in particular to Owen Knight and Carole Drummond, for their guidance and support in bringing this edition to publication. We also must thank Robert Chaundy, the copy-editor, Sue Gard, the proofreader, Mike Smith, who prepared the tables, and Doreen Magowan, who prepared the index.

Anthony Bradley
Keith Ewing
Christopher Knight
16 June 2014

Tony Bradley has been an author or co-author of what are now ten editions of this book, spanning a period of 50 years, a remarkable achievement that should not pass unrecognised. Tony has, however, said that this will be the last occasion in which he will have a role as co-author.

I would like to take this opportunity to express my gratitude to Tony for having invited me to join him as co-author in 1989, and to express my deep appreciation for his guidance and support throughout. Tony taught me Constitutional and Administrative Law at Edinburgh University in 1972; like very many others, I am still learning from him.

KDE

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ABBREVIATIONS

In addition to the standard abbreviations used for the citation of reported cases, the following abbreviations are used for the principal journals and other sources cited.

ACD	<i>Administrative Court Digest</i>
AJCL	<i>American Journal of Comparative Law</i>
AJIL	<i>American Journal of International Law</i>
ALJ	<i>Australian Law Journal</i>
APS	<i>Acts of Parliament of Scotland</i>
BHRC	<i>Butterworths Human Rights Cases</i>
BNIL	<i>Bulletin of Northern Ireland Law</i>
BYIL	<i>British Yearbook of International Law</i>
CL	<i>Current Law</i>
CLJ	<i>Cambridge Law Journal</i>
CLP	<i>Current Legal Problems</i>
CJEU	<i>Court of Justice of the European Union</i>
CJQ	<i>Civil Justice Quarterly</i>
CMLR	<i>Common Market Law Reports</i>
CML Rev	<i>Common Market Law Review</i>
COD	<i>Crown Office Digest</i>
CPR	<i>Civil Procedure Rules</i>
Crim LR	<i>Criminal Law Review</i>
ECHR	<i>European Convention on Human Rights</i>
ECJ	<i>European Court of Justice</i>
ECTHR	<i>European Court of Human Rights</i>
Edin LR	<i>Edinburgh Law Review</i>
EHRLR	<i>European Human Rights Law Review</i>
EHRH	<i>European Human Rights Reports</i>
ELR	<i>Education Law Reports</i>
EL Rev	<i>European Law Review</i>
Harv L Rev	<i>Harvard Law Review</i>
HC	<i>House of Commons (Paper)</i>
HC Deb	<i>House of Commons Debates (Hansard)</i>
HEL	<i>Sir William Holdsworth, <i>A History of English Law</i></i>
HL	<i>House of Lords Paper</i>
HL Deb	<i>House of Lords Debates (Hansard)</i>
HLE	<i>Halsbury's Laws of England (5th edn, 2008 onwards)</i>
HRLR	<i>Human Rights Law Review</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights, 1966</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
ICON	<i>International Journal of Constitutional Law</i>
ILJ	<i>Industrial Law Journal</i>
JCHR	<i>Joint Committee on Human Rights</i>
J Civ Lib	<i>Journal of Civil Liberties</i>
JR	<i>Judicial Review</i>
JSSL	<i>Journal of Social Security Law</i>
Jur R	<i>Juridical Review</i>
Kilbrandon Report	<i>Report of Royal Commission on the Constitution, vol. 1, Cmnd 5460, 1973</i>

Abbreviations

LQR	<i>Law Quarterly Review</i>
LS	<i>Legal Studies</i>
MLR	<i>Modern Law Review</i>
MPR	Report of Committee of Ministers' Powers, Cmd 4060, 1932
NDBP	<i>Non Departmental Public Body</i>
NIJB	<i>Northern Ireland Judgment Bulletin</i>
NILQ	<i>Northern Ireland Legal Quarterly</i>
NLJ	<i>New Law Journal</i>
NMD	<i>Non-Ministerial Department</i>
OJLS	<i>Oxford Journal of Legal Studies</i>
PL	<i>Public Law</i>
SI	Statutory Instrument
SSI	Scottish Statutory Instrument
SLT	<i>Scots Law Times</i>
SO	Standing Order
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WA	Written Answer
YBEL	<i>Yearbook of European Law</i>

PART I

Sources, structure and principles

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CHAPTER 1

Constitutional law – its meaning and sources

A. Constitutional law – its meaning and scope

The fundamental nature of constitutional law

At first sight, constitutional law may appear to be just one among many branches of law that must be studied by those who wish to make their living as lawyers, alongside subjects such as the law of civil wrongs (torts), company law, contract, crime, employment law, land law and taxation. But it has a deeper significance than this, since it is concerned with basic questions about the relations between individuals and the state in which they are citizens. In a society committed to values such as peace and good order, democracy and the rule of law, the existence and functions of the government and public bodies such as the police must be subject to law. And a basic principle in such a society is that those who govern must be accountable to those who are governed. But where does ‘the law’ come from, and what is the authority for it? Constitutional law may be said to be ‘the law about law’, a phrase that in turn raises questions about the ultimate authority of constitutional law.

In many countries (but not the United Kingdom), there is a national constitution in writing, that is regarded as providing the ultimate authority for all bodies that wield public power. By contrast, in the United Kingdom, some essential parts of the structure of government (in particular the monarchy and Parliament) have taken their existence from history. This applies also to that part of the legal system that is termed the ‘common law’. The common law derives its authority from the work of judges over the centuries, sitting to resolve disputes between contesting parties in accordance (so far as possible) with rules of law as they have been applied in earlier cases. By contrast, most public bodies today have been created by Parliament to exercise powers that are felt to be needed in the modern world. These include the Electoral Commission (see chapter 7 E) and the Independent Parliamentary Standards Authority (chapter 9 B), but many other examples could be given.

Constitutional law not only recognises the existence of state power, which may be justified by reference to the wishes of the majority of the people; it also seeks to protect individuals and minority groups against collective action that would ride roughshod over their rightful claim to live free from oppressive and intrusive conduct. The need to protect fundamental human rights is today recognised far more widely than it was in the early years of the 20th century, and it now plays a large part in our constitutional law.

What is a constitution?

Applied to the system of law and government by which the affairs of a modern state are administered, the word constitution has two main meanings. In its narrower meaning, a constitution means a document having a special legal status which sets out the framework and principal functions of the organs of government and declares the principles or rules by which those organs must operate. In countries in which the constitution has overriding legal force, there is often a high-ranking court which applies and interprets the text of the constitution in disputed cases. Such a court is the Supreme Court in the USA or Canada, or the Federal Constitutional Court in Germany. In these countries, legislative or executive acts may be held by the court to be without legal force where they conflict with the constitution.

In this sense of the word, the United Kingdom of Great Britain and Northern Ireland has no constitution. There is no single document from which is derived the authority of the main organs of government, such as the Crown, the Cabinet, Parliament and the courts. No written text lays down the relationship of the primary organs of government one with another or with the people.¹ But the word constitution has a wider meaning. As Bolingbroke stated in 1733:

By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.²

In 2001, the House of Lords committee on the constitution stated that the constitution means ‘the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual’.³ In this sense, the United Kingdom has a constitution since it has a complex and comprehensive system of government, which has been called ‘one of the most successful political structures ever devised’.⁴ The foundations for this system include Acts of Parliament, judicial decisions, political practice and also the procedures established by various organs of government for carrying out their own tasks, for example the law and custom of Parliament or the rules issued by the Prime Minister on the conduct of ministers.⁵

The wider sense of the word constitution necessarily includes a constitution in the narrower sense. In Canada, Germany, India, the USA and many other states, the written constitution occupies the primary place among the ‘assemblage of laws, institutions and customs’ which make up the constitution in the wider sense. But no written document alone can ensure the smooth working of a system of government. Around a written constitution will evolve a wide variety of customary rules and practices which adjust its working to changing conditions.⁶ These customary rules and practices may be more easily changed than the constitution itself: their continuing evolution will reduce the need for formal amendment of the written text. It has been said of the US constitution that ‘[the] governing Constitution is a synthesis of legal doctrines, institutional practices, and political norms’.⁷ A perceptive study of the same constitution begins with the declaration that we can understand how it actually operates ‘only by seeing it as a government fundamentally structured around . . . two nationally organised political parties’⁸ – yet the existence of those parties is nowhere mentioned in the constitution itself.

In reality, a written constitution will often not contain all the rules upon which government depends. Thus the scheme for electing the legislature may be found not in the constitution, but in statutes enacted by the legislature. Such statutes can when necessary be amended by ordinary legislation, whereas amendments to the constitution may require a more elaborate

¹ For what such a document might contain, see *The Constitution of the United Kingdom* (Institute for Public Policy Research, 1991). On the notion of a constitution, see King, *Does the United Kingdom still have a Constitution?* and *The British Constitution*; Loughlin, *The British Constitution: a very short introduction*; G Marshall, ‘The Constitution: its Theory and Interpretation’ in Bogdanor (ed.), *The British Constitution in the Twentieth Century*; Tomkins, *Our Republican Constitution*.

² From *A Dissertation upon Parties* (1733), reprinted in Bolingbroke, *Political Writings* (ed. Armitage), p 88.

³ HL Committee on the Constitution (HL Paper 11, 2001–02), ch 2.

⁴ Hailsham, *On the Constitution*, p 1. Other authors disagree: e.g. McLean, *What’s Wrong with the British Constitution?* And see Bentham, *Handbook of Political Fallacies*, pp 154–63.

⁵ See *Ministerial Code: A code of conduct and guidance on procedures for Ministers*; chs 5 and 11XX.

⁶ For the argument that all constitutions leave important things unsaid, see Foley, *The Silence of Constitutions*; and King, *Does the UK still have a Constitution?*, ch 1.

⁷ Whittington, *Constitutional Construction*, p 3.

⁸ Tushnet, *The Constitution of the USA*, p 5.

process, such as a special majority in the legislature or approval by a referendum. Since the way in which the constitutional text operates is likely to depend on political practice, the process of constitutional change is not limited to the formal process of textual amendment.⁹ Moreover, the making of comparisons is not straightforward, as we can see in an unexpected comment by an expert on the US constitution: ‘Typically offered as a paradigm of a nation with a written constitution, the United States actually operates with a constitution that is more similar to than different from the paradigmatic unwritten constitution of the United Kingdom’.¹⁰

The making of written constitutions

It was in the late 18th century that the word constitution came to be identified with a single document, mainly as a result of the American and French Revolutions. The political significance of this new concept was stressed by the radical, Tom Paine:

A constitution is a thing antecedent to a government, and a government is only the creature of a constitution . . . A constitution is not the act of a government, but of a people constituting a government, and government without a constitution, is power without a right.¹¹

In today’s world, the making of a constitution normally follows a fundamental political event, such as the conferment of independence on a former colony, a successful revolution, or reconstruction of a country’s institutions following a war. The outcome of the process is likely to reflect the beliefs and political aspirations of those who have framed it. In the 1990s, after the collapse of communism, eastern and central Europe experienced an era of constitution-making, as the overthrow of socialist regimes led to the creation of new structures that embraced liberal and democratic values.

Within the United Kingdom, except between 1653 and 1660 when the country was ruled under Cromwell’s ‘Instrument of Government’, political circumstances have never required the enactment of a code covering the whole of government. There have indeed been periods of political upheaval culminating in the reform of certain institutions; thus the revolution of 1688–9 was the final act of the constitutional conflicts of the 17th century. Later, there was the first major reform of the House of Commons in 1832 and the crisis over the Lords which led to the Parliament Act 1911. Both the union of England and Scotland in 1707 and the union of Great Britain and Ireland in 1800 were events that went to the heart of the entity known as the United Kingdom. And there was the abdication crisis affecting the monarchy in 1936. But these events did not lead to reconstruction of the whole system of government. Instead, a pragmatic approach has been adopted, with legislation being passed to give effect to the outcome of the political events. That legislation has intentionally avoided the difficult task of stating the foundational political beliefs and assumptions on which the system of government depends. After 1997, the government of Mr Blair was criticised for making extensive constitutional changes without placing them in an integrated programme of reform. In 2007, Mr Gordon Brown’s government embarked on a new reform initiative,¹² but this fell far short of being a comprehensive programme of reform. In 2010, the formation of the coalition government led to numerous projected constitutional reforms being included in the *Programme for Government*,¹³ and placed under the responsibility of the Deputy Prime Minister.

⁹ See Oliver and Fusaro, *How Constitutions Change: a comparative study*.

¹⁰ Tushnet, *The Constitution of the USA*, p 1.

¹¹ *The Rights of Man* (ed. Kuklick), pp 81 and 174.

¹² See *The Governance of Britain*, Cm 7170, 2007; and *Constitutional Renewal*, Cm 7342, 2008. Also the Constitutional Reform and Governance Act 2010.

¹³ Cabinet Office, 2010. And see the related agreement, *The Coalition Agreement for Stability and Reform* (Cabinet Office, 2010).

Nevertheless, what has often been called the Westminster system of government is compatible with a written constitution. Long before 1945, constitutions were framed for long established British territories overseas, such as Australia, Canada and New Zealand, some of which have stood the test of time, even though they did not guarantee the protection of fundamental human rights.¹⁴ After 1945, as British colonies acquired their independence, numerous variants of the ‘Westminster model’ were created. It became common practice for guarantees of rights and broad political declarations to be included in the constitutions of the newly independent countries, as in 1979 when Rhodesia achieved independence as the republic of Zimbabwe.¹⁵ Within the United Kingdom, there has usually been little political support for the idea of a written constitution. However, because of devolution to Scotland, Wales and Northern Ireland, the Human Rights Act 1998 and changes in electoral law, as well as the emergence of documents such as the *Ministerial Code* and the *Code of Conduct for MPs*, many areas of government have become subject to written rules. The constitution is not as unwritten as it was in the past.¹⁶

Legal consequences of the unwritten constitution

While the written constitutions of states are likely to contain some common ingredients (defining the identity of the state, formulating the aspirations of the people, and setting out the key structure of government), these contents assume a wide variety of forms. Within a federal constitution, the tasks of government are divided into two classes, those entrusted to the federal (or national) organs of government, and those entrusted to the various states or regions which make up the federation. Thus, in countries such as Australia, Canada, Germany or the USA, the constitution sets out in broad terms the powers that may be exercised by each level of government. Again, many constitutions give special protection to the fundamental rights of the citizen in the form of a ‘Bill of Rights’, for example by ‘entrenching’ these rights so that a special legislative procedure is needed if they are to be amended, or even by rendering certain rights in essence unalterable, as in Germany.¹⁷ And many constitutions adopt a separation of powers, vesting legislative power in the legislature, executive power in the executive and judicial power in the courts.¹⁸ In some cases, especially in the US Constitution, this separation of powers is subject to an array of ‘checks and balances’.

Within the United Kingdom, there is no written constitution to secure these objects or serve as the foundation of the legal system. The ensuing vacuum is occupied by the doctrines of the legislative supremacy of Parliament and the rule of law, their interrelation being a fundamental question of public law in Britain.¹⁹ These doctrines will be examined later, but one result is that formal restraints on the exercise of power which exist elsewhere do not exist in the United Kingdom. For example, no truly federal system can exist so long as Parliament’s legislative supremacy is maintained. Parliament passed the Government of Ireland Act 1920, devolving powers of self-government upon Northern Ireland, but in 1972 Parliament re-imposed direct rule on Northern Ireland.²⁰ For a formal federal system to be established a written constitution would be needed to prevent the Westminster Parliament from taking back into its own hands powers that had been devolved to Edinburgh, Cardiff and Belfast.

¹⁴ In 1982, the last Canada Act to be passed at Westminster gave full powers of constitutional amendment to Canada and enacted the Charter of Rights and Freedoms as part of the Canadian constitution.

¹⁵ Zimbabwe Constitution Order 1979, SI 1979 No 1600, part III. See de Smith, *The New Commonwealth and its Constitutions*, ch 5 and Simpson, *Human Rights and the End of Empire*.

¹⁶ See Bogdanor, *The New British Constitution*.

¹⁷ Basic Law of the Federal Republic of Germany, arts 19(2) and 79(3).

¹⁸ Ch 4 C.

¹⁹ See Allan, *Law, Liberty and Justice*; and Forsyth (ed.), *Judicial Review and the Constitution*.

²⁰ Ch 2 A.

Moreover, unlike the position in many written constitutions, the ultimate protection of fundamental rights is a matter for Parliament, not the courts. This remains the position in the United Kingdom, even though by enacting the Human Rights Act 1998, Parliament significantly extended the role of the courts in protecting human rights.²¹

The absence of a written constitution also means that there is no fixed procedure prescribed for legislation of constitutional importance. Before the Republic of Ireland could join the European Communities in 1973, a constitutional amendment had to be approved by referendum of the people. In the United Kingdom, the European Communities Act 1972 was debated at length in Parliament, but was passed by a procedure in the same basic form as ordinary legislation. British membership of the European Communities was in 1975 confirmed by a consultative referendum, the holding of which was a consequence of divisions in the Labour party. There is indeed a case for the use of a referendum on certain fundamental matters, such as the devolution of power to Scotland or Wales, and in the European Union Act 2011 Parliament provided for more scope for referendums on European matters.²² Hitherto referendums have been held for political reasons, not because of a formal obligation binding on the government. By contrast with written constitutions, which may be described as *rigid* because of the special procedure required if they are to be altered, the United Kingdom has what in form is an extremely *flexible* constitution. It would seem that there is no aspect of our constitutional arrangements which could not be altered by Act of Parliament.²³ This quality of ‘flexibility’ is not without its dangers, and in 2011 the House of Lords’ committee on the constitution struck a cautionary note in calling for more consultation to take place before a government embarks on constitutional reforms; the committee commented that fast-track legislation should not be used to make permanent constitutional changes.²⁴

Evolutionary development

To describe the British system of government as flexible does not mean that it is unstable but that, as we have seen, most of its principles and rules can be changed by legislation or by development of a new conventional rule or practice. Perhaps because of this flexibility, the United Kingdom has, at least since 1688/89, escaped those revolutionary convulsions which may occur in countries with more rigid constitutions but less stable political or social systems. Since the 17th century settlement, there have been innumerable changes in the system of government, some freely conceded but many fought for by political action. The result has been a complete change from personal rule by the monarch to the ascendancy of the Prime Minister, who leads the largest party in Parliament and is effective head of the executive branch of the state.

Some of the older features of government have survived from earlier times and these (for instance, the Privy Council)²⁵ are tolerated or respected because they represent historic continuity. Writing in 1867, Walter Bagehot in *The English Constitution* distinguished between the *dignified* parts of the constitution ‘which excite and preserve the reverence of the population’ and the *efficient* parts, ‘by which it, in fact, works and rules’.²⁶ Bagehot called it the characteristic merit of the constitution, ‘that its dignified parts are very complicated and somewhat imposing, very old and rather venerable; while its efficient part, at least when in

²¹ Ch 14.

²² Ch 6 E.

²³ In *R (Jackson) v A-G* [2005] UKHL 56, [2006] 1 AC 262, Lord Steyn remarked that some fundamentals associated with the rule of law might be beyond the reach of Parliament. See p 62.

²⁴ HL Paper 177 (2010–12), paras 37–46, 90, 99.

²⁵ Ch 10 C.

²⁶ *The English Constitution*, p 61.

great and critical action, is decidedly simple and rather modern.²⁷ Because of the vast changes in the ‘efficient parts’ of the constitution that have occurred, it is misleading to claim, as a royal commission on the constitution said in 1973: ‘The United Kingdom already possesses a constitution which in its essentials has served well for some hundreds of years.’²⁸ For a full understanding of the constitution, a sense of history is essential.²⁹

The evolutionary nature of the constitution can be illustrated in many ways. While the monarch has lost the role of governing the country since 1688, further changes in the residual functions of the monarch may yet occur. Tension remains between the competing claims of Cabinet and Prime Ministerial (or presidential) government. And many questions remain about the accountability of Whitehall to Parliament. Despite the measures of constitutional reform that have been enacted since 1997, there is a continuing need to maintain and secure greater democratic accountability of government.

Constitutionalism³⁰

The term ‘constitutionalism’ often appears in discussion of the relationship between state power, law, democracy and the preservation of liberal values,³¹ but it is used with a wide variety of meanings. A Norwegian political scientist has said that constitutionalism ‘is the doctrine that claims that political authority should be bound by institutions that restrict the exercise of power’.³² A Hungarian jurist has written that constitutionalism ‘is the set of principles, manners, and institutional arrangements’ that have traditionally served to limit government.³³ And for an American commentator, ‘[the] special virtue of constitutionalism . . . lies not merely in reducing the power of the state, but in effecting that reduction by the advance imposition of rules’.³⁴

The idea of constitutionalism is particularly associated with the existence of a written constitution from which the state’s authority and legitimacy may be said to derive, and which may help to protect the rights of individuals and minorities. The façade of a written constitution may sometimes exist alongside the structure of a tyrannical state. However, the prevailing tradition in western liberalism assumes existence of a written constitution, along with a democratic parliament, respect for the law, and a system of courts that protect groups and individuals against the abuse of power.

In the United Kingdom the absence of formal limits upon state power has sometimes given rise to demands for a new ‘constitutional settlement’, including a new Bill of Rights to protect individual liberties.³⁵ In 1991, a research institute published the text of a constitution for the

²⁷ Ibid, p 65.

²⁸ Kilbrandon Report, para 395.

²⁹ For two contrasting studies that reinforce this point, see Wicks, *The Evolution of a Constitution* and Allison, *The English Historical Constitution*.

³⁰ See Vile, *Constitutionalism and the Separation of Powers*; McIlwain, *Constitutionalism, Ancient and Modern*; Alexander (ed.), *Constitutionalism: Philosophical Foundations*.

³¹ See J E K Murkens (2009) 29 OJLS 1. On ‘common law constitutionalism’, see T Poole (2003) 23 OJLS 435. Also King, *The British Constitution*, pp 12–13; and Ziegler, Baranger and Bradley, *Constitutionalism and the Role of Parliaments*, ch 1.

³² Lane, *Constitutions and Political Theory*, p 19.

³³ Sajó, *Limiting Government: an Introduction to Constitutionalism*, p xiv.

³⁴ R Kay, in Alexander (ed.), pp 16, 23. See also S Holmes, in Rosenfeld and Sajó (ed.), *The Oxford Handbook of Comparative Constitutional Law*, ch 8.

³⁵ See Scarman, *English Law – The New Dimension*. Contrast the sparkling defence of the unwritten constitution as an expression of political culture in Thompson, *Writing by Candlelight*, pp 191–256. Works calling for reform include Brazier, *Constitutional Reform*; Foley, *The Politics of the British Constitution*; Mount, *The British Constitution*; and Oliver, *Constitutional Reform in the UK*.

United Kingdom.³⁶ Since the 1997 general election, numerous reforms of parts of the constitution have been carried through by successive governments, but all have stopped well short of creating a written constitution. In the United Kingdom today, there is widespread belief in the values of democratic and accountable government, and also much scepticism about the ability of the parliamentary process to protect the public against abuse of power, but these beliefs have not yet led to there being widespread support for the enactment of a written constitution.

Constitutional law in the United Kingdom

As we have seen, the scope of constitutional law in the United Kingdom is necessarily affected by the absence of a written constitution. Constitutional law presupposes the existence of the state³⁷ and accordingly may be said to be that part of national law which governs the system of public administration and the relationships between the individual and the state.³⁸ One difficulty in defining the subject in the United Kingdom is that many of the rules and practices under which government operates do not have the force of law.³⁹ This means that knowledge of the legal rules alone gives an incomplete view of the subject. A distinction is sometimes made between what may be called the ‘legal constitution’, that emphasises the importance of judicial decisions and textual interpretation in the operation of government, and the ‘political constitution’, a term that stresses that the system depends on political culture and democratic process, rather than on decisions taken by formal procedures that may not reflect public opinion today.⁴⁰ In reality, the distinction cannot be pressed too far, since all constitutions are political in content and no democracy can survive without a legal structure.

Another problem of definition is that, unlike systems in which the law is organised in the form of a series of codes administered by separate courts, there is no clearcut demarcation in Britain between constitutional law and other branches of law. As a great legal historian observed: ‘There is hardly any department of law which does not, at one time or another, become of constitutional importance.’⁴¹ For example, in family law, important protection for family life is given by the European Convention on Human Rights;⁴² in employment law, freedom of association and the law of picketing⁴³ are of constitutional importance; and innumerable issues of civil liberty arise out of criminal justice. Constitutional law does not comprehend the whole of the legal system, but the manner in which questions of rights, powers and duties are settled is a central aspect of the subject.⁴⁴

In the past, constitutional law gave more emphasis to the role of the state in maintaining public order and national security than it did to the individual’s ability to benefit from employment and housing, education, health services and conservation of the environment. The state today has important governmental functions in all these areas: how it carries out these functions is of concern to the public at large. Through social services and economic regulation, individuals come into contact more often with officials than with judges.

³⁶ Note 1 above.

³⁷ For the impact of the changing concept of the state, see N MacCormick (1993) 56 MLR 1, C M G Himsworth [1996] PL 639 and MacCormick, *Questioning Sovereignty*.

³⁸ HLE, vol 8 (2), para 1; and see Marshall, *Constitutional Theory*, ch 1.

³⁹ See section C below.

⁴⁰ See the seminal analysis by J A G Griffith in (1979) 42 MLR 1. Also Whittington, *Constitutional Construction*, ch 1; Bellamy, *Political Constitutionalism*; K D Ewing [2000] PL 405; G Gee and G Webber (2010) 30 OJLS 273; and a symposium on the ‘political constitution’ in (2013) 14 *German Law Journal* (available online).

⁴¹ Maitland, *Constitutional History*, p 538.

⁴² Arts 8 and 12. Ch 14 C.

⁴³ Ch 18.

⁴⁴ Cf the approach to the constitution taken in D Feldman [2005] CLJ 329.

Administrative law is a close relation of constitutional law, since it deals with the powers of government and with the remedies (whether political or judicial) that are open to someone who is affected by the decisions of public officials.⁴⁵ Not surprisingly, there is no sharp demarcation between constitutional and administrative law.⁴⁶ A rough distinction might be that constitutional law is mainly concerned with the structure of the primary organs of government, whereas administrative law is concerned with the role of official agencies in providing services and in regulating the activities of citizens. But it is an essential feature of a constitutional state that use or misuse of executive power can be questioned, whether by political or judicial means.

There is also a close relationship between constitutional law and *public international law*, which is the system of law whose primary function is to regulate the relations of states with one another, through such matters as the conduct of diplomacy, the making of treaties, membership of international organisations, and formalities such as the sending of ambassadors.⁴⁷ International law thus deals with the *external* relations of a state with other states; constitutional law concerns the *internal* structure of the state and its relations with those persons who are within its jurisdiction.⁴⁸ Each in its own way is concerned with subjecting to law the power that states wield, but how does one relate to the other? In answering this question, the *monist* tradition seeks to assimilate the national and international legal systems. But in the *dualist* tradition, which the United Kingdom has generally observed, national and international law operate at two distinct levels. Hence, action by a state (for instance, the use of armed forces abroad) may be lawful in national law but in breach of international law; moreover, when a state is in breach of an obligation at international law, the state may not plead in an international forum that its government had no power under national law to take action required by international law. In matters of fundamental human rights, it is desirable for both systems to have the same rules, so that an official decision may be lawful or unlawful in both.⁴⁹ Since 1945, under the aegis of the United Nations, international organisations have established many forms of cooperation between states and multilateral treaties have set standards of conduct for the world community, for example, in respect of war crimes, genocide and torture. International law is increasingly concerned with protecting human rights, to the extent of permitting international intervention in a state's affairs on matters that would once have been considered to be solely within the sovereignty of that state. Because of the evolving interface between constitutional law and international law, courts in the United Kingdom are increasingly dealing with the effects of what has been called 'the internationalisation of public law'.⁵⁰

The European Union (EU) was created by the Maastricht Treaty in 1992, entered into by the member states of the European Community. The EC was from its inception different from other international organisations, being equipped with legislative, administrative and judicial powers that were exercised with direct effect in member states. The substantive rules of Community law in economic and social fields lie outside the scope of this book. But the

⁴⁵ See part 4 of this book.

⁴⁶ Maitland, *Constitutional History*, pp 528–35, and Craig, *Public Law and Democracy in the UK and the USA*, pp 1–3.

⁴⁷ See Brownlie, *Principles of Public International Law*; Clapham, *Brierly's Law of Nations*; and Shaw, *International Law*. Also C Greenwood in Rawlings, Leyland and Young (eds), *Sovereignty and the Law*, ch 14.

⁴⁸ On the meaning of a state's jurisdiction in European human rights law, see *Bancovic v Belgium* (2001) 11 BHRC 435, *Al-Skeini v UK* (2011) 30 BHRC 561, and *Smith v Ministry of Defence* [2013] UKSC 41, [2013] 4 All ER 794.

⁴⁹ See e.g. *Al-Jedda v Home Secretary* [2013] UKSC 62, [2014] 1 All ER 356 (unlawful to use statutory power to revoke British citizenship where effect is to create statelessness).

⁵⁰ See Jowell and Oliver (eds), *The Changing Constitution* (7th edn, 2011), ch 5 (D Feldman). And see note 37 above.

EU today exercises powers of government over all member states, and law in the United Kingdom has had to adapt to this reality. Accordingly, the constitutional implications of EU membership will be examined, including the relationship between EU law and national law.⁵¹

As a system of government, the EU already has a ‘constitution’ based on the treaties that created it, on decisions by the European Court of Justice interpreting the treaties, and on a complex structure of agreements and practices by which the EU functions.⁵² Such a constitution comes within Bolingbroke’s use of that term, mentioned earlier, to refer to the ‘assemblage of laws, institutions and customs’ by which states forming the EU have agreed to be governed. In 2005, an ambitious attempt to provide the EU with a ‘European Constitution’ by that name failed, when it was rejected by referendums in the Netherlands and France. A further attempt at EU reform was made in the form of the Lisbon Treaty, that required ratification by all member states; this came into effect in December 2009, after it was approved (at the second time of asking) by a referendum held in Ireland, and the final ratification by a member state was given to it by the Czech Republic.

B. The formal sources of constitutional law

If the United Kingdom possessed a written constitution, the main rules of constitutional law would be contained within it. Alterations to these rules would be made by the procedure laid down for amending the constitution. Parliament would be likely to have power to legislate on such matters as the machinery of elections and the structure of the courts; and in disputed cases the courts would probably have the authority to determine the meaning of the constitution. The formal sources of constitutional law would comprise: (a) the constitution itself, and amendments made to it; (b) Acts of Parliament dealing with matters of constitutional importance; (c) judicial decisions interpreting the constitution. In the absence of a written constitution, the two main sources of constitutional law in the United Kingdom are the same as those of law in general, namely:

(a) *Legislation* (or enacted law) including: Acts of Parliament; legislation made by ministers and other authorities on whom Parliament has conferred power to legislate;⁵³ exceptionally, legislative measures issued by the Crown under prerogative powers;⁵⁴ and, since 1973, legislation enacted by organs of the European Communities and the EU.⁵⁵

(b) *Judicial precedent* (or case law), being the decisions of the courts expounding the common law or interpreting legislation. Today this includes decisions of the European Court of Justice in relation to EU law; and the Human Rights Act 1998 requires all courts and tribunals to take account of relevant decisions of the European Court of Human Rights.⁵⁶

A lesser known branch of constitutional law is found in the ‘law and custom of Parliament’ (*lex et consuetudo Parliamenti*), which derives from the authority inherent in each House of Parliament to regulate its internal affairs.⁵⁷

Matters relating to the internal conduct of government are generally outside the law in its strict sense and are not directly enforceable unless legislation gives effect to them. But

⁵¹ Ch 6.

⁵² See e.g. S Douglas-Scott, *Constitutional Law of the European Union*.

⁵³ Ch 22.

⁵⁴ Ch 10 D.

⁵⁵ Ch 6 A, B.

⁵⁶ Ch 14 C.

⁵⁷ See p 18 below and ch 9.

exceptionally, a well-established governmental practice may give rise to decisions by the courts upholding the practice as lawful⁵⁸ or as creating an obligation to act in a certain way by reason of the principle of legitimate expectations.⁵⁹

Legislation

There are few topics of constitutional law which are not affected by legislation. Unlike some branches of private law, for example the law of contract, a study of constitutional law involves frequent recourse to the statute book. The statutes which deal with constitutional topics do not form sections of a complete code. If a collection were made of all the legislation (from medieval charters to the present day) that deals with the form and functions of government, the result would present a very unwieldy but incomplete picture of the constitution.⁶⁰ While these enactments can each be repealed or amended by further Acts, a few statutes have special constitutional significance.

1 *Magna Carta*.⁶¹ Magna Carta was granted in 1215 by King John under pressure from the nobles at Runnymede. In varying forms the charter was confirmed by later kings with the approval of the English Parliament; it appears on the statute book in the form confirmed by Edward I in 1297. It contained a statement of grievances, formulated on behalf of important sections of the community, which the King undertook to redress. The charter set out the rights of various classes of the medieval community according to their different needs. The Church was to be free; London and other cities were to enjoy their liberties and customs; merchants were not to be subject to unjust taxation. Although both trial by jury and the writ of habeas corpus owe their origins to other sources, chapter 29 declared that no man should be punished except by the judgment of his peers or the law of the land, and that to none should justice be denied. These clauses embodied a protest against arbitrary punishment and asserted the right to a fair trial and a just legal system. Today, few provisions of Magna Carta remain on the statute book, but it has been called ‘the nearest approach to an irrevocable “fundamental statute” that England has ever had’.⁶²

2 *Petition of Right*. A document adopted by the English Parliament at a much later period of conflict is the Petition of Right 1628, enrolled on the statute book as 3 Car 1 c 1.⁶³ This contained protests against taxation without consent of Parliament, arbitrary imprisonment, the use of commissions of martial law in time of peace and the billeting of soldiers upon private persons. To these protests the King yielded, though the effect of the concession was weakened by the view Charles I held that his prerogative powers were not thereby diminished.

3 *Bill of Rights and Claim of Right*. The ‘glorious revolution’ of 1688 brought about the downfall of James II of England and James VII of Scotland from his two thrones, and the restoration of monarchy in the two kingdoms on terms laid down by the English and Scottish Parliaments respectively. These terms were accepted by the incoming joint monarchs, William and Mary. In England it was the House of Lords and the remnants of Charles II’s last Parliament that in 1689 approved the Bill of Rights, which was later confirmed by the post-revolution

⁵⁸ See e.g. *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560; pp 109, 284 below.

⁵⁹ See ch 24 B.

⁶⁰ See the four volumes under the title ‘Constitutional Law’ in *Halsbury’s Statutes*, 4th edn, vol 10 (2013 reissue).

⁶¹ For an historical account, see Holt, *Magna Carta*.

⁶² Pollock and Maitland, *History of English Law*, vol I, p 173. See also *R v Home Secretary, ex p Phansopkar* [1976] QB 606; *R v Foreign Secretary, ex p Bancoult* [2001] QB 1067; and A Tomkins [2001] PL 571.

⁶³ *Halsbury’s Statutes*, vol 10 (1), p 109.

Parliament.⁶⁴ This laid the foundations of the modern constitution by disposing of the more extravagant claims of the Stuarts to rule by prerogative right.

Its principal provisions ('articles'), many of which are still in force in English law, declared:

- (1) That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal.
- (2) That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.
- (3) That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious.
- (4) That the levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.
- (5) That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.
- (6) That the raising or keeping of a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.
- (7) That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.
- (8) That election of members of Parliament ought to be free.
- (9) That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.
- (10) That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
- (11) That jurors ought to be duly impanelled and returned.
- (12) That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.
- (13) And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently.⁶⁵

The Scottish Parliament enacted the Claim of Right in 1689. Its contents followed those of the Bill of Rights, with certain modifications; for example, the distinction between the suspending and dispensing powers was not made, but all proclamations asserting an absolute power to 'cass [quash], annul or disable laws' were declared illegal.⁶⁶ Many provisions of the Claim of Right are still in force within Scotland.

4 *The Act of Settlement*. The Act of Settlement 1700, enacted by the English Parliament, not only provided for the succession to the throne, but added important provisions complementary to the Bill of Rights, especially:

That whosoever shall hereafter come to the possession of this Crown shall join in communion with the Church of England as by law established. . . .

⁶⁴ Ibid, p 116.

⁶⁵ Cases on the Bill of Rights include *Congreve v Home Office* [1976] QB 629 (art 4); *Williams v Home Office (No 2)* [1981] 1 All ER 1211 (art 10); and *R v Home Secretary, ex p Herbage (No 2)* [1987] QB 1077 (art 10). Art 7, sometimes cited by the gun lobby, had no effect on the Firearms (Amendment) Act 1997. Art 9 was amended by the Defamation Act 1996, see chs 9 A and 17 F. On the Bill of Rights, see Wicks, *The Evolution of a Constitution*, ch 1.

⁶⁶ APS IX, 38.

That no person who has an office or place of profit under the King or receives a pension from the Crown shall be capable of serving as a member of the House of Commons.

That . . . judges' commissions be made *quamdiu se bene gesserint* [so long as they are of good behaviour], and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them.

That no pardon under the great seal of England be pleadable to an impeachment by the Commons in Parliament.⁶⁷

The Bill of Rights and the Act of Settlement marked the victory of Parliament over the claim of the Stuart kings to govern by the prerogative. There was, however, nothing in these statutes to secure the responsibility of the King's ministers to Parliament. That principle of parliamentary government developed in the 18th century and later, a product of constitutional practice rather than legislation.⁶⁸ This enabled the exercise by ministers of many prerogative powers of the Crown to survive into the 21st century.⁶⁹

5 *Other statutes of constitutional importance.* Other statutes that form part of constitutional law include the Act of Union with Scotland 1707, the Parliament Acts 1911 and 1949, the Crown Proceedings Act 1947, the European Communities Act 1972 and the British Nationality Act 1981. Those enacted since 1997 include the Scotland Act 1998, the Human Rights Act 1998, the House of Lords Act 1999, the Terrorism Act 2000, the Constitutional Reform Act 2005 and the Constitutional Reform and Governance Act 2010.

If the United Kingdom had a written constitution, this would be likely to provide a special procedure for making amendments to the constitution. As it is, in two respects a distinction is sometimes drawn between constitutional and other legislation. First, the House of Commons may refer Bills of constitutional significance for detailed examination to a committee of the whole House rather than to a Public Bill committee,⁷⁰ but not all Bills with a constitutional content are treated in this way. Second, by the doctrine of implied repeal, a later Act prevails over an earlier Act which is inconsistent with the later Act; however, the courts are sometimes reluctant to hold that a statute of special significance has been repealed or amended by a later Act. In 2002, it was held, controversially, that 'constitutional' statutes (those that govern relations between citizen and state 'in some general, overarching manner' or affect the scope of fundamental constitutional rights) are unlike 'ordinary' statutes in that the former may not be impliedly repealed, but they may be repealed when the actual intention of a later Parliament is stated expressly.⁷¹

A different question is whether the electorate should be consulted by a national referendum when major constitutional changes are proposed. The practice of holding such a referendum has developed since 1973, and the European Union Act 2011 requires the holding of a referendum before certain changes are made in EU law. A referendum on the reform of the electoral system was held in 2011 as required by the coalition agreement between the Conservatives and Liberal Democrats. In September 2014, a referendum in Scotland will be held on whether Scotland should become an independent country. There is no general consensus as to when such referendums should be held. But if a future government wished to abolish the Scottish Parliament or the Welsh Assembly, which were both established after referendums in those countries, a prior referendum would be inevitable.⁷²

⁶⁷ *Halsbury's Statutes*, vol 10 (1), p 126.

⁶⁸ Ch 5.

⁶⁹ Ch 10 D.

⁷⁰ See p 196. And R Hazell, [2006] PL 247.

⁷¹ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 (the metric measures case, concerning the status of the European Communities Act 1972). On implied repeal, see ch 3 C.

⁷² See ch 3 E below.

Case law

The other main source of legal rules is found in decisions of the superior courts, stated in authoritative form in the law reports. Under the doctrine of precedent, or ‘*stare decisis*’ (i.e. the duty of courts to observe decided cases), these decisions are binding on inferior courts and may, according to the relative status of the courts in question, bind other superior courts.⁷³ Judge-made law takes two principal forms.

1 *The common law*. This consists of the rules and customs which have long been declared to be law by the judges in deciding cases before them. In reports of these cases are found authoritative expositions of the law relating to prerogatives of the Crown,⁷⁴ remedies of the subject against illegal acts by public authorities and officials, including habeas corpus,⁷⁵ which in English law protects individuals against unlawful detention. Such decisions established the principle that ‘from its very earliest days’ the common law ‘set its face firmly against the use of torture’.⁷⁶

Examples of judicial decisions are *Entick v Carrington*, which held that a Secretary of State had no power to issue general warrants for the arrest and search of those publishing seditious papers;⁷⁷ and, in modern times, *Burmah Oil Co v Lord Advocate*, which held that the Crown must compensate the owners of property taken in the exercise of prerogative powers,⁷⁸ *Conway v Rimmer*, which held that the courts had power to order the production as evidence of documents for which Crown privilege had been claimed,⁷⁹ and *M v Home Office*, holding that the Home Secretary had committed contempt of court in not obeying a judge’s order to bring a deported Zairean teacher back to the United Kingdom.⁸⁰ Such decisions declare important rules of public law which often would not have been enacted by Parliament. In the absence of a written constitution, such decisions provide what have been called the legal foundations of British constitutionalism.⁸¹ Even so, they are not binding for all time since they may be set aside or amended by Parliament, even retrospectively.⁸²

The final court of appeal formerly took the form of the ‘law lords’ sitting as a committee of the House of Lords, but in October 2009 these twelve full-time judges became Justices of the Supreme Court for the United Kingdom. As the final court of appeal, the law lords could in exceptional circumstances review and, if necessary, alter the law laid down by their earlier decisions,⁸³ and the position of the Supreme Court is the same. Judicial decisions are the basis for such principles as the legislative supremacy of Parliament and judicial review of executive action.⁸⁴ But even such fundamental principles may be affected by European law. When a case concerns EU law, the decision by a United Kingdom court may be referred to the European Court of Justice at Luxembourg.⁸⁵ In cases concerning rights under the

⁷³ See Cross and Harris, *Precedent in English Law*.

⁷⁴ Ch 10 E.

⁷⁵ Ch 25 D.

⁷⁶ *A v Home Secretary (No 2)* [2005] UKHL 71, paras [11], [12] (Lord Bingham).

⁷⁷ (1765) 19 State Tr 1029. And see ch 4 A.

⁷⁸ [1965] AC 75; ch 10 E.

⁷⁹ [1968] AC 910; ch 26 D.

⁸⁰ *Re M* [1994] 1 AC 377; chs 13 C, 26 D.

⁸¹ See Allan, *Law, Liberty and Justice*, chs 1, 4. Also S Sedley, in Richardson and Genn (eds), *Administrative Law and Government Action*, ch 2 and (1994) 110 LQR 270.

⁸² The War Damage Act 1965 reversed the *Burmah Oil* decision above.

⁸³ *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77. For review of a previous decision for due process reasons, see *R v Bom Street Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119.

⁸⁴ Ch 3 and chs 24, 25.

⁸⁵ For the *Factortame* litigation, see ch 6 D.

European Convention on Human Rights, the European Court of Human Rights at Strasbourg may consider whether the national decision conflicts with the Convention.⁸⁶

2 *Interpretation of statute law.* As a general rule, the courts have no authority to rule on the validity of an Act of Parliament (although they may rule on the validity of subordinate legislation),⁸⁷ but they have the task of interpreting legislation where the meaning of an Act is disputed. Important issues of public law may arise from the interpretation of statutes. In a leading decision under the Human Rights Act 1998, the Law Lords held that a power conferred by Parliament in 2001 to detain foreigners suspected of involvement with terrorist acts infringed their right to liberty and could not be used to bring about their indefinite imprisonment without charge or trial; such imprisonment, said Lord Nicholls, ‘is anathema in any country which observes the rule of law’.⁸⁸ Another decision concerned the power of the Environment Secretary, under an Act of 1985, to make regulations restricting increases in certain residential rents. He used this power to protect tenants against increases resulting from judicial decisions on the assessment of rents; but landlords claimed that the power could be used only as a measure against inflation. In upholding the regulations, the judges discussed their approach to deciding the meaning of the 1985 Act. Lord Bingham said, ‘the overriding aim . . . must always be to give effect to the intention of Parliament as expressed in the words used’.⁸⁹ And Lord Nicholls said:

The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House.⁹⁰

In seeking the meaning of the words used by Parliament, the courts employ established principles of interpretation as useful guides and, if necessary, use internal aids (found in the rest of the Act) or external aids (for example, material outside the Act) to identify the mischief that the statute is intended to cure and the purpose of the legislation.

Since most powers of government are derived from statute, the judge-made law which results from interpretation of statutes is of great importance in administrative law. The principles (or presumptions) of statutory interpretation are seldom conclusive and sometimes point in opposite directions.⁹¹ The task of the court in discovering the meaning of words used by Parliament always requires analysis of the text itself. But if the policy or purpose of a statute can be determined, it may be possible to give an interpretation consistent with that. There was formerly a rule that the courts could not look at Hansard (the record of debates in Parliament) to discover the meaning of legislation, although limited use might be made of documents such as reports of royal commissions and parliamentary committees as an aid to identifying the mischief which legislation was intended to remedy.⁹² However, Hansard was used to discover the intention of Parliament in approving regulations which gave effect to a

⁸⁶ Ch 14 B. And see *Smith v Ministry of Defence* (note 48 above).

⁸⁷ Ch 22.

⁸⁸ *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68, [74]. For an equally significant decision, on the legality of control orders, see *Home Secretary v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

⁸⁹ *R v Environment Secretary, ex p Spath Holme Ltd* [2001] 2 AC 349, 388.

⁹⁰ *Ibid*, 396.

⁹¹ Marshall, *Constitutional Theory*, ch 4; Cross, *Statutory Interpretation*; Bennion, *Statutory Interpretation*.

⁹² *Black-Clawson International Ltd v Papierwerke AG* [1975] AC 591; *Davis v Johnson* [1979] AC 264.

decision of the European Court of Justice.⁹³ And in 1992, the former rule against reading Hansard was changed: a court may now use Hansard as an aid to statutory construction where the legislation is ambiguous or obscure and the material relied on consists of clear statements made by a minister or other promoter of the Bill.⁹⁴

Some presumptions of interpretation are of constitutional importance. Thus many Acts do not bind central government, since the Crown is presumed not to be bound by legislation, unless this is expressly stated or necessarily implied.⁹⁵ It has often been presumed that Parliament does not intend to take away common law rights by implication, as distinct from express words. Thus the courts have held that Parliament does not intend to take away the property of a subject without compensation⁹⁶ or to deprive a subject of access to the courts,⁹⁷ and have interpreted penal statutes strictly in favour of the citizen: thus a statute creating a criminal offence will not in the absence of express words be held to be retrospective.⁹⁸ In recent decisions, the courts have used these presumptions to develop the idea of common law constitutional rights, such as the right of access to a court, which may be abrogated but only by express words or necessary implication.⁹⁹ As Lord Hoffmann has said: ‘The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.’¹⁰⁰

It is in keeping with this approach that, under the Human Rights Act 1998, all legislation, whenever made, must, ‘so far as it is possible to do so’, be read and given effect in a way that is compatible with the rights protected by the European Convention on Human Rights. This duty on the courts (which turns on how the courts interpret the phrase ‘so far as it is possible’) may lead to an outcome far beyond any interpretation that would have been acceptable in the past, and the effect may be to amend the statute.¹⁰¹

British membership of the European Union directly affects the courts’ traditional approaches to interpretation, since in most European countries methods of legislative drafting and rules of interpretation are different from those in Britain. Where it is necessary for a European treaty or regulation to be interpreted in a British court, a procedure for seeking a preliminary ruling enables the question of interpretation to be settled by the European Court of Justice.¹⁰² British courts must follow that court’s practice by giving a purposive construction to regulations intended to comply with EC directives.¹⁰³

It is an essential principle of the rule of law that legislation should be interpreted by judicial bodies independent of the legislature which made the law. While the courts must be able to act independently of the executive in interpreting legislation, their duty is to decide what Parliament must be taken to have intended; they are not free merely to decide what they believe may be in the public interest.¹⁰⁴

⁹³ *Pickstone v Freemans plc* [1989] AC 66.

⁹⁴ *Pepper v Hart* [1993] AC 593. On use of Hansard, see *R v Environment Secretary, ex p Spath Holme Ltd* (above); and *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816. Also Lord Steyn (2001) 21 OJLS 59.

⁹⁵ *Lord Advocate v Dumbarton DC* [1990] 2 AC 580; chs 10 D, 26 D.

⁹⁶ *Central Control Board v Cannon Brewery Co* [1919] AC 744, 752.

⁹⁷ *Chester v Bateson* [1920] 1 KB 829.

⁹⁸ *Waddington v Miah* [1974] 2 All ER 377.

⁹⁹ *R v Lord Chancellor, ex p Witham* [1998] QB 575. Also *R v Home Secretary, ex p Pierson* [1998] AC 539; and *R v Home Secretary, ex p Simms* [2000] 2 AC 115.

¹⁰⁰ *R v Home Secretary, ex p Simms*, at p 131.

¹⁰¹ The leading case on interpretation under the Human Rights Act is *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557; and see ch 14 C.

¹⁰² Ch 6 A.

¹⁰³ *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546.

¹⁰⁴ *Duport Steels Ltd v Sirs* [1980] 1 All ER 529.

The law and custom of Parliament

Legislation enacted by Parliament and decisions of the courts are sources of law with which every lawyer is familiar. The same cannot be said of the law and custom of Parliament. In earlier days, reference was often made to the ‘High Court of Parliament’. Although the notion of Parliament as a court is now obsolete, each House has for centuries had certain privileges, including power over its own procedure. A striking illustration of this power is found in the rules of each House that determine the successive stages by which a Bill is considered by the House. Other rules of constitutional importance are contained in the standing orders of the two Houses, in resolutions of each House and in rulings by the Speaker of the Commons. The inherent authority of each House to control its own affairs is respected by the courts. Each House has now adopted a ‘Code of Conduct’ for its members. Under the codes, all members have to register their financial and other interests, and compliance with the codes is enforced by each House.¹⁰⁵

Public anger in 2009 at revelations of the excessive claims that many MPs were making under the scheme for their expenses and allowances led to the Parliamentary Standards Act 2009 that made inroads into the historic authority of the Commons to regulate its own affairs. But the Act left untouched the ancient power of the Commons to expel or suspend an MP who is in serious breach of the House’s rules of conduct.

In addition to formal rules that govern parliamentary procedure, many informal practices and understandings are observed between the parties in the Commons, and between the front benches and the backbenchers. Such matters are not found in the House’s standing orders. They resemble the customary practices and understandings (or ‘conventions’) outside Parliament that are examined in the next section of this chapter. For one party to depart from these practices could cause other parties to react adversely: this might lead to the withdrawal of cooperation between government and opposition parties (on such matters as pairing between absent MPs or timetabling of Bills), or eventually to changes in the rules of procedure.

C. Other rules and principles, including constitutional conventions

Many rules of constitutional behaviour which are observed by the Queen, ministers, members of Parliament, judges and civil servants, are contained neither in Acts nor in judicial decisions. Disputes which arise from these rules rarely lead to action in the courts and judicial sanctions are not applicable if the rules are broken. These rules have been described in many ways, for instance as the ‘unwritten maxims’ of the constitution,¹⁰⁶ and as ‘a whole system of political morality, a whole code of precepts for the guidance of public men’.¹⁰⁷ Dicey referred to them as:

conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power . . . are not in reality laws at all since they are not enforced by the courts.¹⁰⁸

Under Dicey’s influence, the most common term for them is constitutional convention, which has a meaning quite different from a convention in international law (which refers to a treaty between states).

¹⁰⁵ Ch 9 B.

¹⁰⁶ Mill, *Representative Government*, ch 5.

¹⁰⁷ Freeman, *Growth of the English Constitution*, p 109, quoted in Dicey, p 418. Cf O Hood Phillips (1966) 29 MLR 137.

¹⁰⁸ Dicey, *Law of the Constitution*, p 24.

The notion of conventional conduct includes a strong element of what is customarily expected, in the sense of ordinary or regular behaviour. In social terms, unconventional conduct departs from accepted patterns of behaviour, rather than being in breach of any rule as to how we should behave. In considering constitutional conventions, we will find a continuing tension (that may cause much uncertainty in practice) between regarding conventions as (a) *descriptive* statements of constitutional practice, based on knowledge and observation of what actually happens; or as (b) *prescriptive* statements of what ought to happen, based in part on observation but also on constitutional principle. We return later to the choice between these two approaches;¹⁰⁹ but at present we will assume that conventions are concerned with matters of obligation and we will explore the nature of that obligation. First, examples will be given of conventional rules that affect constitutional behaviour and in each case relevant legal rules will be mentioned.

Conventional rules of the constitution: some examples

1 It is a rule of common law that the royal assent must be given before a Bill which has been approved by both Houses of Parliament can become an Act of Parliament.¹¹⁰ The manner in which the royal assent may be given is now regulated by statute and in certain circumstances the royal assent may be signified by others on behalf of the Queen.¹¹¹ These rules deal with a vital matter of legal form. But a more important conventional rule is that the royal assent is granted by the Queen on the advice of her ministers. Where a Bill has been passed by both Houses of Parliament, the royal assent is given as a matter of course. The monarch's legal power to refuse assent was last exercised by Queen Anne in 1708, when (apparently with the approval of her ministers and without objection by Parliament) assent was refused to the Scottish Militia Bill.¹¹² In the Irish crisis of 1912–14, the Unionists suggested to George V that he should withhold assent from the Bill to give home rule to Ireland. The Liberal Prime Minister, Asquith, advised the King against this and the royal assent was granted.¹¹³ While the Queen may not of her own initiative refuse the royal assent, the position might be different if ministers advised her to do so, although this advice would have to be defended in Parliament and, depending on the circumstances, could be highly controversial.

2 In law the Queen has unlimited power to appoint whom she pleases to be her ministers. Statutes provide for the payment of salaries to ministers and limit the number of appointments which may be made from the House of Commons.¹¹⁴ There is no rule of law which prevents the monarch appointing to ministerial office a person who is outside Parliament. But all such appointments are made on the advice of the Prime Minister and the principle of ministerial responsibility¹¹⁵ requires that a minister should belong to one or other House of Parliament. If a non-member is appointed a minister, he or she will receive a life peerage: the earlier practice of expecting such a person to enter the Commons at an early by-election (last seen in 1965) has lapsed since no government today willingly causes a by-election to be held in one of its own seats.

3 Although the conduct of a general election is governed by detailed statutory rules,¹¹⁶ no legal rule regulates the conduct of the Prime Minister when the result of the election is

¹⁰⁹ Page 22 below.

¹¹⁰ Chs 3 C, 8 D.

¹¹¹ Royal Assent Act 1967, Regency Acts 1937–53. And see R Brazier (2013) 129 LQR 184.

¹¹² Hearn, *The Government of England*, p 61.

¹¹³ Jennings, *Cabinet Government*, pp 395–400. Cf Brazier, *Constitutional Practice*, pp 193–6.

¹¹⁴ Ch 7 C.

¹¹⁵ Ch 5.

¹¹⁶ Ch 7 D.

known. But by a long-standing conventional rule, the government must have the confidence of a majority in the Commons. When it is clear from election results that the Prime Minister who decided to call the election has been defeated and another party has won, he or she must resign immediately without waiting for the new Parliament to meet.¹¹⁷ Where the result of the election gives no party an overall majority in the Commons, the Prime Minister may continue in office for so long as is necessary to discover whether he or she can govern with the support of other parties or, as happened in May 2010, a coalition may be formed that will command a majority in the Commons.

4 High Court judges in England and Wales hold their offices by statute during good behaviour, subject to a power of removal by the Queen on an address presented to her by both Houses; by statute they are disqualified from membership of the Commons.¹¹⁸ Before appointment as a judge, a lawyer may have been active in party politics (and, although rarely today, may have been an MP before being appointed a judge), but if so a conventional rule requires the judge to sever all links with the party which he or she had formerly supported. This convention is now incorporated in the Guide to Judicial Conduct, which states it to be a specific application of the principle that judges must avoid extra-judicial activities that may give rise to ‘a reasonable apprehension of bias’.¹¹⁹

5 Under the Scotland Act 1998, the Scottish Parliament has power to legislate on many devolved matters, but the Westminster Parliament retains full power to legislate for Scotland. By what is known as the ‘Sewel convention’, that is based on an agreement between the government in London and the Scottish Executive, the Westminster Parliament will not legislate for Scotland on devolved matters except with the agreement of the Scottish Parliament; that agreement is given by a ‘legislative consent motion’ adopted by the Scottish Parliament.¹²⁰

6 The legal opinions which the Law Officers of the Crown (who include the Attorney General and the Solicitor General) give to the government are in law confidential and are protected by legal privilege from being produced as evidence in court proceedings. They may, however, be published by the government or quoted from in Parliament if (as rarely happens) a minister considers it expedient that the Commons should be told of their contents.¹²¹ During the Westland affair in 1986, the Secretary of State for Trade and Industry (Mr Brittan) authorised civil servants to leak to the press extracts from a confidential letter to him from the Solicitor General, without first seeking the latter’s consent. ‘Cover’ but not approval for the leak was sought from the Prime Minister’s Office. Under a storm of criticism, Mr Brittan resigned. This resignation reinforced the authority of the rule which the Law Officers sought to defend.¹²² The code of conduct for ministers now states: ‘The fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority’.¹²³ In a very controversial decision, the Blair government at first refused to publish an opinion given by the Attorney General on 7 March 2003, regarding the legality of an invasion of Iraq by American and British forces. The Attorney General published a brief summary of his opinion a few days later, but the full opinion was eventually published only after extensive extracts had been leaked to the press.¹²⁴

¹¹⁷ Ch 10 B.

¹¹⁸ Chs 7 G, 13 B.

¹¹⁹ See *Guide to Judicial Conduct* (revised version, 2008), para 3.3.

¹²⁰ See HL Deb, 21 July 1998, col 791; Cm 4444 (1999), para 13. Also ch 2 B.

¹²¹ Edwards, *The Law Officers of the Crown*, pp 256–61.

¹²² See Linklater and Leigh, *Not Without Honour*, ch 11; and G Marshall [1986] PL 184.

¹²³ *Ministerial Code* (2010), para 2.13; and see chs 5 C and 11 C.

¹²⁴ The documents are in Sands, *Lawless World*, Apps X, XI.

Many more examples of conventional rules could be given. Such rules develop under every system of government, whether a written constitution exists or not. It is through such rules and practices that the system of government in Britain has developed and continues to evolve. With such a diversity of subject matter, what general characteristics, if any, do these rules possess?

General characteristics¹²⁵

Some long-established conventional rules have great authority and are universally known. Many have developed out of a desire to avoid the formality, explicitness and publicity associated with changes in the law. The role of the monarch in the conduct of government has almost disappeared since the 18th century without a series of statutes removing one royal power after another. In the same way, powers have been acquired by the Prime Minister by operation of convention rather than as the result of legislation. Conventional rules may be used for discreetly managing the internal relationships of government while the outward legal form is left intact.

The informality of such rules is often accentuated by the fact that the rules themselves are not formulated in writing, but this is not always the case. As we have seen, the rule that judges should not undertake political activities is now in a written form. In 2011, the government issued *The Cabinet Manual*, which derived from a similar document prepared previously in New Zealand, as ‘a guide to laws, customs and rules on the operation of government’.¹²⁶ The booklet covers all the machinery of central government in an informative way, but it is essentially descriptive; it does not claim any special authority (it has not been approved by Parliament) and the government reserves the right to change the practices that are described. In reality, some of the practices are too well-established to be changed (for instance, the rule that the Queen’s speech in opening a session of Parliament is written by the government).

The development of unwritten rules is often an evolutionary process that occurs before clear rules of conduct emerge. In retrospect, we can identify when (for instance) a member of the House of Lords last held office as Prime Minister (1902). But because such an occurrence is impossible today, we cannot conclude that this has always been the case since 1902. At any given time, it may be difficult to tell whether practice on a certain matter has hardened into a rule, particularly when the practice is negative in character. Before the Constitutional Reform Act 2005, which took away the judicial role of the Lord Chancellor, there was uncertainty over the extent to which the Lord Chancellor, as a government minister, might properly sit as a judge to decide appeals in the House of Lords.¹²⁷

As with all forms of rules, disputes may arise about the meaning and effect of conventional rules, particularly when they have no definitive written form. The enforcement of many conventions depends essentially on the force of public and political opinion. If many legal rules have an ‘open texture’,¹²⁸ how much more ‘open’ will be the texture of non-legal rules where there is no definite procedure for resolving disputes about their existence and content.

¹²⁵ A full discussion by the Supreme Court of Canada is in *Reference re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1. See also C R Munro (1975) 91 LQR 218, W Maley (1985) 48 MLR 121, R Brazier (1992) 43 NILQ 262 and G Wilson’s postscript to Nolan and Sedley, *The Making and Remaking of the British Constitution*, pp 95–133.

¹²⁶ Cabinet Office, 2011.

¹²⁷ As he did in *Boddington v British Transport Police* [1999] 2 AC 143.

¹²⁸ See Hart, *The Concept of Law*, pp 121–32.

In the past, accounts of constitutional conventions often concentrated on the rules by which powers vested in the monarch came to be exercised by ministers of the Crown. Dicey considered that conventions were ‘rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown’.¹²⁹ It is more accurate to say that conventional rules regulate the conduct of all those holding public office. Different roles in government are played by the monarch, ministers, judges, civil servants and so on. Anyone who would play one of these roles must observe the restraints which apply to that office. In 1936, Edward VIII was not willing to accept these constraints and was required to abdicate.¹³⁰ So, too, a minister who does not observe or does not accept the constraints of his or her office must resign.¹³¹ In 2005, Mr David Blunkett resigned from the Cabinet when it became known that, after leaving a Cabinet post once before, he had breached the clear rule in the *Ministerial Code* that required former ministers to seek advice from an independent committee before they accept business appointments.

Why are conventional rules observed?

Dicey, writing as a lawyer in a period dominated by Austinian jurisprudence according to which laws were observed because they could be enforced by the coercive power of the state, said:

the sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the courts and the law of the land.¹³²

To support this view, Dicey argued that Parliament meets at least once a year because the government would be compelled to act unlawfully if this did not happen. This argument was shown to be much weaker than Dicey had supposed.¹³³ In any event, the rule which the supposed sanction supports is antiquated. Today, Parliament is in session at Westminster for about 34 weeks in the year, interspersed with holidays, the summer recess and the party conferences. During these weeks there is a customary pattern of work to be done, for which purpose it is expected that Parliament will meet. The Provisional Collection of Taxes Act 1968¹³⁴ imposes certain constraints upon the time-table of Parliament, but this in itself does not explain why Parliament meets regularly throughout the year.

It is nearer the mark to say, as did Sir Ivor Jennings, that conventions are observed because of the political difficulties which arise if they are not.¹³⁵ As these rules regulate the conduct of those holding public office, possibly the most acute political difficulty for such a person is to be forced out of office. In a moment of personal crisis, a minister may choose to resign rather than wait to be dismissed by the Prime Minister. However, an explanation merely in terms of political difficulties is inadequate, since not every event which gives rise to political difficulties (for example, an unpopular Bill) is a breach of a conventional rule. The Supreme Court of Canada stated that the main purpose of conventions is to ensure that the legal framework of the constitution is operated in accordance with the prevailing

¹²⁹ Dicey, p 426.

¹³⁰ Ch 10 A.

¹³¹ Mr Heseltine resigned as Defence Secretary in 1986, when he refused to accept a Cabinet limitation on making ministerial statements: see D Oliver and R Austin (1987) 40 *Parliamentary Affairs* 20; and note 122 above.

¹³² Dicey, pp 445–6.

¹³³ See Jennings, *The Law and the Constitution*, pp 128–9.

¹³⁴ Ch 8 B.

¹³⁵ *The Law and the Constitution*, p 134. See J Jaconelli (1999) 19 LS 24 and [2005] CLJ 149.

constitutional values of the period.¹³⁶ On this basis, conventions are observed for the positive reason that they express prevailing constitutional values and for the negative reason of avoiding the difficulties that may follow from ‘unconstitutional’ conduct.

Formulating rules of good government

It is sometimes said that, as conventions derive neither from legislation nor from decisions of the courts, they are essentially uncertain and are not backed up by any obligation. Indeed, so long as the obligations owed by ministers to Parliament or to the Prime Minister rested on shared understandings of what the political game required, those understandings might change and their content could be disputed.

Today, in many areas of government, particularly regarding standards of integrity in public life, written codes of behaviour exist – for the civil service, for ministers, for members of Parliament and for public authorities. These codes may not be authorised by legislation or enforced by the courts, but it would be wrong to claim that the codes lack any authority. An important rule in the *Ministerial Code*¹³⁷ is that ministers should give accurate and truthful information to Parliament, and that ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister. It is up to each House to ensure that this rule is observed.¹³⁸ A minister in breach of the *Ministerial Code* knows that a refusal to resign may lead to a dismissal. Under the same code, ministers must ‘ensure that no conflict arises, or appears to rise, between their public duties and their private interests, financial or otherwise’. Enforcement of this duty is essentially for the Prime Minister, acting in the light of public and parliamentary opinion. Yet if a minister’s decision breached this principle, and if someone adversely affected sought judicial review of the decision, the Administrative Court could if necessary take the code into account. Other rules of ‘good government’ that may have a potentially similar effect are the rules of public accounting,¹³⁹ and the principles of good administration upheld by the Parliamentary Ombudsman,¹⁴⁰ And there is now a statutory basis for the operation of disciplinary rules and procedures affecting various levels of judges.¹⁴¹

What we can identify here is an evolving regulatory process. The starting point is power to direct or oversee an organ of government: the need to regulate the conduct of its members leads in time to the emergence of principles, guidance as to best practice, and ultimately a code of rules. The outcome of this process may be little different in legal terms from a code of practice authorised by statute.¹⁴²

The meaning of ‘unconstitutional’

Where a written constitution ranks as fundamental law, acts which conflict with the constitution may be held unconstitutional and thus illegal. In the United Kingdom, the term ‘unconstitutional’ has no defined content. For Freeman, writing in the 19th century, unconstitutional conduct was conduct contrary to ‘the undoubted principles of the unwritten but universally accepted constitution’.¹⁴³ Where conduct breaches a written constitution, ‘unconstitutional’

¹³⁶ *Reference re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1, 84.

¹³⁷ See ch 11 C. N W Barber, (2009) 125 LQR 294, argues persuasively that the *Ministerial Code* is an instance of how some conventional rules ‘are in the process of crystallisation’ and acquire greater formality.

¹³⁸ The courts may not question the truth of statements in Parliament: Article 9, Bill of Rights; ch 9 A.

¹³⁹ See *R v Foreign Secretary, ex p World Development Movement Ltd* [1995] 1 All ER 611.

¹⁴⁰ See ch 23 D.

¹⁴¹ Constitutional Reform Act 2005, ss 108–121.

¹⁴² The Civil Service Code is now issued under statute, not under the prerogative. See ch 11 D.

¹⁴³ Freeman, *The Growth of the English Constitution*, p 112.

is likely to mean ‘unlawful’; where it breaches unwritten principles of government, the term may mean simply ‘wrong’ or ‘unwise’. The two senses of ‘unconstitutional’ were illustrated in the Canadian controversy of 1981–82, when the Supreme Court of Canada dealt separately with the issues of whether it would be (a) illegal and (b) in breach of convention for the Federal Parliament to adopt resolutions requesting amendments to the constitution which were opposed by eight of the ten provinces.¹⁴⁴ On the first question, the court held (by seven to two) that such action would not be illegal, but on the second question (by six to three) that it would be in breach of convention.

While conduct may be unconstitutional without being illegal, illegal acts are likely to be unconstitutional. British ministers who instigated or covered up criminal offences for political ends would be departing from the standards of behaviour recognised by public opinion, as well as being in breach of criminal law. There is an overriding obligation on government to conduct its affairs according to law. In relation to executive decisions, ‘unconstitutional’ implies that a decision is not merely incorrect in law but also contrary to fundamental principle, for example where a policy of the Inland Revenue involved ‘taxation by self asserted administrative discretion and not by law’.¹⁴⁵ It is in this sense that exemplary damages may in exceptional cases be awarded in the law of tort when public authorities or officials commit wrongful acts that are ‘oppressive, arbitrary or unconstitutional’.¹⁴⁶

However, it may not be easy to determine whether the boundary between constitutional and unconstitutional conduct has been crossed. The political parties may take conflicting views of the propriety of the acts of a government. Unpopular proposals for new legislation are not in themselves unconstitutional, but a Bill which sought to destroy essential features of the electoral system or to give the Cabinet power to overrule decisions of the courts could rightly be described as unconstitutional.

Another difficulty in determining what is constitutional in a given situation is that there may be no relevant precedent. When in 1932 the Cabinet of the National government agreed to differ on a major issue of economic policy, an attack on the government for unconstitutional conduct was met by the rejoinder:

Who can say what is constitutional in the conduct of a National Government? It is a precedent, an experiment, a new practice, to meet a new emergency, a new condition of things.¹⁴⁷

The existence of the coalition government since May 2010 has enabled Conservative and Liberal Democrat ministers to disagree openly about the government’s policies. Within a single-party Cabinet, such open disagreements would be seriously damaging to its authority and would not be acceptable, but they cannot be excluded so long as the partners to the coalition wish to retain their separate identity in preparation for the next general election.

Consequences of a breach of convention

Various consequences may follow the breach of conventional rules. Loss of office or departure from public life is the severest consequence, as when a minister is forced to resign because of an open disagreement with stated government policy. The force of public opinion may compel the offender to acknowledge his or her error. In these instances, the outcome reinforces the established rule. A less serious consequence would be a warning not to act similarly in the future, given by someone in a position to enforce the rule. If no adverse

¹⁴⁴ Note 136 above.

¹⁴⁵ *Vestey v Inland Revenue Commissioners* [1980] AC 1148, 1173.

¹⁴⁶ *Rookes v Barnard* [1964] AC 1129; *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122.

¹⁴⁷ HC Deb, 8 February 1932, col 535 (Mr Baldwin).

consequences follow, the matter becomes more open. It may be expedient that, for instance, the Prime Minister should turn a blind eye to acts of colleagues that breach a rule for ministers: but if such acts are repeatedly condoned, it must be asked whether the rule has been modified or even abandoned.

As constitutional rules often give rise to reciprocal obligations, one consequence of a breach may be to release another office-holder from the normal constraints that would apply. When Ian Smith's Cabinet in 1965 unilaterally and unlawfully declared Rhodesia's independence, the immediate response of the UK government, conveyed through the Governor-General of Rhodesia, was to dismiss the entire Cabinet. This dismissal proved purely nominal. More significantly, the Southern Rhodesia Act 1965 was passed at Westminster to give the British government power to legislate for the domestic affairs of Rhodesia, overriding the previous convention that Westminster would not exercise its sovereignty in such matters except with the agreement of the Rhodesian government.¹⁴⁸

Another consequence may be the passing of legislation to avoid a similar breach in the future. When in 1909 the Lords rejected the Liberal government's Finance Bill, the crisis was resolved only by the Parliament Act 1911, which removed the power of the Lords to veto or delay money Bills. The 1911 Act contained other provisions intended to place the Lords–Commons relationship on a new footing, and these provisions led in turn to new conventions regarding the use by the House of Lords of its residual powers.¹⁴⁹ We will note in the next section what a Westminster committee said in 2006 about the possibility of 'codifying' these conventions.

Should all conventional rules be enacted as law?

In theory, all conventional rules of the constitution could be enacted by Parliament. Written constitutions in the Commonwealth have adopted various means of incorporating conventions: express enactment of the main rules, wholesale adoption by reference to practice in the United Kingdom and so on.¹⁵⁰

If a written constitution were to be drafted for the United Kingdom, difficult decisions on these matters would have to be made. It would, for example, be far from easy to provide for every situation in which the appointment of a new Prime Minister might be required. Merely to declare that ministers are accountable to Parliament for their decisions would not achieve very much if it were left to Parliament to decide how to enforce that accountability. And to make ministerial responsibility enforceable by the courts would be to change its character entirely.¹⁵¹

There is little to be said for attempting to prepare a single document that would include *all* informal constitutional rules: this would be a huge task and it might freeze evolving political practice at an arbitrary moment. But it may be useful to bring together rules on a defined subject matter, like the *Ministerial Code*. And a salutary contribution to promoting the health of democracy was made by the Nolan Committee in 1995,¹⁵² which declared broad standards of integrity and honesty that should be observed in public life, and led to more detailed rules of conduct being applied to many areas of government.

¹⁴⁸ Cf *Madzimbamuto v Lardner-Burke* [1969] AC 645, 723.

¹⁴⁹ Ch 8 D.

¹⁵⁰ de Smith, *The New Commonwealth and its Constitutions*, pp 78–87. For an Australian exercise in restating the conventions, see C Sampford and D Wood [1987] PL 231.

¹⁵¹ In 1996, Sir Richard Scott said that if ministers did not accept the obligations of accountability, a statutory duty requiring them to keep Parliament informed should be enacted and enforced by the courts: [1996] PL 410, 426. And see ch 5.

¹⁵² Cm 2850-I, 1995.

The development of new constitutional rules can be achieved without the formality and precision associated with legislation. Thus, it is now accepted that Parliament should give its approval before a government under the prerogative commits the armed forces to a new military policy abroad, but governments have resisted the argument that this should become a statutory requirement.¹⁵³

In 2006, a joint committee of both Houses examined the conventions relating to the role of the House of Lords in the process of legislation, its remit being to ‘consider the practicality of codifying the key conventions’ in this highly political area. The committee flatly rejected the idea of codification, declaring that since conventions ‘by their very nature, are unenforceable . . . codifying conventions is a contradiction in terms. It would raise issues of definition, reduce flexibility, and inhibit the capacity to evolve. It might create a need for adjudication . . .’¹⁵⁴ However, despite rejecting ‘codification’, the committee stated that it would be useful for the House of Lords to adopt resolutions that would clarify the approach of the House to Bills that the government had promised in its election manifesto and also the need for the House to deal with government business ‘in a reasonable time’.

In a democratic state that recognises executive accountability to Parliament, constitutional obligations exist that are based neither on legislation nor on decisions of the courts. Legal rules, whether stemming from the judges or Parliament, may continue in force long after the original reasons for them are forgotten. The relative informality of many constitutional rules makes for greater flexibility as circumstances change.¹⁵⁵ This does not mean that so long as the original circumstances continue, there is no rule or no obligation. The abdication of Edward VIII in 1936 and the reasons for it have had a continuing influence on later monarchs and their advisers. So, too, the process by which Conservative MPs caused Mrs Thatcher to resign as Prime Minister has implications for later Prime Ministers, however strong their majority in the Commons.

One lesson from previous events is that short-term political expediency may be a temptation that an experienced government ought to resist, and that constitutional principle may provide more reliable guidance. As Freeman wrote in 1872:

Political men may debate whether such and such a course is or is not constitutional, just as lawyers may debate whether such a course is not legal. But the very form of the debate implies that there is a Constitution to be observed, just as in the other case it implies that there is a law to be observed.¹⁵⁶

The motives for human conduct are usually mixed. If we seek to understand the conduct of a monarch, a politician or a judge, we may discover both enlightened self-interest and also a strong perception of constitutional obligation. If that perception is shared by others in a similar position, as well as by informed commentators, it is difficult to explain this without reference to the perceived obligation. The fact that conventional rules may change without formal amendment does not mean that they are irrelevant to political behaviour.

The attitude of the courts

The discussion so far has assumed that conventions are not capable of being enforced through due process of law. If, when a rule has been broken, a remedy is available in the

¹⁵³ See ch 10 D. Also HL Constitution Committee, *Constitutional arrangements for the use of armed force* (HL Paper 46, 2013–14). When the Commons debated military deployment in Syria, the government motion proposing deployment was defeated by 285 to 272. HC Debs, 29 August 2013.

¹⁵⁴ Joint Committee on Conventions, *Conventions of the UK Parliament*, HL Paper 265–1, HC 1212–1, para 279.

¹⁵⁵ On the distinction between law and convention, see Jennings, *Law and the Constitution*, p 132; Mitchell, *Constitutional Law*, pp 34–8; Marshall, *Constitutional Theory*, pp 7–12. Also note 125 above.

¹⁵⁶ *The Growth of the English Constitution*, p 112; cf Loughlin, *Public Law and Political Theory*, p 53.

courts for securing relief or penalising the wrongdoer, this indicates that the rule has the quality of law. Where an informal rule has been broken, no direct remedy is available in the courts. Often the citizen's only recourse will be political action – a complaint to an MP, a letter to the press, or a public demonstration. In view of the context of most conventions, the stress on political or parliamentary remedies is appropriate. Moreover, many conventions, for example those relating to the Cabinet, do not affect an individual closely enough for a judicial remedy to be justified.

It may, however, be necessary for a court to take into account the existence of a conventional rule in making its decision on a legal dispute. This is likely to happen in administrative law, where the courts take judicial notice of the fact that civil servants take decisions in the name of ministers and that ministers may be called to account by Parliament for the decisions. But the courts are aware that such accountability may not provide an effective remedy for the individual.¹⁵⁷

The Crossman diaries case, in which the Attorney General tried to prevent a newspaper publishing the diaries of a former Cabinet minister, is an outstanding illustration of the inter-relation of legal and non-legal rules. In this case, an attempt was made by the Attorney General to prevent the breach of a conventional rule and to establish the existence of a legal obligation. The court held that former Cabinet ministers could be restrained by injunction from publishing confidential information which came to them as ministers: there was a legal duty to respect that confidentiality, and such a ban might be justified in the public interest (for instance, on grounds of national security) and to maintain the secrecy of current Cabinet discussions.¹⁵⁸ But the court did not thereby enforce the entire convention of collective responsibility, and the diaries were allowed to be published; the convention was thus no more than one material factor in establishing the limits of the legal doctrine of confidence. In the different context of the Canadian constitution, by a procedure which permits Canadian courts to give wide-ranging advisory opinions, the Supreme Court of Canada in 1981 gave an opinion on the existence of conventions governing the process of constitutional amendment.¹⁵⁹

Nonetheless, developments in public law have broadened the scope for judicial decisions about the observance of conventions by public authorities. The GCHQ case concerned a decision by the Prime Minister (Mrs Thatcher) that was imposed on the civil servants without prior consultation; on the evidence, there was an invariable practice by government of consulting with civil service unions before changing conditions of employment.¹⁶⁰ If this practice had been viewed merely as a constitutional convention, the unions would have had no enforceable rights. But the House of Lords held that, as a matter of public law, the unions had a 'legitimate expectation' of being consulted that would have been protected,¹⁶¹ had this not been overridden by national security considerations. As we have seen, many forms of ministerial conduct that formerly rested on unwritten rules are now contained in the *Ministerial Code*. Should someone be adversely affected by the breach of a minister's duties under the Code, an argument based on legitimate expectations might succeed that would have been certain to fail if phrased in terms of breach of a constitutional convention.

¹⁵⁷ *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560; p 284 below. And see *R v Environment Secretary, ex p Notts CC* [1986] AC 240.

¹⁵⁸ *A-G v Jonathan Cape Ltd* [1976] QB 752; ch 11 B.

¹⁵⁹ Note 125 above. Cf *Adegbenro v Akintola* [1963] AC 614.

¹⁶⁰ *CCSU v Minister for the Civil Service* [1985] AC 374.

¹⁶¹ See ch 24 B.

Legal and constitutional literature

In English law, no legal textbook has inherent authority as a source of law: the authority of the most eminent text is confined to the extent to which a court considers that it accurately reproduces the law enacted by the legislature or decided by earlier courts. Where a statute has not yet been judicially interpreted or where no court has pronounced on a matter of common law, the opinions of textbook writers and academic authors may be of great value when a case arises for decision.¹⁶² Such writing is also of value when questions of constitutional principle have to be decided. Dicey's *Law of the Constitution* has profoundly influenced many aspects of constitutional law since its publication in 1885. In recent decades the development of administrative law has owed much to the work of the late Professors Stanley de Smith and Sir William Wade.

In Scots law, the position is different as regards the past. A series of eminent legal authors between the mid-17th and early 19th centuries, including Stair, Erskine and Hume, are known as the institutional writers. Their work expounded the private law and criminal law of Scotland in a systematic manner derived from the institutional writers of Roman law: in the absence of other authority, a statement in their works may be taken as settling the law.¹⁶³ The approach of the Scottish legal system was seen in *Burmah Oil Co v Lord Advocate*,¹⁶⁴ relating to the Crown's prerogative: the case having reached the House of Lords on appeal from Scotland, counsel and judges referred extensively to the civilian writers of earlier centuries, in a manner untypical of the English common law.

Legal writers on the constitution are handicapped by the unreality of many of the terms which they must sometimes employ.¹⁶⁵ Statements about the prerogative powers of the Crown may seem to be conferring despotic powers upon the monarch, until it is realised that they concern powers of government exercised by ministers and civil servants.

In some areas of the constitution, books such as Jennings's *Cabinet Government*, Mackintosh's *The British Cabinet*, Hennessy's *Cabinet* and Brazier's *Constitutional Practice* are a valuable record of practice. Since they are founded both on historical sources and on contemporary political accounts, works on British government are seldom unanimous in their description of controversial events (for example, the differing interpretations of the political crisis in 1931 which led to the formation of the National government).¹⁶⁶ Moreover, historical precedents are often of doubtful relevance to present issues, especially with the increasing pace of change in political and governmental practice. There is, however, much more openness about the Cabinet system today than in the past: it is remarkable that, until 1992, even the structure of Cabinet committees and the rules of conduct for ministers were regarded as secret.

In the field of parliamentary procedure, a work with special authority is Erskine May's *Parliamentary Practice*. First published in 1844, this is revised regularly under the editorship of the Clerk to the House of Commons.¹⁶⁷ It is an invaluable guide to the sources of parliamentary procedure, which are found in standing orders, in resolutions of the House and in rulings given by the Speaker and recorded in Hansard.

¹⁶² For recognition of this by the House of Lords, see *Woolwich BS v IRC (No 2)* [1993] AC 70, 163 (Lord Goff).

¹⁶³ See *Stair Memorial Encyclopedia, The Laws of Scotland*, vol 22, pp 212–19.

¹⁶⁴ [1965] AC 75; ch 10 E.

¹⁶⁵ Cf Bagehot, *The English Constitution*, pp 99–100. The point is made strongly by Lady Hale in *R (Quark Fishing Ltd) v Foreign Secretary* [2005] UKHL 57, [2006] 1 AC 529, paras [94, 95].

¹⁶⁶ See Bassett, *1931: Political Crisis*.

¹⁶⁷ See the 24th edn by M Jack, 2011.

Finally, there is an unending flow from government and Parliament of reports by such bodies as royal commissions, departmental committees, committees at Westminster and ministerial inquiries. Some of these reports have concerned important constitutional topics, the most notable in recent years being the first report of the (Nolan) committee on standards in public life, Sir Richard Scott's massive report on the 'arms for Iraq' inquiry, and Lord Butler's inquiry into the use of intelligence about weapons of mass destruction in Iraq.¹⁶⁸ As well as the innumerable reports by select committees of the Commons into the activities of government departments,¹⁶⁹ some committees at Westminster have a special concern for constitutional affairs.¹⁷⁰

¹⁶⁸ Respectively Cm 2850–1, 1995, HC 115 (1995–6) and HC 898 (2003–4).

¹⁶⁹ Ch 8 E.

¹⁷⁰ In particular, in the Commons, the Political and Constitutional Reform Committee and in the Lords, the Constitution Committee.

CHAPTER 2

The structure of the United Kingdom

A. The historic structure

While the external identity of a state is a matter for international law, it is constitutional law which regulates the internal relationships of the various territories which make up the state. In the past, writers often used the word ‘English’ in referring to the constitution. Dicey and Bagehot, for example, wrote about the English constitution when they were dealing with the British constitution or, to be completely accurate, with what was then the constitution of the United Kingdom of Great Britain and Ireland. The active political consciousness of Ireland since the 19th century, and that of Scotland and Wales more recently, means that today constitutional lawyers (like the BBC) must choose their geographical adjectives with care. When in 1969 a royal commission on the constitution was appointed, among its duties was ‘to examine the present functions of the central legislature and government in relation to *the several countries, nations and regions* of the United Kingdom’.¹ Some of the deliberate vagueness of the words in italics was dispelled when the commission’s report referred to England, Scotland, Wales and Northern Ireland as the four countries which make up the United Kingdom.

The United Kingdom has often been described as a unitary state, since there is no structure of federalism. But while the authority of the Crown and Parliament extends to all the United Kingdom, three legal systems exist, each with its own courts and legal profession, namely (a) England and Wales, (b) Scotland and (c) Northern Ireland. A unifying influence is that the Supreme Court for the United Kingdom is the final court of appeal from all three jurisdictions, except for criminal cases in Scotland. When Parliament legislates, it may do so for all the United Kingdom (for example, on income tax or immigration), for Great Britain (for example, on social security or trade union law), or separately for one or more of the countries within the United Kingdom.

Legal definitions

In law, the expression ‘United Kingdom’ means Great Britain and Northern Ireland; it does not include the Channel Islands or the Isle of Man.² For purposes of international relations, however, these islands are represented by the UK government. So are the remaining overseas territories of the United Kingdom, such as Bermuda, the Falkland Islands and Gibraltar.³ The term ‘British Islands’ is defined in the Interpretation Act 1978 as meaning the United Kingdom, the Channel Islands and the Isle of Man. The Republic of Ireland is of course outside the United Kingdom. ‘Great Britain’ refers to England, Scotland and Wales: these became a single kingdom by virtue of the Treaty of Union between England and Scotland in 1707. The Wales and Berwick Act 1746 provided, curiously to our eyes today, that where the

¹ See section B in this chapter.

² Interpretation Act 1978, Sch 1. By the British Nationality Act 1981, s 50 (1), the United Kingdom includes the Channel Islands and the Isle of Man for purposes of nationality law. They are today referred to as Crown Dependencies: see HC 56 (2009–10).

³ For a recent account, see Hendry and Dickson, *British Overseas Territories Law*.

expression ‘England’ was used in an Act of Parliament, this should be taken to include the dominion of Wales and the town of Berwick-upon-Tweed. But by the Welsh Language Act 1967, s 4, references to England in future Acts do not include Wales.⁴

The adjective ‘British’ is used in common speech to refer to matters associated with Great Britain or the United Kingdom. It has no single legal connotation, and the term ‘British law’ is best avoided. In legislation ‘British’ is sometimes used with reference to the United Kingdom, particularly in the context of nationality.⁵

Historical development of the United Kingdom

1. Wales⁶

While there is no need to summarise the lengthy history by which England became a single entity, it is worthwhile briefly to examine the historical formation of the United Kingdom. The military conquest of Wales by the English reached its culmination in 1282, when Prince Llywelyn was killed and his principality passed by conquest to King Edward I of England. Thereafter the principality (which formed only part of what is now Wales) was administered in the name of the Prince, but the rest of Wales was subjected to rule by a variety of local princes and lords; at this period English law was not extended to Wales, where the local customs, laws and language prevailed. From 1471, a Council of Wales and the Marches brought Wales under closer rule from England and the accession of the Tudors did much to complete the process of assimilation. In 1536, an Act of the English Parliament united Wales with England, establishing an administrative system on English lines, requiring the English language to be used, and granting Wales representation in the English Parliament.⁷ In 1543, a system of Welsh courts (the Courts of the Great Sessions) was established to apply the common law of England. The Council of Wales and the Marches was granted a statutory jurisdiction which it exercised until its abolition in 1689. In 1830, the Courts of the Great Sessions were replaced by two new circuits that operated as part of the English court system. After the union with England, Acts of Parliament applying exclusively to Wales were rare.⁸

The mid-19th century saw the beginning of a political and educational revival and occasional Acts of Parliament applying only to Wales began again to be passed.⁹ In 1906 the Welsh Department of the Board of Education was established, the first central department created specifically to administer Welsh affairs.¹⁰ In 1914 was passed the Welsh Church Act, which disestablished and disendowed the Church of England in Wales. From time to time, the identity of Wales was recognised as new administrative arrangements were made.¹¹ In 1964, the post of Secretary of State for Wales was established and the Welsh Office emerged as a department of the UK government. Thereafter administration of Wales through the Welsh Office was to an extent based on the model of the Scottish Office.¹² Wales and England share a common legal system,¹³ but some statutes make special provision for Wales. By the

⁴ On the boundary between England and Wales, see Local Government Act 1972, ss 1(12), 20(7) and 269; Interpretation Act 1978, Sch 1.

⁵ British Nationality Act 1981.

⁶ Kilbrandon Report, ch 5, and Andrews (ed.), *Welsh Studies in Public Law*, specially chs 2 (D Jenkins), 3 (H Carter) and 4 (I L Gowan).

⁷ 27 Hen VIII, c 26. The Statute Law Revision Act 1948 called this the Laws in Wales Act 1535, but recent Welsh writers have called it the Act of Union of 1536: *Welsh Studies*, p 28.

⁸ See e.g. Welsh Bible and Prayer Book Act 1563: *Welsh Studies*, pp 38–9.

⁹ See e.g. Sunday Closing (Wales) Act 1881: *Welsh Studies*, p 48.

¹⁰ *Welsh Studies*, p 49.

¹¹ E.g. creation of the Welsh Economic Planning Council in 1966.

¹² See *Welsh Studies*, ch 4 (I L Gowan); and HLE, vol 8(2), pp 50–4.

¹³ See e.g. Constitutional Reform Act 2005, ss 7–9.

Welsh Language Act 1967, the Welsh language may be spoken in any legal proceedings within Wales, by any person who desires to use it; and Welsh versions of any official document or form may be used. The Welsh Language Act 1993 created the Welsh Language Board, to further the principle in Wales that public authorities and the courts should treat the English and Welsh languages on a basis of equality.

2. Scotland¹⁴

Unlike Wales, Scotland maintained its independence of England during the Middle Ages. Scotland retained its own monarchy and only in the 16th century did the two royal lines come closer with the marriage of Henry VII's daughter, Margaret, to James IV of Scotland. On the death of Elizabeth in 1603, James VI of Scotland, great-great-grandson of Henry VII, became James I of England. This personal union of the two monarchies had the legal consequence that persons born in England and Scotland after the union both owed allegiance to the same King.¹⁵ During the conflicts of the 17th century, there was a brief period under Cromwell when the Commonwealth of England, Scotland and Ireland was subject to a single legislature and executive. But apart from this, and despite the personal union of the monarchies, the constitutions of the two countries were not united and the English and Scottish Parliaments maintained separate existences.¹⁶ Following the ousting of James II/VII in 1688, the Scottish Parliament for the first time asserted independence of the royal will. There followed a contest of wills between the English and Scottish Parliaments, marked by religious disputation and by keen rivalry to profit from expanding ventures in world trade, against a deeply insecure European background. In 1704, the Scottish Parliament went so far as to provide that if Anne died without heirs the Parliament would choose her successor, 'provided always that the same be not successor to the Crown of England', unless in the meantime acceptable conditions of government had been established between the two countries.¹⁷ Following a strong initiative from the English government, the two Parliaments authorised negotiations between two groups of commissioners representing each Parliament but appointed by the Queen. The Treaty of Union was drawn up by them and was approved by Act of each Parliament together with an Act to maintain Presbyterian Church government within Scotland.¹⁸

The Treaty of Union came into effect on 1 May 1707: it united the two kingdoms of England and Scotland into one by the name of Great Britain; the Crown was to descend to the Hanoverian line after Anne's death; there was to be a Parliament of Great Britain including 16 Scottish peers and 45 elected members in the Commons. Extensive financial and economic terms were included in the Treaty. Guarantees were given for the continuance of Scottish private law (art 18) and the Scottish courts (art 19), as well as for the maintenance of the feudal jurisdictions in Scotland and the privileges of the royal burghs in Scotland. The Act to maintain the Presbyterian Church in Scotland was incorporated in the Treaty and it provided for the maintenance of the Scottish universities. The Treaty was described as an incorporating union: it did not establish a federal system and it did not maintain any role for the previous Scottish and English legislatures. But it gave extensive guarantees to Scottish

¹⁴ Kilbrandon Report, ch 4; Donaldson, *Scotland: James V–James VII*; Ferguson, *Scotland, 1689 to the Present*; HLE, vol 8(2), pp 54–72 and Devine, *The Scottish Nation 1700–2000*, pt 1. Also Wicks, *The Evolution of a Constitution*, ch 2.

¹⁵ *Calvin's case* (1608) 7 Co Rep 1a. And see C Russell [2005] PL 336.

¹⁶ See Donaldson, ch 15, and Terry, *The Scottish Parliament 1603–1707*.

¹⁷ APS XI, 136.

¹⁸ Scottish Act: APS XI, 406, English Act: 6 Anne c 11; *Halsbury's Statutes*, vol 10(1), 4th edn, 2013 reissue, p 136. On the making of the union, see Riley, *The Union of England and Scotland* and Devine, ch 1.

institutions. Guarantees of a similar kind for English institutions were not required as it was obvious that the English would be predominant in the new Parliament of Great Britain.¹⁹

In the years after 1707, the new unity of Great Britain was challenged by the Jacobite uprisings in 1715 and 1745 but without success. Various expedients were resorted to for governing Scotland from London and, from time to time, new laws were made for Scotland by the Parliament of Great Britain. Some of these, for example abolition of the Scottish feudal jurisdictions in 1747, were considered in Scotland to be a breach of the Treaty of Union. The Scottish Privy Council having been abolished in 1708, for much of the 18th and 19th centuries the Lord Advocate, the chief law officer in Scotland, occupied the primary role in politics and government, managing affairs in Scotland on behalf of the Crown. In 1885, a post of Secretary for Scotland was created and in 1928 this was raised to Cabinet status with the title of Secretary of State for Scotland. Demands for home rule for Scotland were expressed from the late 19th century onwards: the response of the government was to develop the Scottish Office as the department responsible for Scottish affairs.²⁰ Political demands for a Scottish legislative assembly were firmly resisted, although greater use was made of committees of Scottish MPs in the Commons. After 1707, Parliament often legislated separately for the English and Scottish legal systems. In particular, the structure of private law, the courts, education and local government in Scotland has always differed from the English pattern.

From 1945 to 1999 the Scottish Office comprised four or five departments of the UK government, located in Edinburgh but headed by the Secretary of State for Scotland.²¹ The officials in these departments were members of the British civil service. The functions entrusted to the Scottish Office included agriculture and fisheries, education, health, housing, local government, police, prisons, social services, transport (except road freight and rail) and town planning. Other functions (such as inland revenue, social security, employment and control of immigration) were exercised in Scotland by British or UK departments. As well as having direct responsibility for the Scottish Office, the Secretary of State had an indirect interest in all matters affecting Scotland, enabling a Scottish view to be heard in a wide variety of decisions made in Whitehall.

Although the direction of government remained centralised in the Cabinet, the Scottish Office system enabled much Scottish business to be handled by civil servants resident in Scotland and, latterly, some financial autonomy was conferred on Scottish ministers. On many matters, uniform social and economic standards were maintained throughout Great Britain (for example, financing of higher education) but in some services higher levels of expenditure in Scotland were accepted. One drawback was that subjects requiring separate legislation for Scotland had to compete for a place in Westminster's legislative programme. The political legitimacy of the system was brought into question whenever, as from 1970 to 1974 and from 1979 to 1997, the majority of MPs from Scotland were in the Opposition at Westminster. For instance, despite the fact that only ten Conservative MPs (out of 72) were elected from Scotland at the 1987 election, the Conservative government in 1989 abolished domestic rates for financing local government in favour of the notorious poll tax (community charge), one year earlier in Scotland than in England and Wales.²² Although the Scottish Office system was sometimes referred to as 'administrative devolution', it was in essence a form of direct rule of Scotland by the UK government.

¹⁹ On the legal effect of these guarantees, see ch 3 D and J D Ford (2007) 66 CLJ 106. Also E Wicks (2001) 117 LQR 109; and (same author), *The Evolution of a Constitution*, ch 2.

²⁰ See H J Hanham in Wolfe (ed.) *Government and Nationalism in Scotland*, ch 4.

²¹ See Drucker (ed.) *Scottish Government Yearbook 1980*, ch 8 (M Macdonald and A Redpath); Keating and Midwinter, *The Government of Scotland*; Milne, *The Scottish Office*. And HLE, vol 8(2), pp 69–71.

²² See C M G Himsworth and N C Walker [1987] PL 586 and authorities cited in ch 3, note 168.

3. Northern Ireland²³

The history of Northern Ireland is inextricably linked with that of Ireland itself. As an entity Northern Ireland dates only from the partition of Ireland in the early 1920s. Ireland itself came under English influence in the 12th century when Henry II of England became Lord of Ireland. As settlers came from England, courts modelled on those in England were established. While an Irish Parliament began to develop, some English legislation was extended to Ireland by ordinance of the King of England. In 1494, the Irish Parliament passed the statute known as Poyning's Law, which required that all Irish Bills be submitted to the King and his Council in England; only such Bills as the English Council approved were returned for the Irish Parliament to pass. In 1541, the title of Lord of Ireland was changed to King of Ireland. During the 17th century, Ireland had its share of religious bitterness and conflict. William of Orange defeated the former King James II at the Battle of the Boyne in 1690. To resolve a dispute over the power of the Irish House of Lords to hear appeals from Irish courts, the British Parliament in 1720 declared that it retained full power to legislate for Ireland and deprived the Irish House of Lords of all its judicial powers. Pressure from Ireland for greater autonomy led in 1782 to repeal of the Declaratory Act of 1720 and to the recognition by the British Parliament of the Irish Parliament's legislative independence, although there was no change in the position of the monarchy.²⁴ But legislative independence was short-lived and after the rising of the United Irishmen in 1798, the British government proceeded to a legislative union with Ireland.

The Union agreement between the two Parliaments was broadly similar to the Union with Scotland, although fewer guarantees were given to Ireland than had been given to Scotland. Article 1 created the United Kingdom of Great Britain and Ireland and arts 3 and 4 provided for Irish representation in the Parliament of the United Kingdom. Article 5 provided for the (Protestant) United Church of England and Ireland, whose continuance was stated to be an essential and fundamental part of the Union. Within the enlarged United Kingdom, all trade was to be free; the laws in force in Ireland were to continue, subject to alteration by Parliament from time to time. As with the Scottish Union, the terms of the Union were separately adopted by Act of each of the two Parliaments concerned.²⁵

The Irish Union with Britain was less stable than the Union of 1707. For much of the 19th and 20th centuries, the Irish question was one of the most difficult political and constitutional issues within the United Kingdom. Catholic emancipation in 1829 opened the way for demands for further reform, often associated with militant action and violence. The Irish Church was disestablished in 1869 despite the guarantee for its existence contained in the Act of Union.²⁶ Gladstone's two Home Rule Bills in 1886 and 1893 were both defeated in Parliament, the first in the Commons, the second in the Lords. After the Parliament Act 1911 had taken away the power of the Lords to veto legislation,²⁷ the Government of Ireland Act 1914 became law, but it never came into effect because of the outbreak of world war; its parliamentary history had been marked by the extreme determination of Ulster Protestants not to be separated from Britain.

²³ For the earlier history, see Donaldson, *Some Comparative Aspects of Irish Law*; for the 1920 Constitution, Calvert, *Constitutional Law in Northern Ireland*, and Kilbrandon Report, ch 6. Also Hadfield, *The Constitution of Northern Ireland*; Hadfield (ed.), *Northern Ireland: Politics and the Constitution*; McCrudden, in Jowell and Oliver (eds), *The Changing Constitution*, 3rd edn, ch 12; Morison and Livingstone, *Reshaping Public Power*; HLE, vol 8(2), pp 72–93.

²⁴ Cf *Re Keenan* [1972] 1 QB 533.

²⁵ For the Union with Ireland Act 1800, see *Halsbury's Statutes*, vol 32 (2011 reissue), p 49.

²⁶ *Ex p Canon Selwyn* (1872) 36 JP 54.

²⁷ Ch 8 D.

The Easter rising in Dublin in 1916 was further evidence of nationalist feeling in Catholic Ireland. In 1919, the Sinn Fein movement established a representative assembly for what was proclaimed to be the Irish Republic. In 1920, the Government of Ireland Act was passed by the UK Parliament, providing for two Parliaments in Ireland, one for six northern counties and one for the remainder of Ireland, with cooperation between the two to be maintained by means of a Council of Ireland. The Act was ignored by Sinn Fein and, after a period of bitter civil war, an Anglo-Irish Treaty was formally concluded in 1922. This recognised the existence of the Irish Free State (excluding the six northern counties), on which Westminster conferred what was described as the status of a self-governing dominion within the British Empire.

The dominion status of the Irish Free State proved no more than a transitional stage and the Irish Constitution of 1937 declared that Eire was a sovereign independent state. During the Second World War, Eire was neutral. In 1949, the state became the Republic of Ireland. The UK Parliament at last recognised that Eire had ceased to be part of Her Majesty's dominions although it was, perhaps anomalously, also declared that Ireland was not to be regarded as a foreign country.²⁸

Under the Government of Ireland Act 1920, a scheme of devolution was created for the six counties of Northern Ireland that featured an executive (Governor, Prime Minister and Cabinet) and a legislature of two houses sitting at Stormont.²⁹ Subject to the legislative supremacy of Westminster and except for many matters that were reserved to Westminster, the Stormont Parliament had power 'to make laws for the peace, order and good government of Northern Ireland'.³⁰ If an Act of the Stormont Parliament exceeded its competence (for example, by legislating with respect to the armed forces),³¹ it could be held invalid, but the courts rarely had to interpret the Act of 1920.³² Since the (Protestant) Unionist party was in power throughout the life of Stormont, the Catholic community was in a permanent minority and their accumulated grievances led to serious unrest from 1968 onwards.³³ In 1972, direct rule of Northern Ireland from London was resumed; the 1920 constitution was suspended, and brought to an end one year later.³⁴ There followed nearly three decades in which various attempts were made to establish a new Assembly, elected by proportional representation, and a new form of executive based on the concept of power-sharing. These attempts included the Sunningdale agreement (to which the Dublin government was a party) in 1974, an increase in Northern Ireland's representation at Westminster from 12 to 17 seats,³⁵ and in 1985 the Anglo-Irish Agreement signed by the British and Irish Prime Ministers at Hillsborough.³⁶ The 1985 Agreement led Unionists to protest at the recognition of the Dublin government's interest in Northern Ireland.³⁷

Both direct rule and terrorist activity continued during most of the 1990s. In 1993, the 'Downing Street Declaration' of the two Prime Ministers renewed the assurance that the status of Northern Ireland would not be changed without majority consent and confirmed

²⁸ Ireland Act 1949, ss 1(1) and 2. And see Roberts-Wray, *Commonwealth and Colonial Law*, pp 32–5.

²⁹ See note 23. Also Birrell and Murie, *Policy and Government in Northern Ireland*; Buckland, *The Factory of Grievances*; Lawrence, *The Government of Northern Ireland*, ch 10.

³⁰ Government of Ireland Act 1920, s 4(1).

³¹ See *R (Hume) v Londonderry Justices* [1972] NILR 91; Northern Ireland Act 1972.

³² See *Londonderry CC v McGlade* [1925] NI 47; *Gallagher v Lynn* [1937] AC 863; *Belfast Corporation v OD Cars Ltd* [1960] AC 490.

³³ See Cmnd 532, 1969 (the Cameron report).

³⁴ Cmnd 5259, 1973; Northern Ireland Assembly Act 1973; Northern Ireland Constitution Act 1973.

³⁵ House of Commons (Redistribution of Seats) Act 1979.

³⁶ Cmnd 9690. And see Hadden and Boyle, *The Anglo-Irish Agreement*.

³⁷ For an unsuccessful legal challenge, see *Ex p Molyneux* [1986] 1 WLR 331.

that the British government would not oppose a united Ireland for which there was popular consent.³⁸ But only after the general election in 1997 was a more fruitful initiative taken, in the form of the Belfast (or Good Friday) Agreement reached on 10 April 1998.³⁹ Strand One of the agreement provided for an elected Assembly in Northern Ireland of 108 members. Strand Two created a North/South Ministerial Council, representing the Northern Ireland and Irish governments and with machinery for implementing policies agreed by the Council. Strand Three provided for a British–Irish Council, representing the British and Irish governments, as well as the devolved governments of Northern Ireland, Scotland and Wales, and also a British–Irish Inter-governmental Conference to discuss Northern Ireland matters that were not devolved, such as policing. In this elaborate way, the Good Friday Agreement made possible a scheme of devolution for Northern Ireland.

In the next section, we examine aspects of the current devolution legislation applying to Scotland, Wales and Northern Ireland. Emphasis will be given to structural issues. It is not possible here to describe in any detail how these schemes of devolution are operating.⁴⁰

B. Devolution of government

The Labour government elected in 1997 was committed to securing devolution of government to both Scotland and Wales and to renewing efforts to establish peace and order in Northern Ireland. This commitment caused Westminster in 1998 to legislate separately for Scotland, Wales and Northern Ireland.⁴¹ It is an indication of the asymmetric structure of the United Kingdom that differences between the three schemes are almost greater than the similarities.

Devolution is not a term of art in constitutional law. Unlike federalism, its nature within the United Kingdom depends not on a written constitution, but on the devolution legislation and on the operation of the new structures. In essence, devolution denotes the vesting of legislative and executive powers in elected bodies in Scotland, Wales and Northern Ireland, who have political responsibility for the devolved functions. The legislation specifies the areas of government that are devolved, arrangements for funding, and measures to ensure legal and political accountability. Despite the devolution of many functions, the Parliament and government in London retain authority over all the United Kingdom.

Precursors to devolution in 1998

The schemes of devolution created in 1998 were influenced by the abortive attempt in the 1970s to establish devolved government for Scotland and Wales. In 1973, the Royal Commission on the constitution (the Kilbrandon report)⁴² made proposals for devolution

³⁸ Cm 2442, 1994.

³⁹ *The Belfast Agreement: An Agreement Reached at the Multi-Party talks on Northern Ireland*, Cm 3383, 1998; B Hadfield [1999] PL 599 and D O’Sullivan [2000] Dublin Univ LJ 112. On subsequent events, see Jowell and Oliver (eds), *The Changing Constitution* (6th edn, 2007), ch 10 (C McCrudden).

⁴⁰ See the Constitution Unit’s series on this subject, including Hazell (ed.) *The State of the Nations 2003*; Trench (ed.) *Has Devolution made a Difference?*, *The Dynamics of Devolution* and *The State of the Nations 2008*. Also Hazell and Rawlings, *Devolution, Law Making and the Constitution*, Mitchell, *Devolution in the United Kingdom*; Bogdanor, *Devolution in the United Kingdom*; and symposium ‘Devolution, Ten Years On’ (2010) 63 *Parliamentary Affairs* 85–172.

⁴¹ Scotland Act 1998; Government of Wales Act 1998; and Northern Ireland Act 1998.

⁴² Cmnd 5460, 1973. And see T C Daintith (1974) 37 MLR 544.

that were far from unanimous. For Scotland, eight of the 13 members recommended legislative devolution, but only six members favoured a similar scheme for Wales. Nonetheless, the Labour government decided to create a Parliament for Scotland and an Assembly for Wales. The Scotland Act 1978 and the Wales Act 1978 were eventually enacted, but in referendums in March 1979 the scheme for Wales was heavily defeated; the Scottish scheme was approved by a small majority of those voting, but their number did not satisfy the controversial ‘40 per cent rule’ that had been applied to the referendum to guard against a low turnout of voters. Orders repealing the two Acts were made after the Conservatives won the general election in May 1979.

Between 1979 and 1997, the Conservative government opposed all proposals for devolution within Great Britain, apart from minor changes in Scottish business at Westminster.⁴³ The Labour and Liberal Democrat parties supported the Scottish Constitutional Convention, a non-governmental body endorsed by many groups and organisations in Scotland. In 1995, the Convention proposed a scheme of devolution which sought to improve on the Scotland Act 1978.⁴⁴ In 1997, the Labour and Liberal Democrat parties agreed that there would be an early referendum in Scotland on the Convention’s scheme. For Wales, they favoured an elected assembly to oversee Welsh affairs.

The Referendums (Scotland and Wales) Act 1997 authorised referendums in Scotland and Wales on the government’s schemes for devolution.⁴⁵ In 1997, of the 60 per cent who voted in Scotland, 74 per cent supported the proposed Parliament and 63.5 per cent agreed that the Parliament should be able to vary the basic rate of income tax for Scottish taxpayers. In Wales, only 50 per cent of the electorate voted, of whom no more than 50.3 per cent supported the proposed Assembly. Yet legislation to implement both schemes was enacted and elections to the Parliament and Assembly were held in May 1999.

Devolution to Scotland⁴⁶

Under the Scotland Act 1998,⁴⁷ there is a unicameral Parliament of 129 members: 73 are elected from single-member constituencies by simple majority vote and 56 are elected from regions under an ‘additional member’ system of proportional representation.⁴⁸ Elections are held every four years (s 2), but elections may exceptionally be held at other times, for example if two-thirds of the members vote for a resolution dissolving the Parliament (s 3). The electoral system is less likely than a ‘first past the post’ system to give an absolute majority to a single party. In 2007, the Scottish National Party won the largest number of seats (47) and formed a minority government, but in 2011 the party won an absolute majority of seats (69). Members of the Scottish Parliament (MSPs) are not barred by law from being members of the House of Commons or the Lords, or of the European Parliament.

The Scottish Parliament has a broad power to make laws for Scotland, known as Acts of the Scottish Parliament (s 28(1)), but this power does not extend to matters reserved to Westminster. ‘Reserved matters’ include the Crown, the Union, foreign affairs, the civil

⁴³ See HC S0 94A–94H (1995); HC Deb, 29 November 1995, col 1228, and 19 December 1995, col 1410.

⁴⁴ *Scotland’s Parliament, Scotland’s Right* (1995); J McFadden [1995] PL 215; D Millar (1997) 1 Edin LR 260.

⁴⁵ *Scotland’s Parliament*, Cm 3658, 1997; and *A Voice for Wales*, Cm 3718, 1997.

⁴⁶ Himsworth and Munro, *The Scotland Act 1998*; Jowell and Oliver (eds), *The Changing Constitution* (6th edn, 2007), ch 9 (B K Winetrobe); Himsworth and O’Neill, *Scotland’s Constitution: Law and Practice*, chs 4–6.

⁴⁷ And see the Scotland Act 2012, which gave effect to proposals by the Calman commission in its report, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (2010); and below pp 39–40.

⁴⁸ The size of the Parliament was originally linked to the number of Westminster MPs from Scotland, but that link was removed by the Scottish Parliamentary Constituencies Act 2004.

service, defence and the armed forces, and a long list of domestic matters under 11 headings, including finance and the economy, aspects of home affairs (such as misuse of drugs, data protection and immigration), trade and industry, energy, social security, regulation of the professions, employment, broadcasting and equal opportunities.⁴⁹ The Act provides for the list of reserved matters to be amended by an Order in Council, made with the approval of the Houses at Westminster and the Scottish Parliament (s 30(2)): this power was used in 2013 to enable the Scottish Parliament to legislate for a referendum on the country's independence.⁵⁰

If the Scottish Parliament were to legislate on a 'reserved matter', that provision would not be law (s 29(1)). Other limits on its competence are that a Scottish Act may not affect the law of any country outside Scotland and may not conflict with European Community law or with the European Convention on Human Rights (s 29(2)(a), (d)).

By Part 2 of the 1998 Act, the Scottish Government (as the 2012 Act re-named the Scottish Executive) comprises the First Minister, other ministers and the law officers (the Lord Advocate and the Solicitor-General for Scotland) (s 44). The First Minister is appointed by the Queen after having been nominated by the Parliament (ss 45, 46). The First Minister and other ministers must be MSPs and the nomination of other ministers must be approved by the Parliament before their formal appointment (s 47). All ministers must resign if the Parliament resolves that the Government no longer enjoys its confidence (ss 45(2), 47(3)(c), 48(2)). The Government is thus accountable to the Parliament, which may scrutinise acts of the ministers and civil servants who staff the Scottish Administration (s 51). For this purpose, the Parliament has a system of committees, dealing with all aspects of the work of the Government.

The Government's powers are based on a transfer of functions from the UK government. In general, these functions relate to matters within the Parliament's legislative competence. Like the Parliament, the Government may not take decisions that are contrary to Community law or conflict with Convention rights (s 57).

The bulk of the income of the Scottish Administration comes in a block grant from Westminster (Parts 3 and 4 of the 1998 Act). The grant is calculated on the basis of the 'Barnett formula', which produces a sum that is treated as Scotland's share of public expenditure.⁵¹ Within that total, the Scottish Government may set its priorities for expenditure: thus it has adopted its own policy on university tuition fees and on personal care for the elderly.⁵² Under the 1998 Act, the Scottish authorities had a limited power, which was not exercised, to vary the basic rate of income tax paid by Scottish taxpayers⁵³ on their earned income by 3 per cent. By the Act of 2012, power in respect of income tax was enlarged to 10 per cent, and power was also devolved regarding stamp duty for property transactions and landfill charges.

While it is inherent in the devolution of powers that the Scottish authorities should make their own decisions (one of the most controversial being the decision by the Minister of Justice in 2009 to permit a Libyan prisoner convicted of complicity in the Lockerbie air-disaster to return to Libya), there are safeguards against decisions that would be outside the devolved

⁴⁹ Schedule 5 to the 1998 Act contains general and specific reservations; detailed provisions modify the effect of the general headings. See Himsworth and O'Neill, pp 119–40.

⁵⁰ The Scotland Act 1998 (Modification of Schedule 5) Order 2013, SI 2013 No 242.

⁵¹ The formula, dating from 1979, is used to calculate a population-based proportion of future expenditure for each of Scotland, Wales and Northern Ireland, reflecting proposed changes in spending on comparable services in England: see HM Treasury, *Funding the Scottish Parliament, National Assembly for Wales and the Northern Ireland Assembly* (2000); Trench (ed.), *The Dynamics of Devolution*, ch 8 (D Bell and A Christie); House of Commons Library Research Paper 07/91, *The Barnett Formula* (2007) and *Serving Scotland better: Scotland and the UK in the 21st Century*, 2009 (the Calman report), ch 3.

⁵² On the latter, see Hazell (ed.), *The State of the Nations 2003*, ch 9 (R Simeon).

⁵³ For the meaning of Scottish taxpayers, see Scotland Act 1998, s 75.

powers. When a Bill is introduced, the minister and the presiding officer must separately consider whether it is within the competence of the Parliament (s 31); the Supreme Court for the United Kingdom may be asked to decide whether a Bill is within competence (s 33). The 1998 Act also provides for the decision of ‘devolution issues’ (Schedule 6). Such issues arise when a Scottish Act or an executive decision is challenged on the ground that it is not within the devolved powers, including questions as to compatibility with the European Convention on Human Rights. A devolution issue that arises in any court or tribunal may be referred to the Court of Session or the High Court of Justiciary; a further appeal may lie to the Supreme Court. In such cases, interpretation of the Acts of 1998 and 2012 has constitutional significance.⁵⁴ Since these Acts impose many limitations on the powers of the Scottish authorities, the range of questions that may have to be decided is potentially very wide. Many cases have concerned the question of compliance with the European Convention on Human Rights.⁵⁵ Relatively few cases have arisen from other provisions of the 1998 Act.⁵⁶ In 2011, in *AXA General Insurance Ltd, Petitioners*,⁵⁷ insurance companies challenged the validity of the Damages (Asbestos-related conditions) (Scotland) Act 2009: the Act made it easier for those claiming for personal injuries caused by exposure to asbestos at work to claim compensation from the former employers’ insurers. The companies claimed unsuccessfully both that the legislation deprived them retrospectively of their possessions (thus breaching ECHR, First Protocol, art 1) and, relying on common law grounds of judicial review,⁵⁸ that the Act was irrational, unreasonable or arbitrary. If reliance on those common law grounds had succeeded, this would have been a serious limitation on the authority of the Parliament imposed by the judges. The Supreme Court held that while the 1998 Act had not excluded the supervisory jurisdiction of the courts, it would have to be a very extreme case in which review at common law should be applied to the work of a democratically elected legislature.

The Edinburgh Parliament has been an active legislature, no fewer than 134 Acts being enacted between 1999 and 2008.⁵⁹ Moreover, Westminster retains power to legislate for Scotland (s 28(7)) and it has done so frequently. On devolved matters, there is a firm convention, known as the ‘Sewel convention’, that Westminster should not legislate on a devolved matter without the prior consent of the Scottish Parliament: the consent is given in the form of a ‘legislative consent motion’. This use of Westminster’s continuing supremacy has sometimes been controversial but is often convenient.⁶⁰

Critics of devolution have argued that it is an essentially unstable structure that creates the risk of conferring too little autonomy to be worthwhile or of fuelling a desire for ever increasing powers. In 2009, a cross-party commission chaired by Sir Kenneth Calman

⁵⁴ See P Craig and M Walters [1999] PL 274, S Tierney (2001) 5 Edin LR 49, Himsworth and O’Neill, *Scotland’s Constitution: Law and Practice*, pp 395–410.

⁵⁵ These include *Brown v Stott* [2003] 1 AC 681 (car owner’s duty to inform police of identity of driver); *R v Lord Advocate* [2002] UKPC D3, [2004] 1 AC 462 (duty of court to stay delayed prosecution); *Cadder v Lord Advocate* [2010] UKSC 43, [2010] 1 WLR 2601 (police questioning of suspect in absence of lawyer). And see Reed and Murdoch, *A Guide to Human Rights Law in Scotland*.

⁵⁶ But see *Whaley v Lord Watson* 2000 SC 340, *Adams v Scottish Ministers* 2004 SC 665 and *Martin v Lord Advocate* [2010] UKSC 10, 2010 SLT 412. On the difficult overlap between devolution issues and claims under the Human Rights Act, see *Somerville v Scottish Ministers* [2007] UKHL 44, [2007] 1 WLR 2734; and now Scotland Act 2012, s 14 and part 4. See also *H v Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413 and *Kinloch v HM Advocate*, [2012] UKSC 62, [2013] 2 AC 93.

⁵⁷ [2011] UKSC 46, 2011 SLT 1061. See C Himsworth [2012] PL 205; A Page 2012 *Juridical Review* 225; and A McHarg (2012) 16 Edin LR 224.

⁵⁸ See chapter 24.

⁵⁹ And see Sutherland (ed), *Law Making and the Scottish Parliament*.

⁶⁰ For the ‘Sewel convention’, see Himsworth and O’Neill, pp 140–3; *Memorandum of Understanding* (Cm 4444, 1999), para 13; A Page and A Batey [2002] PL 501; Hazell and Rawlings, ch 2 (B Winetrobe).

reported on the need for changes in the system of Scottish devolution.⁶¹ The report concluded that devolution had been a ‘real success’ and that it was to Scotland’s advantage that the United Kingdom, despite the asymmetry of its union structure, enjoyed a highly integrated economy. The success of the SNP in the 2011 elections opened the way for many Calman recommendations to be adopted in the Scotland Act 2012, but at the same time Scottish Ministers began to prepare for a referendum on whether devolution should give way to independence.⁶² The Scotland Act 1998 had reserved from devolution the power to legislate on ‘aspects of the constitution’, including ‘the Union of the Kingdoms of Scotland and England’.⁶³ Despite the claim of Scottish Ministers that this did not prevent them holding an advisory referendum, the better view was that an independence referendum would be lawful only if authorised by a UK Act or if the list of reserved matters was amended to provide for this.⁶⁴ In 2012, the two governments reached an agreement on arrangements for a referendum.⁶⁵ An Order in Council was then made under s 30(2) of the Scotland Act 1998 to authorise the Scottish Parliament to legislate on an independence referendum during 2014.⁶⁶ The referendum was to be conducted in accordance with the Political Parties, Elections and Referendums Act 2000. The date for the poll was set at 18 September 2014, with a single question on the ballot paper being ‘Should Scotland be an independent country?’ The legislation is limited to the holding of the referendum. The Scottish Government has declared that if the majority vote is for independence, 24 March 2016 will allow sufficient time for the further legislation that will be necessary before independence is achieved.⁶⁷

The Government of Wales Act 2006⁶⁸

Although both schemes were created in 1998, devolution to Wales differed markedly from devolution to Scotland. Under the opaque and bureaucratic Government of Wales Act 1998, the National Assembly for Wales had no general power to make laws and was seen as a kind of executive body, limited to making secondary (or delegated) legislation by transfer from the Secretary of State for Wales. In composition, the Assembly was and remains a smaller version of the Scottish Parliament: 40 members are elected in single-member constituencies by simple majority, and 20 members by regions under proportional representation. In 2004, a commission appointed by the Assembly, chaired by Lord Richard, recommended that the Assembly should have a broad power to make laws for Wales, that there should be a clear distinction between legislative and executive powers, and that the Assembly should have 80 members, elected by single transferable vote.⁶⁹ In response,⁷⁰ the government agreed that future legislation at Westminster would give greater scope for the Assembly’s legislative powers, by using ‘framework’ clauses applying to Wales.⁷¹ However, it rejected both the

⁶¹ See *Serving Scotland Better: Scotland and the UK in the 21st Century*, June 2009.

⁶² See *Scotland’s Constitutional Future* (Cm 8203) and Scottish Ministers, *Your Scotland, Your Referendum* (January 2012).

⁶³ Scotland Act 1998, s 30 and schedule 5, para 1 (b).

⁶⁴ See HL Paper 263, 2010–12; HL Paper 62, 2012–13.

⁶⁵ Agreement between the UK and Scottish Governments on a referendum on independence for Scotland, 15 October 2012.

⁶⁶ See note 50 above.

⁶⁷ See *Scotland’s Future: Your Guide to an Independent Scotland* (November, 2013).

⁶⁸ See Jowell and Oliver (eds), *The Changing Constitution* (6th edn), ch 11 (B Hadfield); A Trench [2006] PL 687. On the Government of Wales Act 1998, see Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution*.

⁶⁹ Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, 2004.

⁷⁰ *Better Governance for Wales*, Cm 6582, 2005. See R Rawlings [2005] PL 824.

⁷¹ E.g. National Health Service Redress Act 2006, s 17.

idea of a larger Assembly and the proposal that the Assembly should have a general power to make laws.

What emerged in 2006 was a second Government of Wales Act, re-enacting much of the 1998 Act but containing new provisions. Assembly elections are held every four years, except that an extraordinary election may be held if at least two-thirds of all members vote for it, or if the Assembly fails to nominate a First Minister within the requisite time (2006 Act, s 5). No person may be nominated on a party's regional list of candidates who has been nominated for election in an Assembly constituency (s 7). The Assembly has a broad power to appoint committees and sub-committees (s 28). Since the Assembly under the 2006 Act initially had no general legislative power, the Act enabled it to be consulted each year before the UK government settled its legislative programme (s 33), and some laws were made in this way to meet Welsh needs.⁷²

Executive powers are vested in the Welsh Ministers: the 'Welsh Assembly Government' (s 45) comprises the First Minister, the Welsh Ministers, deputy ministers, and the Counsel General to the Welsh Government, who is legal adviser to ministers and the Assembly (s 49). The Government's functions include the promotion of economic, social and environmental well-being (s 60), and the support of culture (including the arts, libraries, sport and the Welsh language) (s 61). The Assembly may scrutinise the activities of Welsh public bodies.

The 2006 Act provided for two further phases of devolution. Part 3 of the Act empowered the Assembly (in the next phase of devolution) to enact 'Assembly Measures', provided that they dealt with matters related to one or more of 20 fields of government listed in Schedule 5. These fields included agriculture and forestry, culture, education, health and social services, local government, tourism, transport and the voluntary sector. The conferment of powers under Part 3 had to be authorised by the making of 'Legislative Competence Orders' (s 93),⁷³ but this cumbersome phase was short-lived. Part 4 of the Act provided for the granting of wider legislative powers to the Assembly, in a manner resembling the position in Scotland, with reference to the 20 subject fields (and accompanying restrictions) listed in Schedule 7, but before Part 4 could have effect, a national referendum had to be held. In March 2011, in a referendum in Wales, 63 per cent of those who voted (on a turnout of 35 per cent) favoured conferring on the Assembly the extra powers in question. This result enabled Part 4 of the Act to be brought into operation. Accordingly, legislation by the Assembly is now contained in Bills, which when approved become 'Acts of the Assembly'. The first legislation to be enacted by this procedure (the Local Government Byelaws (Wales) Bill) was referred to the Supreme Court, when it was argued that a simpler procedure for making local byelaws in Wales proposed in the Bill could not dispense with the need for certain byelaws to be confirmed by the Secretary of State for Wales. The argument was rejected by the Court, and the validity of the Bill was upheld.⁷⁴

Despite the widening of its powers in 2011, the Assembly remains subject to many restrictions on its competence, for instance it may not breach international or European obligations of the United Kingdom, and may not act inconsistently with the Human Rights Act 1998. As with Scotland, the Assembly is primarily funded by an annual block grant from Westminster calculated with reference to the Barnett formula, and within this figure it can set its expenditure priorities. Unlike the Scottish Parliament, the Assembly has no power to vary the basic rate of income tax, but in 2012 a cross-party commission (known as the Silk Commission) recommended the conferring of new financial powers on the Assembly, including (subject to a referendum) power to impose income tax on Welsh taxpayers, borrowing powers, and

⁷² E.g. Public Services Ombudsman (Wales) Act 2005 and Commissioner for Older People (Wales) Act 2006.

⁷³ See e.g. National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010: SI 2010/1838. For criticism of this complex procedure, see HL Paper 159 (2008–09).

⁷⁴ *A G's Reference, re Local Government Byelaws (Wales) Bill 2012* [2012] UKSC 53, [2013] 1 All ER 1013.

power over landfill charges and stamp duty on property transactions.⁷⁵ In reply, the UK government accepted that financial provisions for Wales should be broadly the same as for Scotland.⁷⁶

The Northern Ireland Act 1998

The Belfast Agreement was endorsed on 22 May 1998 by separate referendums in both parts of Ireland and elections for the new Assembly were held in June 1998. By the Northern Ireland Act 1998, Northern Ireland will remain part of the United Kingdom until a majority of the electorate, voting in a poll held for the purpose, decide to the contrary (s 1); in that event, the Secretary of State shall lay proposals to give effect to the majority wish before the Westminster Parliament. The Assembly is, in principle, elected every four years. The electoral system is that of the single transferable vote, with each of the 18 Westminster constituencies returning six members. A complex scheme of power sharing between the main parties provides for key decisions to be taken on a cross-community basis, either by parallel consent of a majority of unionist and nationalist designations or by a weighted majority (60 per cent) of members present and voting, including at least 40 per cent of unionist and nationalist designations. These key decisions include election of the Assembly chair, the First Minister and the Deputy First Minister.

Certain matters (such as the Crown, defence, immigration, elections and political parties) are *excepted* from devolution (s 4 and Sch 2). Other matters (including civil aviation, law, emergency powers, telecommunications, consumer protection and data protection) are *reserved* from devolution (s 4 and Sch 3). *Transferred* matters, which fall within the scheme of devolution, are neither excepted nor reserved. The Assembly may make laws on transferred matters, but this does not affect the power of Westminster to make laws for Northern Ireland (s 5). The Assembly may not adopt measures that would extend outside Northern Ireland, would be incompatible with the Human Rights Act 1998 or European Community law or would discriminate on grounds of religious belief or political opinion (s 6). As in Scotland, there are safeguards against the Assembly exceeding its competence (ss 11, 14) and provision for the decision of ‘devolution issues’ (s 79, Sch 10).

The Executive Committee of the Assembly comprises the First Minister, the Deputy First Minister and other ministers appointed by a formula that divides ministries between the main parties on the basis of voting at the previous election. All ministers must take the prescribed pledge of office.⁷⁷

The 1998 Act gives effect to other aspects of the Belfast Agreement, such as the North/South Ministerial Council and the British–Irish Council and the appointment in Northern Ireland of a Human Rights Commission (ss 68–70) and an Equality Commission (s 73). All public authorities must promote equality of opportunity (s 75) and it is unlawful for a public authority to discriminate on grounds of religious belief or political opinion (s 76).

The progress of devolution was impeded by continuing difficulties in the peace process, in particular as regards decommissioning of arms and other aspects of the security situation. For many months between 2000 and 2007, the Assembly was suspended while Northern Ireland returned to direct rule by the Secretary of State. At elections in 2003 and 2007, the Democratic Unionist Party and Sinn Fein were the leading parties from the two communities. Disagreements between them after 2003 prevented the Assembly from resuming its operations, and UK ministers became responsible for all Northern Ireland departments.

⁷⁵ *Empowerment and Responsibility: Financial Powers to Strengthen Wales*, November 2012.

⁷⁶ *Empowerment and Responsibility: Devolving Financial Powers to Wales*, November 2013.

⁷⁷ See Northern Ireland Act 2000.

In July 2005, the Provisional IRA announced the end of its armed campaign and the independent international commission on decommissioning (formed in 1997) reported that the Provisional IRA had decommissioned all its weapons. In October 2006, the St Andrews Agreement was concluded between the two governments and the major parties in Northern Ireland, and a time-table was set for elections, the formation of a four-party power-sharing government, and the return of devolution.⁷⁸ Devolved government under the (amended) Northern Ireland Act 1998 was restored in May 2007, with the Northern Ireland Executive Committee comprising the First Minister, the Deputy First Minister and ten departmental ministers. Debate continued into 2010 over devolving the sensitive function of policing and justice.⁷⁹ Agreement having at last been reached between the representatives of the two communities, policing and justice were devolved in April 2010.⁸⁰ A Minister of Justice with responsibility for policing and justice was elected by a cross-community vote in the Assembly; but the direction and control of the Police Service of Northern Ireland remain with the chief constable of Northern Ireland. Notwithstanding these governmental changes, during 2013 there continued to be difficulties over the control of sectarian parades and the flying of the Union flag from public buildings.

Conclusion

It might be said that three of the four countries that make up the United Kingdom each now has a written constitution. But each of these ‘constitutions’ gives no more than a partial account of the government of these countries. For one thing, their operation cannot be understood without reference to the elaborate array of ‘Concordats’, namely, the agreements reached between Whitehall departments and the devolved executives as to how the two levels of government should relate to each other.⁸¹ Important functions are still exercised by the Westminster Parliament and by Whitehall. The Secretaries of State for the three countries remain in being, albeit with far fewer functions than before devolution, and the activities of each Secretary of State are overseen by a select committee of the Commons. Westminster retains power to alter the present arrangements, but use of that power cannot ignore the politics of devolution.

Devolution within the United Kingdom is indeed asymmetrical. The position in England presents a sharp contrast to Scotland, Wales and Northern Ireland. With the possible exception of Greater London, which enjoys a form of regional government in transport, economic and environmental matters,⁸² democratic decision-making has not been devolved to a regional level. In 1994 Whitehall divided England outside London into eight regions for official purposes,⁸³ but in 2004, in a referendum in north-east England held by postal ballot, 78 per cent of those voting rejected the proposal for a regional assembly of 25–35 members elected by proportional representation: the scale of the defeat ensured that the referendum would be the last of its kind.⁸⁴

⁷⁸ Northern Ireland Act 2006, Northern Ireland (Miscellaneous Provisions) Act 2006 and Northern Ireland (St Andrews Agreement) Act 2007.

⁷⁹ See Northern Ireland Act 2009, and the Hillsborough Castle Agreement of 5 February 2010.

⁸⁰ Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010; SI 2010/976.

⁸¹ See *Memorandum of Understanding and Supplementary Agreements*, Cm 4444, 1999, and works cited in note 40 above. Also R Rawlings (2000) 106 LQR 257 and J Poirier [2001] PL 134.

⁸² Trench (ed.) *Has Devolution made a Difference?*, ch 6 (M Sandford) and *The Dynamics of Devolution*, ch 5 (M Sandford and P Hetherington).

⁸³ Regional Development Agencies Act 1998.

⁸⁴ See Cm 5511, 2002 and the Regional Assemblies (Preparations) Act 2003. See Trench (ed.), *The Dynamics of Devolution*, ch 5 (M Sandford and P Hetherington).

Nor has an answer been found to the ‘West Lothian question’ or, as it is sometimes called, the ‘English question’.⁸⁵ This question takes the form of asking why Scottish MPs may debate and (more importantly) vote at Westminster on, for instance, issues about the NHS, housing policy or education in England, when English MPs are barred from considering these matters in Scotland (or Wales or Northern Ireland, as the case may be). The short answer is that Westminster serves both as the Parliament for the United Kingdom and for England: but how can it best fulfil these two functions?

In 2013, an independent commission, chaired by Sir William McKay, a former Clerk to the Commons, failed to find a clear solution to this question.⁸⁶ In examining the consequences of devolution for the Commons, the commission considered how in the light of powers devolved to Scotland, Northern Ireland and Wales the House might best deal with legislation that affected only England. The commission formulated the principle that decisions at the UK level that had a separate effect on England should normally be taken only with the consent of a majority of MPs for England: the principle should be adopted by resolution of the Commons, but the right of the whole House to decide on legislation should remain. The commission rejected the idea that MPs elected for constituencies that were not directly affected by a Bill should be barred from voting on it. The underlying political difficulty is that a government with a majority in the whole House may not have a majority if MPs from devolved areas are barred from voting on certain topics.

Is devolution leading to the break-up of the United Kingdom, as some of its opponents predicted?⁸⁷ The position of Northern Ireland must be set on one side, since there is general agreement that the future of the six counties must be decided by their people. The SNP’s campaign for Scottish independence has plainly been assisted by the party’s success in elections for the Edinburgh Parliament, but it cannot be assumed that the referendum in September 2014 will support independence. While in neither Scotland nor Wales will devolution be put into reverse, one effect has been increased complexity in the making of statute law, and in the administrative structure that underlies the political process.⁸⁸ One important aspect of devolution is the developing network of governmental relationships, both within the United Kingdom and extending into Europe.⁸⁹ At one time devolution was defined as involving ‘the delegation of central government powers without the relinquishment of sovereignty’.⁹⁰ That conclusion is not sustainable today except on a simple view of sovereignty that leaves out of account both Europe and the new centres of political power in the United Kingdom.⁹¹

⁸⁵ B Hadfield [2005] PL 288 and in Jowell and Oliver (note 68 above); Hazell (ed.), *The English Question*.

⁸⁶ Report, *The Consequences of Devolution for the House of Commons* (May 2013).

⁸⁷ E.g. Dalvell, *Devolution, the End of Britain?*

⁸⁸ See HL Paper 192 (2003–4), App 1 (C M G Himsworth); Hazell and Rawlings, *Devolution, Law Making and the Constitution*. Also A Ross and H Nash [2009] PL 564 (examining the ways in which EU environmental law is implemented within Great Britain).

⁸⁹ See *Devolution: Inter-institutional Relations in the United Kingdom*, (HL Paper 28, 2002–3); and Trench (ed.) *The Dynamics of Devolution*, ch 7 (A Trench) and ch 9 (C Jeffery). Also R Rawlings, ‘Cymru yn Ewrop: Wales in Europe’, in Craig and Rawlings (eds), *Law and Administration in Europe*, ch 13.

⁹⁰ Kilbrandon Report, para 543.

⁹¹ MacCormick, *Questioning Sovereignty*, p 74, says in respect of Scotland: ‘The unitary sovereignty of the incorporating union agreed in 1707 seems to be at best in its twilight.’

CHAPTER 3

Parliamentary supremacy

It is a fundamental principle of democratic government that there should be an elected assembly representing the people, and that this assembly should have authority to make laws that apply to the entire population. But there is no universal agreement that such an assembly should have an absolute and unlimited power to make laws of whatever kind and subject matter. In many national constitutions both the existence of the assembly and the extent of its powers are set out in the constitution itself. Without such a constitutional text, are there limits on legislative authority and, if so, where may they be found? And should measures enacted by Parliament prevail over all other rules of law?

This chapter examines the extent of the legislative authority exercised today by the Westminster Parliament. We first consider briefly the stages by which that authority was established, since in the absence of a written constitution, the historical background to the authority of Parliament has great significance.

A. The growth of the legislative authority of Parliament

The year 2015 will mark the 750th anniversary of the Parliament assembled by Simon de Montfort in 1265 to give counsel to Henry III, which for the first time included representatives of the shires, cities and boroughs of England as well as the feudal barons. But to become a legislature in a modern sense, the enlarged royal council had to acquire a regular existence as a body with power to legislate and with settled procedure; and the measures which emerged from that procedure had to be accepted as law. By 1485, it was accepted that measures that had been considered by Parliament and enacted by the monarch could change the common law. With the English Reformation, there disappeared the belief that Parliament could not affect the authority of the Roman Church. Henry VIII and Elizabeth I made the Crown of England supreme over all persons and causes and used the English Parliament to attain this end.

Although wide authority was attributed to acts of the ‘King in Parliament’, two views were held as to the justification for this.¹ The royalist view grounded legislative authority in the King, acting as Sovereign in exercise of divine right, but with the approval of Lords and Commons. By contrast, the parliamentarian view stressed the role of the two Houses, acting on behalf of the nobility and the common people, in exercising supreme authority with the monarch. There continued to be a view that certain natural laws could not be changed, even by the King in Parliament.² To set against this view, there was much authority in the law reports and in political writing which indicated that the courts had no power to review the validity of Acts of Parliament.³

¹ For historical attitudes to the authority of Parliament, see Goldsworthy, *The Sovereignty of Parliament*, ch 4. Also P Craig [2000] PL 211.

² See *Bonham’s case* (1610) 8 Co Rep 114a, quoted below in text at note 64.

³ Goldsworthy (passim); and Gough, *Fundamental Law in English Constitutional History*.

The struggle for supremacy

Legislative supremacy involves not only the right to change the law but also that no one else should have that right. At the heart of the conflicts in the 17th century that led to the civil war, Charles I's execution, Cromwell's Protectorate and the restoration of the monarchy in 1660, lay the question whether the King could use his prerogative powers to govern without Parliament. In 1603, the King's prerogatives were undefined. Despite the existence of Parliament and the common law courts, the King, through his Council, exercised not only full executive powers but also a residue of legislative and judicial power. Acts of Parliament which sought to take away any of the 'inseparable' prerogatives of the Crown were considered invalid.⁴ Four instances of the struggle for authority between Crown and Parliament may be mentioned.

1. Ordinances and proclamations

A clear distinction between statutes of the English Parliament and ordinances of the King in Council was lacking long after the end of the 13th century. The Statute of Proclamations 1539 declared that Henry VIII had wide powers of legislating by proclamation without reference to Parliament. This statute did not give the King and Council power to legislate, but sought to clarify the position of the authority possessed by proclamations. It safeguarded the common law, existing Acts of Parliament and rights of property, and prohibited infliction of the death penalty for breach of a proclamation.⁵ Its chief practical purpose was to create machinery to enforce proclamations.⁶ Despite repeal of the statute in 1547, Mary and Elizabeth continued to resort to proclamations. The judicial powers of the Council, in particular of the Court of Star Chamber, were available to enforce proclamations. The scope of the royal prerogative to legislate remained undefined. James I made full use of this power, and in 1611 Chief Justice Coke was consulted by the Council, along with three of his brother judges, about the legality of proclamations. The resulting opinion is to be found in the *Case of Proclamations*:

- (1) The King by his proclamation cannot create any offence which was not one before; for then he might alter the law of the land in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment.
- (2) The King hath no prerogative but what the law of the land allows him.
- (3) But the King for the prevention of offences may by proclamation admonish his subjects that they keep the laws and do not offend them upon punishment to be inflicted by law; the neglect of such proclamation aggravates the offence.
- (4) If an offence be not punishable in the Star Chamber, the prohibition of it by proclamation cannot make it so.⁷

A definite limit was thus put upon the prerogative, the full force of which was effective only when Star Chamber and other conciliar tribunals were abolished in 1640. The gist of the *Case of Proclamations* is that the King's prerogative is under the law and that Parliament alone can alter the law which the King is to administer.⁸

⁴ 'No Act of Parliament can bar a King of his regality': *The Case of Ship Money* (1637) 3 St Tr 825, Finch CJ, at 1235. For the leading 17th-century cases on prerogative, see Keir and Lawson, *Cases in Constitutional Law*, ch II. Also Tomkins, *Our Republican Constitution*, ch 3.

⁵ HEL, vol IV, pp 102–3.

⁶ G R Elton, in Fryde and Miller, *Historical Studies of the English Parliament*, II, p 206.

⁷ (1611) 12 Co Rep 74. This case was applied by the Court of Session in *Grieve v Edinburgh and District Water Trustees* 1918 SC 700.

⁸ The Crown retains broad prerogative power to make laws for a few overseas territories, but this power is not unlimited: *Campbell v Hall* (1774) 1 Cowp 204; cf *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61, [2009] 1 AC 453. And see ch 10 D.

2. Taxation

If the imposition of taxes is to be lawful, it must be authorised by legislation. But this basic principle was the subject of a long-running dispute between Parliament and the Stuart kings, who claimed that the Crown had a prerogative right to levy certain forms of taxation without the consent of Parliament. It had been conceded by the time of Edward I that the consent of Parliament was necessary for direct taxation. The history of indirect taxation is more complicated, since the regulation of foreign trade was a part of the royal prerogative relating to foreign affairs. There was no clear distinction between the imposition of taxes in the form of customs duties and the exercise of prerogative powers over foreign trade and defence of the realm:

In the *Case of Impositions (Bate's Case)*,⁹ John Bate refused to pay a duty on imported currants imposed by the Crown on the ground that the imposition was contrary to the statute 45 Edw 3 c 4 which prohibited indirect taxation without the consent of Parliament. The Court of Exchequer unanimously decided in favour of the Crown. The King could impose what duties he pleased for the purpose of regulating trade, and the court could not go behind the King's statement that the duty was in fact imposed for the regulation of trade.

In the *Case of Ship Money (R v Hampden)*,¹⁰ John Hampden refused to pay ship money, a tax levied by Charles I for the purpose of furnishing ships in time of national danger. Counsel for Hampden accepted that sometimes the existence of danger would justify taking the subject's goods without his consent, but only in actual as opposed to threatened emergency. The Crown conceded that the subject could not be taxed in normal circumstances without the consent of Parliament, but contended that the King was the sole judge of whether an emergency justified use of his prerogative power to raise funds to meet a national danger. A majority of the Court of Exchequer Chamber gave judgment for the King.¹¹

The *Ship-money* decision was reversed by the Long Parliament,¹² and this aspect of the struggle for supremacy was concluded by the Bill of Rights, art 4, which declared that it was illegal for the Crown to seek to raise money without Parliamentary approval.¹³

3. Dispensing and suspending powers

The power of the Crown to dispense with the operation of statutes (for instance, by declaring that a statute need not be applied in a certain situation) may at one time have been necessary because of the form of ancient statutes and the irregular meetings of Parliament. So long, however, as the limits on the dispensing power were not clearly defined, this constituted a potential threat to the legislative authority of Parliament. In *Thomas v Sorrell*,¹⁴ the court took care to define the limits within which the royal power to dispense with laws was acceptable. But in *Godden v Hales*, an unduly compliant court upheld a dispensation from James II

⁹ (1606) 2 St Tr 371; G D G Hall (1953) 69 LQR 200.

¹⁰ (1637) 3 St Tr 825.

¹¹ For a full analysis, see D L Keir (1936) 52 LQR 546.

¹² Shipmoney Act 1640.

¹³ Page 13 above.

¹⁴ (1674) Vaughan 330.

to Sir Edward Hales excusing him from taking religious oaths and fulfilling other obligations imposed by the Test Act; it was held that it was an inseparable prerogative of the King to dispense with penal laws in particular cases and upon necessary reasons of which the King was sole judge.¹⁵

Thus encouraged, James II proceeded to set aside statutes as he pleased, granting a suspension of the penal laws relating to religion in the Declarations of Indulgence in 1687 and 1688. These acts of James were an immediate cause of the revolution of 1688. The Bill of Rights abolished the Crown's alleged power of suspending laws and prohibited the Crown's power to dispense with the operation of statutes, except where this was authorised by Parliament.¹⁶ Similar provision was made in the Scottish Claim of Right.¹⁷

4. *The independence of the judiciary*

As was shown by *Godden v Hales*, so long as judges could be removed from office at pleasure of the Crown, there was a continuing risk of their being subservient to the King in cases in which he had a direct interest. To ensure that English judges should not serve at pleasure of the Crown, the Act of Settlement 1700 provided that they should hold office *quamdiu se bene gesserint* (during good behaviour) but subject to a power of removal upon an address from both Houses of Parliament.¹⁸

Growth of ministerial responsibility

The Bill of Rights and the Act of Settlement established the legislative authority of the English Parliament vis-à-vis the Crown, while not affecting prerogatives of the Crown which had not been called in question. The settlement reflected the fact that the common lawyers had joined with Parliament to defeat the Crown's claim to rule by prerogative; and it is often said that the common lawyers thereby accepted that legislation by Parliament was of overriding authority as a source of law. However, executive power itself was left in the hands of the monarch and a more democratic base for government was established only by degrees during the two centuries after the Act of Settlement. The changed role of the monarch has been summarised in this way:

The position of affairs has been reversed since 1714. Then the King or Queen governed through Ministers, now Ministers govern through the instrumentality of the Crown.¹⁹

The development of Cabinet government and the creation of a democratic electoral system eventually ensured that the political authority of Parliament is pre-eminent in relation to the monarch, but government ministers still exercise many powers for which it is difficult to achieve democratic accountability. In the next section, we consider the nature of the legislative authority of Parliament, which is not necessarily justified in constitutional terms by the argument that the most recent general election will have given a mandate to the party (or parties) with a majority of seats in the Commons.

¹⁵ (1686) 11 St Tr 1165. The judges were hand-picked by James II, and gave cursory reasons for the decision: see A W Bradley [2008] PL 470.

¹⁶ Articles 1 and 2 of the Bill of Rights, p 13 above. The Bill of Rights did not curtail the prerogative of pardon or the power to enter a *nolle prosequi*. Cf the present practice of granting extra-statutory concessions in taxation, ch 22 E.

¹⁷ Page 13 above.

¹⁸ See now Senior Courts Act 1981, s 11(3); Constitutional Reform Act 2005, s 33. Also ch 13 B.

¹⁹ Anson, *Law and Custom of the Constitution*, vol II, p 41.

B. Meaning of legislative supremacy

The legal doctrine of the legislative supremacy of Parliament is referred to by many writers, notably by Dicey, as the sovereignty of Parliament. New constitutional developments are often debated in terms of their supposed effect on the sovereignty of Parliament. Thus, in the debate about British membership of the European Communities, those opposed to British membership proposed, without success, an amendment to the Bill which became the European Communities Act 1972 declaring that British membership would not affect the sovereignty of Parliament.²⁰ Critics of British membership of the EU complain both at the loss of national sovereignty and at erosion of the sovereignty of Parliament. There is no doubt that Britain's place in Europe affects the role of Parliament, since many laws are now made at a European level. But the same applies to every state that is a member of the EU. Moreover, many states (including the USA) enjoy sovereignty in international law without having a 'sovereign' legislature. In this chapter, the expression legislative supremacy will be used, partly because it is less likely to be confused with national sovereignty, and also to stay clear of the jurisprudential doctrine of John Austin and his successors that in every legal system there must be a sovereign.²¹ The chapter will concentrate on the fundamental legal elements of legislative supremacy, but the concept has significant political implications which come into play in any discussion of the desirability of retaining that supremacy.

At its simplest, the supremacy of Parliament means that there are no legal limitations on the power of Parliament to legislate. Parliament here does not refer to the two Houses separately, for neither House may legislate on its own, but to the constitutional entity known as the Queen in Parliament: namely the process by which a Bill approved by Lords and Commons receives the royal assent and thus becomes an Act of Parliament. Thus defined, said Dicey, Parliament has 'under the English constitution, the right to make or unmake any law whatever; and further . . . no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.²² Dicey was writing at a time when England was often used as a loose synonym for Great Britain or the United Kingdom²³ and today it is necessary to discuss whether the law on this matter is the same throughout the United Kingdom.²⁴ But the positive and negative aspects of the doctrine emerge clearly from Dicey's formulation, namely that Parliament has power to legislate on any matter whatsoever and that there exists no competing authority with power to legislate for the United Kingdom or to impose limits upon the competence of Parliament.

British membership of the European Union gives rise to the difficult issue of competing supremacies, the supremacy of Parliament on the one hand and the supremacy, or primacy, of Community law, on the other. This question will be considered later,²⁵ but we first examine the issue of supremacy in terms of the law of the United Kingdom alone.

Legal nature of legislative supremacy

This doctrine consists essentially of a legal rule which governs the relationship between the courts and the legislature, namely that the courts must apply the legislation made by Parliament and may not hold an Act of Parliament to be invalid or unconstitutional. As was

²⁰ HC Deb, 5 July 1972, cols 556–644; HL Deb, 7 August 1972, cols 893–914. And see ch 6 D, E.

²¹ Austin, *The Province of Jurisprudence Determined*, Lecture 6. See MacCormick, *Questioning Sovereignty* and (same author) (1993) 56 MLR 1; P Eleftheriadis (2009) 22 Canadian JI of Law & Jurisprudence 367. On sovereignty in Commonwealth law, see Oliver, *The Constitution of Independence*, chs 1, 3, 4, 11, 12.

²² Dicey, *The Law of the Constitution*, pp 39–40.

²³ Ch 2 A.

²⁴ Section D in this chapter.

²⁵ Page 66; and ch 6 D, E.

at one time said, ‘All that a court of law can do with an Act of Parliament is to apply it.’²⁶ In *Madzimbamuto v Lardner-Burke*, which concerned the effect of the unilateral declaration of independence in 1965 by the Rhodesian government on the Westminster Parliament’s power to legislate for Rhodesia, Lord Reid said:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid.²⁷

While the doctrine of legislative supremacy has great political significance, the legal rule defines the outcome of the process of legislation; it is not concerned with whether that process is controlled by the governing party, the Cabinet or the Prime Minister. Certainly, how Parliament exercises its authority is of great importance in the debate about whether its supremacy should be retained or modified. Craig has argued that Dicey’s exposition of sovereignty was advanced on the basis of assumptions about representative democracy which (in Craig’s view) were flawed even in 1885 and cannot be made today.²⁸ However, we must distinguish as far as possible between analysing the present law and considering how it should develop in future. Changes in the legislative process do not in themselves alter the legal effect of that process, although they might affect the case for further development of the law.

Only an Act of Parliament is supreme

An Act of Parliament has a legal force which the courts are not willing to ascribe to other instruments which for one reason or another fall short of that pre-eminent status. Thus the following instruments do not enjoy legislative supremacy and the courts will if necessary decide whether or not they have legal effect:

- (a) a resolution of the House of Commons;²⁹
- (b) a proclamation issued by the Crown under prerogative powers for which the force of law is claimed;³⁰
- (c) a treaty entered into by the government under prerogative powers which seeks to change the law within territory subject to British jurisdiction;³¹
- (d) subordinate legislation which appears to be issued under the authority of an Act of Parliament by a minister or government department,³² whether or not this has been approved by resolution of each House of Parliament;³³
- (e) an act of a subordinate legislature,³⁴ such as the Scottish Parliament or the Northern

²⁶ Keir and Lawson, *Cases in Constitutional Law*, p 1. For the position where an Act conflicts with EC law, see p 66 below; and where an Act is incompatible with Convention rights, p 67 below.

²⁷ [1969] 1 AC 645, 723. And see *Manuel v A-G* [1983] Ch 77.

²⁸ In *Public Law and Democracy*, ch 2, Craig argues that Dicey’s notion of sovereignty was ‘firmly embedded within a conception of self-correcting majoritarian democracy’ (p 15) since, in Dicey’s words, ‘The electors can in the long run always enforce their will’; further, that the British system ‘became one dominated by the top, by the executive and the party hierarchy’ (p 42) and that the danger has always been one of majoritarian tyranny.

²⁹ *Stockdale v Hansard* (1839) 9 A & E 1; *Bowles v Bank of England* [1913] 1 Ch 57.

³⁰ *Case of Proclamations* (n 7 above).

³¹ *The Parlement Belge* (1879) 4 PD 129, 154; *A-G for Canada v A-G for Ontario* [1937] AC 326. Cf *Malone v Metropolitan Police Commissioner* [1979] Ch 344.

³² E.g. *Chester v Bateson* [1902] 1 KB 829; ch 22.

³³ *Hoffmann-La Roche v Secretary for Trade & Industry* [1975] AC 295.

Ireland Assembly;

- (f) by-laws made by a local authority or other public body;³⁵
- (g) prerogative Orders in Council made for overseas territories, and laws purporting to be made under powers conferred by such Orders.³⁶

In all these cases, the courts must consider whether the document for which legislative force is claimed is indeed legally binding.³⁷ So, too, when a litigant relies on an Act of Parliament, the court must if necessary decide whether the provision in question has been brought into force.

The difference between an Act of Parliament and lesser instruments is reflected in a distinction drawn by the Human Rights Act 1998 between ‘primary legislation’ and ‘secondary legislation’. Unfortunately, the line drawn in the 1998 Act does not coincide with the distinctions just drawn. Thus various measures (including prerogative Orders in Council) are treated by the Act as primary legislation.³⁸

Position different under written constitution

The doctrine of legislative supremacy distinguishes the United Kingdom from those countries in which a written constitution imposes limits on the legislature and entrusts the ordinary courts or a constitutional court to decide whether acts of the legislature comply with the constitution. In *Marbury v Madison*, the US Supreme Court held that the judicial function vested in the court necessarily carried with it the task of deciding whether an Act of Congress was or was not in conformity with the constitution.³⁹ In a legal system which accepts judicial review of legislation, legislation may be held invalid on a variety of grounds: for example, because it conflicts with the separation of powers where this is a feature of the constitution,⁴⁰ infringes human rights guaranteed by the constitution,⁴¹ or has not been passed in accordance with the procedure laid down in the constitution.⁴² By contrast, in the United Kingdom the legislative supremacy of Parliament appears to be the fundamental rule of constitutional law and this supremacy includes power to legislate on constitutional matters. In so far as constitutional rules are contained in earlier Acts, there seems to be no Act which Parliament could not repeal or amend by passing a new Act. The Bill of Rights of 1689 could in law be repealed or amended by an ordinary Act of Parliament. This was done in the Defamation Act 1996, section 13 of which amended article 9 of the Bill of Rights regarding the freedom of speech in Parliament.⁴³

Legislative supremacy illustrated

The apparently unlimited powers of Parliament may be illustrated in many ways. The Tudor kings used Parliament to legalise the separation of the English Church from the Church of Rome: Sir Thomas More was executed in 1535 for having denied the authority of Parliament

³⁴ *Belfast Corpn v OD Cars Ltd* [1960] AC 490.

³⁵ E.g. *Kruse v Johnson* [1898] 2 QB 91.

³⁶ *R v Foreign Secretary, ex p Bancoult (No 2)* (note 8, above); and *R v Foreign Secretary, ex p Bancoult* [2001] QB 1067.

³⁷ As was done in *R (Jackson) v A-G* [2005] UKHL 56, [2006] 1 AC 262 (p 62 below).

³⁸ Human Rights Act 1998, s 21(1). See ch 14 C; and P Billings and B Pontin [2001] PL 21.

³⁹ 1 Cranch 137 (1803).

⁴⁰ *Liyana v R* [1967] 1 AC 259; *Hinds v R* [1977] AC 195 and see ch 4 C.

⁴¹ E.g. *Aptheker v Secretary of State* 378 US 500 (1964) (Act of US Congress refusing passports to communists held an unconstitutional restriction on right to travel).

⁴² *Harris v Minister of Interior* 1952 (2) SA 428. Generally see de Visser, *Constitutional Review in Europe*.

⁴³ See ch 9 A.

to make Henry VIII supreme head of the Church. In 1715, Parliament passed the Septennial Act to extend the life of Parliament (including its own) from three to seven years, because it was desired to avoid an election so soon after the Hanoverian accession and the 1715 uprising in Scotland. In vain did opponents of the Act argue that the supreme legislature must be restrained ‘from subverting the foundation on which it stands’.⁴⁴ Less controversially, during the two world wars, Parliament prolonged its own life by amending the rule in the Parliament Act 1911 that a general election must be held at least every five years.

Parliament has altered the succession to the throne (in the Act of Settlement 1700 and His Majesty’s Declaration of Abdication Act 1936); reformed the composition of both Houses of Parliament; dispensed with the approval of the House of Lords for certain Bills (the Parliament Acts 1911 and 1949); enabled British membership of the EC (the European Communities Act 1972); given effect to the Scottish and Irish Treaties of Union and later departed from those treaties;⁴⁵ and altered the territorial limits of the United Kingdom.⁴⁶ Since 1997, there has been a flurry of constitutional legislation, including the Scotland Act 1998, the Human Rights Act 1998, the House of Lords Act 1999, the Constitutional Reform Act 2005, the Constitutional Reform and Governance Act 2010 and the Fixed-term Parliaments Act 2011.

Indemnity Acts and retrospective legislation

Parliament has exercised the power to legalise past illegalities and to alter the law retrospectively. This power has been used by a government with a secure majority in Parliament to reverse inconvenient decisions made by the courts.⁴⁷ Retrospective legislation was passed after both world wars, protecting various illegal acts committed in the national interest.⁴⁸ Retrospective laws are, however,

contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought . . . to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law . . . Accordingly the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature.⁴⁹

The rule of interpretation is that a statute will not be read as having a retrospective effect that impairs an existing right or obligation unless this result is unavoidable.⁵⁰ The Immigration Act 1971 was held to empower the Home Office to deport Commonwealth citizens who had entered in breach of earlier immigration laws but against whom no such action could have been taken at the time the 1971 Act came into effect:⁵¹ but the Act did not make punishable by criminal sanctions conduct which had occurred before the Act was passed.⁵² Although art

⁴⁴ Quoted in Marshall, *Parliamentary Sovereignty and Commonwealth*, p 84.

⁴⁵ Ch 2, and section D in this chapter.

⁴⁶ Island of Rockall Act 1972.

⁴⁷ War Damage Act 1965 (*Burmah Oil Co v Lord Advocate* [1965] AC 75); Northern Ireland Act 1972 (*R (Hume et al.) v Londonderry Justices* [1972] NILR 91); Education (Scotland) Act 1973 (*Malloch v Aberdeen Corpn* 1974 SLT 253); National Health Service (Invalid Direction) Act 1980 (*Lambeth BC v Secretary of State* (1980) 79 LGR 61).

⁴⁸ Indemnity Act 1920 and War Charges Validity Act 1925; Enemy Property Act 1953, ss 1–3.

⁴⁹ Per Willes J in *Phillips v Eyre* (1870) LR 6 QB 1, 23. On retrospectivity in general, see Lord Rodger of Earlsferry (2005) 121 LQR 57; and Sampford, *Retrospectivity and the Rule of Law*.

⁵⁰ *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, 558. And see *Plewa v Chief Adjudication Officer* [1995] 1 AC 249 (common law presumption applied to recovery of overpaid benefits).

⁵¹ *Azam v Home Secretary* [1974] AC 18.

7 of the European Convention on Human Rights provides that no one shall be held guilty of a criminal offence for conduct which did not constitute an offence at the time when it was committed,⁵³ Parliament has power to legislate retrospectively in breach of this. However, 'It is hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation.'⁵⁴ Legislation which authorises payments to be made to individuals in respect of past events is also retrospective,⁵⁵ but it may be objectionable if it restricts existing claims or is discriminatory.

Legislative supremacy and international law

There are many reasons why Parliament should take into account the United Kingdom's obligations at international law when it legislates, but the courts may not hold an Act void on the ground that it contravenes general principles of international law.

The Herring Fishery (Scotland) Act 1889 authorised a fishery board to make by-laws prohibiting certain forms of trawling within the Moray Firth, an area which included much sea that lay beyond British territorial waters. The Danish master of a Norwegian trawler was convicted in a Scottish court for breaking these by-laws. The High Court of Justiciary held that its function was confined to interpreting the Act and the by-laws, and that Parliament had intended to legislate for the conduct of all persons within the Moray Firth, whatever might be the position in international law. 'For us an Act of Parliament duly passed by Lords and Commons and assented to by the King is supreme, and we are bound to give effect to its terms.'⁵⁶

Nor may the courts hold an Act invalid because it conflicts with a treaty to which the United Kingdom is a party.

An assessment to income tax was challenged on the ground that part of the tax raised was used for the manufacture of nuclear weapons, contrary to the Geneva Convention Act 1957. It was held that the unambiguous provisions of a statute must be followed even if they are contrary to international law. Regarding an argument that tax had been imposed for an improper purpose, the judge said: 'What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country.'⁵⁷

⁵² *Waddington v Miah* [1974] 2 All ER 377, 379 (Lord Reid).

⁵³ Ch 14 B. On the War Crimes Act 1991, A T Richardson (1992) 55 MLR 73, 76–80; S N McMurtrie (1992) 13 *Statute Law Review* 128. On retrospective penalties, *R v Pora* [2001] 2 NZLR 37; A Butler [2001] PL 586.

⁵⁴ [1974] 2 All ER 377, 379; and see *R v Home Secretary, ex p Bhajan Singh* [1976] QB 198.

⁵⁵ E.g. Employment Act 1982, s 2 and Sch 1.

⁵⁶ Lord Dunedin in *Mortensen v Peters* (1906) 8 F(J) 93, 100. The Trawling in Prohibited Areas Prevention Act 1909 later made it an offence to land fish caught in prohibited areas of the sea, thus limiting the extra-territorial effect of the earlier ban.

⁵⁷ Ungoed-Thomas J in *Cheney v Conn* [1968] 1 All ER 779, 782; and see *Inland Revenue Commissioners v Collico Dealings Ltd* [1962] AC 1.

As far as UK courts are concerned, there are no territorial restrictions on the legislative competence of Parliament. Generally Parliament legislates only in respect of its own territory or in respect of the conduct of its own citizens when they are abroad, but occasionally legislation is intended to operate outside the United Kingdom: thus the Continental Shelf Act 1964 vested in the Queen the rights of exploration and exploitation of the continental shelf; the Act provided for the application of criminal and civil law in respect of installations placed in the surface waters above the continental shelf. A few serious crimes committed abroad by British citizens are justiciable in British courts, such as treason, murder, bigamy and some revenue offences; all torture, wherever it takes place, is a crime in UK law.⁵⁸ The courts apply a rule of interpretation that statutes will not be given extraterritorial effect, unless this is expressly provided or necessarily implied.⁵⁹ In general, Parliament does not pass laws which would be contrary to the comity of nations. Yet national law does not always keep pace with Britain's changing international obligations. While the government under the royal prerogative may enter into treaties, treaties must be adopted by Act of Parliament if national law is to be altered.⁶⁰ The ratification of a treaty by the government may in some instances create a legitimate expectation that the government will act in accordance with the treaty,⁶¹ but such an expectation does not oblige Parliament to implement the treaty in national law.

British membership of the European Union raises questions as to the relationship between UK law and Community law which cannot be answered by reference to the general principles of international law.⁶²

No legal limitations on Parliament

Many illustrations may be given of the use which Parliament has made of its legislative supremacy in legislating on constitutional matters, retrospectively, in breach of international law, and so on. It does not follow from a recital of this kind that the powers of Parliament are unlimited. As Calvert said:

No one doubts that the powers of the UK Parliament are extremely wide . . . But that is not what is in issue. What is in issue is whether those powers are unlimited and one no more demonstrates this by pointing to a wide range of legislative objects than one demonstrates the contrary by pointing to matters on which Parliament has not, in fact, ever legislated.⁶³

There is much evidence from the law reports that, at least since 1688, judges have been strongly inclined to accept the legislative omnicompetence of Parliament. Yet this has not always been the judicial attitude. In his note on *Dr Bonham's* case, Coke CJ said:

In many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.⁶⁴

⁵⁸ Criminal Justice Act 1988, s 134; see *R v Bow Street Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147.

⁵⁹ *Treacy v DPP* [1971] AC 537, 552; and Jones, *Bennion's Statutory Interpretation*, pp 371–8. On the extra-territorial effect of the Human Rights Act 1998, see *Smith v Ministry of Defence* [2013] UKSC 41, [2013] 4 All ER 794.

⁶⁰ Note 31 above. And see Constitutional Reform and Governance Act 2010, part 2.

⁶¹ See *R v Uxbridge Magistrates' Court, ex p Adimi* [2001] QB 667.

⁶² Page 66 below and ch 6 D, E.

⁶³ *Constitutional Law in Northern Ireland*, p 14.

⁶⁴ (1610) 8 Co Rep 113b, 118a. See S E Thorne (1938) 54 LQR 543; Goldsworthy, *The Sovereignty of Parliament*, pp 111–17; and Gough, *Fundamental Law*, pp 35–40.

While English judges made similar statements only rarely after 1688,⁶⁵ it is not possible from reported cases alone to demonstrate that they have utterly lost the power to ‘control’ an Act of Parliament – or to show that a judge who is confronted with a statute repugnant to moral principle (for example, a law condemning all of a certain race to be executed) must either apply the statute or resign from office.⁶⁶ Support for this has come from New Zealand, where Lord Cooke of Thorndon urged that within the common law the judges exercise authority which extends to upholding fundamental values that might be at risk from certain forms of legislation.⁶⁷ In 1995, Lord Woolf argued that ‘if Parliament did the unthinkable’ and legislated without regard for the role of the judiciary in upholding the rule of law, the courts might wish to make it clear that ‘ultimately there are even limits on the supremacy of Parliament which it is the courts’ inalienable responsibility to identify and uphold’.⁶⁸ Lord Steyn has said that the courts might have to revisit the principle of parliamentary supremacy, if Parliament sought ‘to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens’; in such circumstances, the courts might have to ‘qualify’ the supremacy of Parliament, ‘a principle established on a different hypothesis of constitutionalism’.⁶⁹

Short of such an extreme situation, it is not at all likely that the courts would of their volition exercise power derived solely from common law to review the validity of Acts of Parliament. Where in countries judicial review of legislation takes place, this is generally derived from a written constitution.⁷⁰ But in the United Kingdom, Parliament enjoys an unlimited power to legislate on constitutional matters. Is it therefore possible that, *on the initiative of Parliament itself*, the courts could exercise a power of judicial review derived from constitutional legislation passed by Parliament? This possibility has often been dismissed out of hand by invoking the principle that no Parliament may bind its successors. It has been said that the rule that the courts enforce without question all Acts of Parliament is the one rule of the common law which Parliament may not change.⁷¹ But, it has been asked, ‘Why cannot Parliament change that rule; since all other rules of the common law are subject to its sovereignty?’⁷² It is to this difficult and fundamental question that we now turn.

C. The continuing nature of parliamentary supremacy

Within a modern legal system, enacted laws remain in force until they are repealed or amended, unless by the inclusion of a ‘sunset clause’ they are declared when enacted to have a limited life.⁷³ It is inherent in the nature of a legislature that it should be free to make new

⁶⁵ E.g. Holt CJ, *City of London v Wood* (1702) 12 Mod 669, 687.

⁶⁶ Cf Jennings, *The Law and the Constitution*, pp 159–60. For the attitude of British courts to foreign legislation which infringes fundamental rights, see *Oppenheimer v Cattermole* [1976] AC 249 and *F A Mann* (1978) 94 LQR 512.

⁶⁷ See *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398; also *J L Caldwell* [1984] NZLJ 357 and *R Cooke* [1988] NZLJ 158.

⁶⁸ Lord Woolf [1995] PL 57, 69. See also *J Laws* [1995] PL 72, 81–93 and cf *Lord Irvine* [1996] PL 59, 75–8.

⁶⁹ *R (Jackson) v A-G*, [102], note 119 below.

⁷⁰ Israel is an apparent exception: *I Zamir* [1991] PL 523, 529–30, *C Klein* (1996) 2 *European Public Law* 225. Also *Navot*, *The Constitutional Law of Israel*, pp 57–63, 156–67.

⁷¹ *H W R Wade* [1955] CLJ 172, 187–9; and (1996) 112 LQR 568.

⁷² *E C S Wade*, *Introduction to Dicey*, p lv.

⁷³ This has always been the position in English law (*Greenberg*, *Craies on Legislation*, p 483). But Scottish Acts passed before 1707 may by the doctrine of desuetude cease to be law through non-use and change of circumstances: *M'Ara v Magistrates of Edinburgh* 1913 SC 1059; *Mitchell*, *Constitutional Law*, pp 21–2.

laws. The fact that legislation about, say, divorce or abortion was enacted five or 25 years ago does not prevent fresh legislation on the same subject being enacted today: even if social conditions have not changed, the legislature may wish to adopt a new approach. When Parliament does so, it is convenient if the new Act expressly repeals the old law or states the extent to which the old law is amended. Suppose that this is not done and the new Act conflicts with an older Act but does not expressly repeal it. There now appear to be two inconsistent statutes on the statute book. How is the apparent conflict to be resolved?

The doctrine of implied repeal

It is for the courts to resolve this conflict because they must decide the law which applies to a given situation. If the conflict cannot be resolved in any other way, the courts apply the later Act; the earlier Act is taken to have been repealed by implication to the extent of the inconsistency.

If two inconsistent Acts be passed at different times, the last must be obeyed . . . Every Act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment.⁷⁴

This doctrine is found in many legal systems, but in Britain the operation of the doctrine is sometimes considered to have special constitutional significance.

Before 1919, many public and private Acts of Parliament empowered public authorities to acquire land compulsorily and laid down differing rules of compensation. In 1919, the Acquisition of Land (Assessment of Compensation) Act was passed to provide a uniform code of rules for assessing the compensation to be paid in future. Section 7(1) provided: 'The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall . . . have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect.' The Housing Act 1925 sought to alter the 1919 rules of compensation by reducing the compensation payable in respect of slum-housing. In *Vauxhall Estates Ltd v Liverpool Corporation*,⁷⁵ it was held that the provisions of the 1925 Act must prevail over the 1919 Act so far as they were inconsistent with it. The court rejected the ingenious argument of counsel for the slum-owners that s 7(1) (and especially the words 'or shall not have effect') had tied the hands of future Parliaments so that the later Parliament could not (short of express repeal) legislate inconsistently with the 1919 Act. In a similar case, *Ellen Street Estates Ltd v Minister of Health*, Maugham LJ said: 'The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of Parliament.'⁷⁶

The correctness of these two decisions is not in doubt, for there were very weak grounds for suggesting that in 1919 Parliament had been attempting to bind its successors. But Maugham LJ went far beyond the actual situation in saying that Parliament could not bind itself as to the *form* of subsequent legislation. He would have been closer to the facts of the case had he

⁷⁴ Lord Langdale, in *Dean of Ely v Bliss* (1842) 5 Beav 574, 582. See also *Thoburn v Sunderland Council* [2002] EWHC 195 (Admin), [2003] QB 151 and ch 6 D; Jones, *Bennion's Statutory Interpretation*, pp 315–20; Young, *Parliamentary Sovereignty and the Human Rights Act*, ch 2.

⁷⁵ [1932] 1 KB 733.

⁷⁶ [1934] 1 KB 590, 597.

said that Parliament could not bind itself as to the *contents* of subsequent legislation.⁷⁷ However, these cases, which illustrate the doctrine of implied repeal, have been used to support a broad constitutional argument that Parliament may never bind its successors.⁷⁸

Can Parliament bind its successors?

The rule that Parliament may not bind its successors (and that no Parliament is bound by Acts of its predecessors) is often cited both as a limitation on legislative supremacy and as an example of it. To adopt for a moment the language of sovereignty: if it is an essential attribute of a legal sovereign that there should be no legal restraints upon her, then, by definition, the rules laid down by a predecessor cannot bind the present sovereign, for otherwise the present holder of the post would not be sovereign. Dicey, outstanding exponent of the sovereignty of Parliament, accepted this point:

The logical reason why Parliament has failed in its endeavours to enact unchangeable enactments is that a sovereign power cannot, *while retaining its sovereign character, restrict its own powers by any parliamentary enactment.*⁷⁹ (italics supplied)

Thus to state that no Parliament may bind its successors is to assume that all future Parliaments must have the same attribute of sovereignty as the present Parliament. But why must this be so? The problem is less intractable than the comparable conundrum of whether an omnipotent deity can bind itself,⁸⁰ for even sovereign Parliaments are human institutions; and there is nothing inherently absurd in the idea of a supreme Parliament having power to make fresh constitutional arrangements for the future. To state that Parliament may not bind its successors leaves unclear both the nature of the obligation which a present Parliament cannot impose on its successors and also the meaning of ‘successors’.⁸¹ Indeed, the doctrine that Parliament may not ‘bind’ its successors is an over-simplification.

(a) Some matters authorised by legislation are of such a kind that, once done, they cannot be undone by a later Act. Thus, over 60 years after Parliament approved the cession of Heligoland to Germany in 1890, Parliament repealed the statute by which cession was approved,⁸² but no-one expected that this would recover the territory for the United Kingdom. On the many occasions after 1960 when independence was conferred on an overseas territory, it was the practice for Parliament to provide that no future Act of the UK Parliament ‘shall extend or be deemed to extend’ to the independent country as part of its law; and that the UK government should thereafter have no responsibility for the government of the country in question.⁸³ Earlier Independence Acts were less categorical, since it was thought that it might sometimes be convenient for the Westminster Parliament to continue to legislate at the request of the territory concerned.⁸⁴ At one time it was suggested that provisions conferring independence could be revoked by the Westminster Parliament,⁸⁵ but in reality ‘freedom once conferred cannot be revoked’.⁸⁶ Thus, by ceding territory or conferring independence,

⁷⁷ H R Gray (1953) 10 Univ of Toronto LJ 54, 67.

⁷⁸ Cf H W R Wade [1955] CLJ 172, 187.

⁷⁹ Dicey, p 68.

⁸⁰ Cf Hart, *The Concept of Law*, p 146; Marshall, *Parliamentary Sovereignty and the Commonwealth*, p 13.

⁸¹ R Stone (1966) 26 Louisiana LR 753, 755.

⁸² Anglo-German Agreement Act 1890, repealed by Statute Law Revision Act 1953, s 1.

⁸³ E.g. Kenya Independence Act 1963, s 1; and see Roberts-Wray, *Commonwealth and Colonial Law*, p 261.

⁸⁴ Statute of Westminster 1931, s 4 and e.g. Ceylon Independence Act 1947, s 1.

⁸⁵ *British Coal Corp'n v R* [1935] AC 500, 520.

⁸⁶ *Ndlwana v Hofmeyr* 1937 AD 229, 237; *Ibralebbe v R* [1964] AC 900, 923; *Blackburn v A-G* [1971] 2 All ER 1380.

Parliament may restrict the geographical area over which future Parliaments may legislate effectively. In the Canada Act 1982, which conferred full power of constitutional amendment on Canada, it was provided that no subsequent Act of the UK Parliament ‘shall extend to Canada as part of its law’. If Westminster in future should attempt to legislate for Canada, Canadian courts would ignore the attempt, unless the Canadian Parliament had authorised them to apply the legislation from Westminster. But British courts would be bound to give effect to the Westminster legislation so far as it lay within their jurisdiction to do so.⁸⁷

(b) In a different way, Parliament may bind future Parliaments by altering the composition of the two Houses or the succession to the throne. In 1832, when Parliament reformed the House of Commons to secure more democratic representation, later Parliaments were bound by that legislation inasmuch as the only lawful House of Commons was one elected in accordance with the 1832 Act. The present House was elected under election laws that are different from what they were in 1900 or in 1945. As for the Lords, in 1958 authority was given for life peerages and in 1999 all but 92 hereditary peers were removed from the House. Every change in composition of the Lords must either be approved by that House (as constituted for the time being), or in the absence of such approval be enacted under the Parliament Acts 1911 and 1949.⁸⁸ In 1936, His Majesty’s Declaration of Abdication Act altered the line of succession to the throne laid down by the Act of Settlement 1700, by removing Edward VIII from the throne: if a later Parliament had wished the throne to revert to him, the assent of the monarch (George VI or his descendant) would have been required, just as Edward VIII’s assent was needed for the Abdication Act itself. Thus, Parliament may alter the rules that determine who the successors of the component parts of Parliament will be.

By contrast, when Westminster creates an assembly or parliament with devolved power to make law for part of the United Kingdom, its current practice is to ensure that this does not limit its own power to legislate for the whole United Kingdom. The Scotland Act 1998, s 28, empowered the Scottish Parliament to make laws on devolved matters; but the Act stated that conferment of that power to make laws ‘does not affect the power’ of the UK Parliament to make laws for Scotland (s 28(7)). A similar provision is found in the legislation for Wales and Northern Ireland.⁸⁹ When the Government of Ireland Act 1920 established a parliament for Northern Ireland, s 75 provided that the ‘supreme authority’ of the UK Parliament ‘shall remain unaffected and undiminished over all persons, matters and things’ in Northern Ireland. That authority was exercised in 1972, when Westminster abolished the Stormont Parliament. On the Diceyan view of supremacy, it is not necessary in law to include express provision in a devolution Act to preserve Westminster’s legislative powers. But such provision serves a political purpose, if only to forestall any challenge to the continuing authority of Westminster to legislate even on devolved matters.⁹⁰

The rule that Parliament may not bind its successors presents difficulties for certain constitutional reforms (for example, the creation of an entrenched Bill of Rights, discussed below). But it presents no obstacle to the adoption of a new constitutional structure for the United Kingdom. As was said about Gladstone’s first Home Rule Bill for Ireland, ‘if the Irish Government Bill had become law the Parliament of 1885 would have had no successors’.⁹¹ Dicey described it as a ‘strange’ and ‘clearly untenable’ dogma that a sovereign power ‘can never by its own act divest itself of sovereignty’.⁹² The object of ensuring that no subsequent

⁸⁷ *Manuel v A-G* [1983] Ch 77, 88.

⁸⁸ Ch 8 D.

⁸⁹ Government of Wales Act 2006, s 93(5); Northern Ireland Act 1998, s 5(6).

⁹⁰ And see ch 2 B.

⁹¹ W R Anson (1886) 2 LQR 427, 436.

⁹² Dicey, p 68.

Parliament enjoyed legislative supremacy could be achieved in various ways, for example by creating a federal system in the United Kingdom under which England, Scotland, Wales and Northern Ireland each had its own legislature and executive; these bodies, together with a federal legislature and executive, would all be subject to the constitution. Such a system would be inconsistent with the continuing supremacy of the Westminster Parliament. The legislative ground for the new constitution would be laid by the supreme Parliament before it put an end to its own existence.⁹³

With the possible exception of the Union between Scotland and England in 1707 and the Union between Ireland and Great Britain in 1800,⁹⁴ no reforms have been intended to go as far as this. However, as with British membership of the EU,⁹⁵ problems may arise where the clear intention of Parliament to divest itself of legislative supremacy is not expressed and it may be argued that the supremacy has not been affected. The question is not, ‘May a supreme Parliament bind its successors?’ but ‘What must Parliament do (a) to express the definite intention that future Parliaments should not be supreme and (b) to ensure (by express direction and/or structural changes) that the courts will give effect to that intention?’ The second part of the question is important: for if the matter were to rest merely on the stated intention of the present Parliament, it is likely (in the absence of structural changes) that the courts would hold that a later Parliament would be free to depart from that intention. An example of legislation that is intended to have a lasting effect is the Fixed-term Parliaments Act 2011, which requires general elections to be held at regular five-year intervals and no longer at the discretion of the Prime Minister. The Act contains no protection against its amendment or repeal by Parliament, should a new government decide to change from the five-year rule.⁹⁶

We must at this point examine more fully a question which has already been mentioned, namely the need for legal rules identifying the measures which are to be accepted as Acts of Parliament.

What is an Act of Parliament?⁹⁷

In an extremely simple community, where all powers within the human group are exercised by one person recognised as sovereign, no legal problems of identifying acts of the sovereign arise. But, as R T E Latham said:

Where the purported sovereign is anyone but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him.⁹⁸

Latham pointed out that Parliament, regarded only as an assembly of human beings, was not sovereign. ‘It can only be sovereign when acting in a certain way prescribed by law. At least some rudimentary “manner and form” is demanded of it: the simultaneous incoherent cry of a rabble, small or large, cannot be law, for it is unintelligible.’⁹⁹

⁹³ And see Dicey, p 69.

⁹⁴ Ch 2 A and section D in this chapter.

⁹⁵ Ch 6 C, D.

⁹⁶ And see ch 10 B.

⁹⁷ R T E Latham (1939) *King’s Counsel* 152; G Marshall (1954) 2 *Political Studies* 193.

⁹⁸ *The Law and the Commonwealth*, p 523; compare Hart’s ‘rule of recognition’, *The Concept of Law* (pp 75, 245 and ch 6). And see on Latham, P Oliver (2002) 2 *King’s College Law Journal* 153.

⁹⁹ (1939) *King’s Counsel*, 153, quoted in Heuston, *Essays in Constitutional Law*, pp 7–8.

In the absence of a written constitution to guide the courts in identifying an Act of Parliament, the definition of such an Act is primarily a matter of common law.¹⁰⁰ The long-standing rule is that for a Bill to become law, it must have been approved by Lords and Commons and have received the royal assent. In the ordinary case, this simple test will be satisfied by a rapid inspection of the Queen's Printer's copy of an Act of Parliament which will bear at its head formal words of enactment.¹⁰¹ When Acts of Parliament have been challenged on the ground of procedural defects during their passage through Parliament, the judges have laid down the 'enrolled Act' rule.

In *Edinburgh & Dalkeith Railway v Wauchope*, a private Act which adversely affected Wauchope's rights against a railway company was challenged by him on the ground that notice of its introduction as a Bill into Parliament had not been given to him, as required by standing orders of the Commons. The court rejected this challenge. Lord Campbell said: 'All that a court of justice can do is to look to the Parliament roll: if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, or into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.'¹⁰² And in *Lee v Bude & Torrington Railway Co* it was said: 'If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but, so long as it exists as law, the courts are bound to obey it.'¹⁰³

This principle was re-affirmed in 1974, when the House of Lords in *Pickin v British Railways Board* held that a local or private Act of Parliament was binding whether or not the standing orders of each House had been complied with.

Private Acts of 1836 and 1845 authorised the taking of land for a railway and provided that, if the line were ever abandoned, the land should vest in the owners of the adjoining land. In 1968, another private Act was passed, promoted by the British Railways Board, which abolished this rule. In 1969, Pickin bought a small piece of adjoining land and, when the railway was closed, claimed that under the 1836 and 1845 Acts he was entitled to a strip of the old line. He alleged that the board had fraudulently misled Parliament when promoting the 1968 Act, and had not complied with the standing orders of each House requiring individual notice to be given to owners affected by private legislation. Although the Court of Appeal held that these allegations raised a triable issue,¹⁰⁴ the House of Lords held that the courts had no power to disregard an Act of Parliament, whether public or private, nor to examine proceedings in Parliament to determine whether an Act had been obtained by irregularity or fraud.¹⁰⁵

¹⁰⁰ Sir Owen Dixon (1957) 31 ALJ 240. And see *Prince's Case* (1606) 8 Co Rep 1, 20b; also *R (Jackson) v A-G*, discussed below.

¹⁰¹ Interpretation Act 1978, s 3. And see *Manuel v A-G* [1983] Ch 77, 87.

¹⁰² (1842) 8 Cl and F 710, 725.

¹⁰³ (1871) LR 6 CP 577, 582 (Willes J).

¹⁰⁴ [1973] QB 219.

¹⁰⁵ [1974] AC 765.

There are several reasons why the courts do not inquire into the internal procedures of Parliament. One important reason is the privilege of each House to regulate its own proceedings.¹⁰⁶ Thus for officers of Parliament to give evidence in a court about the internal proceedings of Parliament would create a danger of the court infringing art 9 of the Bill of Rights.¹⁰⁷ On many matters of parliamentary procedure, the courts have declined to intervene whether or not alleged breaches of statute were involved.¹⁰⁸ Moreover, the rule that a Bill must be read three times in each House is not a requirement of the common law but is part of the ‘law and custom of Parliament’ on which the standing orders of each House are based. If one House altered the requirement, say by abolishing the third reading, this change would not affect the duty of the courts to apply the ‘enrolled Act’ rule.

But some comments must be made on the ‘enrolled Act’ rule. First, there is today no Parliament roll: in case of necessity, all that a court could inspect is the two vellum prints of an Act which since 1849 have been signed by the Clerk of Parliaments and preserved in the National Archives and the House of Lords Record Office.¹⁰⁹ Second, the rule is reinforced by the provision in the Interpretation Act 1978 that every Act passed after 1850 shall be a public Act and judicially noticed as such, unless the contrary is expressly provided by the Act.¹¹⁰ However, if it should appear that a measure has not been approved by one House, then (unless the Parliament Acts 1911–49 apply) the measure is not an Act.¹¹¹ Where there is a written constitution, this may lay down the procedure to be followed before a Bill can become an Act. In South Africa, the pre-apartheid constitution provided that certain entrenched rights could be revoked only by legislation adopted at a joint sitting of both Houses of the South African Parliament, voting by a two-thirds majority: when this procedure was not followed, the result was not a valid Act.¹¹²

Could the ‘enrolled Act’ rule be changed by Act of Parliament? To an extent this has already occurred. Thus the Regency Acts 1937–53 make permanent provision for the infancy, incapacity or temporary absence abroad of the monarch.¹¹³ A regent appointed under these Acts may exercise all royal functions, including assenting to Bills, except that he or she may not assent to a Bill for changing the order of succession to the Crown or for repealing or altering the Act of 1707 securing Presbyterian church government in Scotland. If, which is unlikely, a regent did assent to a Bill for one of these purposes, the courts ought not to regard the resulting measure as an Act of Parliament.

Similarly, the Parliament Acts 1911–49¹¹⁴ provide that in certain circumstances a Bill may become an Act without having been approved by the Lords. The 1911 Act lays down special words of enactment which refer to the Parliament Acts (s 4(1)) and provides that the Speaker’s certificate that the requirements of the Acts have been complied with shall be conclusive for all purposes (s 3). But this procedure does not apply to a Bill to extend the life of Parliament or to private or local Bills. If it were attempted to extend the life of Parliament

¹⁰⁶ Ch 9 A. The Scottish Parliament does not enjoy this privilege (*Whaley v Lord Watson of Invergowrie* 2000 SC 125) but by the Scotland Act 1998, s 28(5), the validity of an Act of that Parliament is not affected by any invalidity in proceedings leading to its enactment.

¹⁰⁷ Page 13 above.

¹⁰⁸ *Bradlaugh v Gossett* (1884) 12 QBD 271; *Bilston v Wolverhampton Corpn* [1942] Ch 391; *Harper v Home Secretary* [1955] Ch 238; *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 (O Hood Phillips (1971) 87 LQR 321). And see B Beinart [1954] SALR 135.

¹⁰⁹ Heuston, *Essays in Constitutional Law*, p 18; and Erskine May, *Parliamentary Practice*, p 660.

¹¹⁰ For an explanation of this rule, see *Craies on Legislation*, pp 26–7.

¹¹¹ *The Prince’s Case* (1606) 8 Co Rep 1a.

¹¹² *Harris v Minister of Interior* 1952 (2) SA 428. See Marshall, *Parliamentary Sovereignty and the Commonwealth*, part 3; Loveland, *By Due Process of Law*, chs 7 and 8.

¹¹³ See R Brazier [2005] CLJ 352.

¹¹⁴ Ch 8 D.

by a measure which had not been approved by the Lords, a court should decline to regard the result as an Act of Parliament: the ‘conclusiveness’ of the Speaker’s certificate would not bar such a decision by the court.¹¹⁵

In respect of the Regency Acts and the Parliament Acts, it has been argued that measures which become law thereunder are Acts of a subordinate legislature to which the supreme Parliament has made a limited delegation of its powers; such measures must therefore be regarded as delegated legislation.¹¹⁶ In other contexts, courts have been reluctant to apply to a legislature the principle that delegated power may not be sub-delegated (*delegatus non potest delegare*)¹¹⁷ and a contrasting view is that, except for the excluded purposes, Parliament has provided a procedure for legislation which is alternative to legislation by the supreme Parliament.¹¹⁸ This question arose in the unusual case of *R (Jackson) v Attorney-General*.¹¹⁹

The Hunting Act 2004, which made fox hunting with dogs unlawful and had been strongly opposed in the Lords, had been enacted under the Parliament Act 1911, as amended by the Parliament Act 1949. Supporters of hunting claimed that the Hunting Act was invalid; they argued that the Parliament Act 1949 was invalid as it had not been passed by the supreme Parliament, yet it had amended the conditions on which power to legislate without the approval of the Lords had been created in 1911 (by reducing the delaying power of the Lords from two years to one). The Court of Appeal had held that ‘major constitutional changes’ could not be made under the Parliament Act 1911, but that the reduction in the period of delay was not a major change. The nine Law Lords who heard the appeal held, unanimously, that both the 1949 Act and the Hunting Act were valid. The broad consensus that emerged from eight separate judgments was that in 1911 Parliament had intended to restrict the powers of the Lords by enabling the Commons and monarch to legislate without the Lords’ approval. The procedure was an alternative to the usual process of legislation, and a measure passed under the Parliament Acts was primary (not delegated) legislation. The power to enact legislation in this way was not subject to implied exceptions but, as expressly stated in the 1911 Act, the life of Parliament could not be extended without consent of the Lords. A majority of the judges held obiter that the Parliament Act procedure could not be used to remove this exception from the 1911 Act.

In the course of his judgment, Lord Steyn questioned whether Dicey’s account of the ‘pure and absolute’ nature of parliamentary supremacy was ‘out of place in the modern United Kingdom’. Taken with similar comments by Lord Hope and Lady Hale, this raised the possibility of a situation in which a court might refuse to apply a statute that breached a fundamental constitutional principle, for instance by seeking to abolish judicial review of executive decisions.¹²⁰ For present purposes, *Jackson* decided that the definition of an Act

¹¹⁵ Section 3 of the 1911 Act requires that the Speaker’s certificate shall be given ‘under this Act’; in interpreting this section, a court could hold that the test of ultra vires had not been ousted: cf *Minister of Health v R* [1931] AC 494 and *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; ch 25 C.

¹¹⁶ H W R Wade [1955] CLJ 172, 193–4 and *Constitutional Fundamentals*, pp 27–8.

¹¹⁷ *R v Burah* (1878) 3 App Cas 889 and *Hodge v R* (1883) 9 App Cas 117.

¹¹⁸ P Mirfield (1979) 95 LQR 36, 47–50.

¹¹⁹ [2005] UKHL 56, [2006] 1 AC 262. See A Young [2006] PL 187, A McHarg, [2006] PL 539, Lord Cooke of Thorndon (2006) 122 LQR 224, M Plaxton (2006) 69 MLR 249, R Ekins (2007) 123 LQR 91. Also HL Committee on the Constitution, HL Paper 141 (2005–06), App 3 (A W Bradley).

¹²⁰ On what Lord Steyn might have meant by ‘a different hypothesis of constitutionalism’, see J Jowell [2006] PL 562.

of Parliament differs according to whether it has been enacted with the consent of both Commons and Lords, or with consent of the Commons alone. The judges accepted that legislation by means of the Parliament Acts may include matters of constitutional importance (for instance, changes in functions of the Lords), although there was disagreement about the extent of this power. Further, despite hesitation by some judges, on an issue that in this case was not contested by the Attorney General, *Jackson* confirms that the courts have jurisdiction to decide whether an instrument relied on in litigation is or is not an Act of Parliament, at least where the issue turns on a matter of statutory interpretation. In 1974, a different view had been expressed by Lord Morris in *Pickin's* case:

It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have been followed.¹²¹

That was said in the context of an alleged departure from the standing orders of the Commons, where the issue was rightly held to be a matter of internal procedure. But *Jackson* confirms that, in the rare situation where the status of a legislative instrument is disputed, the court must decide whether that document satisfies the ‘enrolled Act’ rule at common law, or any other rule that a statute may have laid down for the enactment of legislation.

In the light of *Jackson*, we may consider a question that has been much discussed,¹²² namely whether a parliament with supreme legislative authority may bind itself by laying down rules that determine the ‘manner and form’ of future legislation. Although the case concerned a subordinate legislature, *A-G for New South Wales v Trethowan*¹²³ illustrates issues that may arise when a legislature departs from rules governing the process of legislation which it had itself enacted.

Under the Colonial Laws Validity Act 1865, the legislature of New South Wales had power to make laws respecting its own constitution and procedure, provided that these laws were passed ‘in such manner and form’ as might be required by a law for the time being in force in the state. In 1929, an Act provided that the upper House of the legislature should not be abolished until a Bill approved by both Houses had been approved by a referendum of the electorate; the requirement of a referendum applied also to amendments of the 1929 Act. Following a change of government, a Bill passed through both Houses which sought to abolish both the upper House and the requirement of a referendum. The government did not intend to submit the Bill to a referendum. An injunction was granted by the New South Wales court to restrain the government from presenting the Bill for the royal assent unless a majority of the electors had approved it. On appeal, the Privy Council held that the requirement of a referendum was binding on the legislature until it had been abolished by a law passed in the ‘manner and form’ required by law for the time being, i.e. with the approval of a referendum.

¹²¹ [1974] AC 765, 790. There is an ambiguity here: does ‘Parliament’ refer to an Act of Parliament, or to a decision made by resolution of one or both of the Houses?

¹²² The work of Jennings, Latham, Marshall and others is examined in Oliver, *The Constitution of Independence*, ch 4. See also Loveland, *Constitutional Law*, pp 34–43; M Gordon [2009] PL 519, H-R Zhou (2013) 129 LQR 610; A W Bradley in Jowell and Oliver (eds), *The Changing Constitution* (7th edn), ch 2.

¹²³ [1932] AC 526. See Marshall, *Parliamentary Sovereignty and the Commonwealth*, ch 8; Oliver, *The Constitution of Independence*, pp 72–5.

One view of *Trethowan's* case is that it depended solely on the fact that the legislature was a subordinate legislature, subject to the rule in the Colonial Laws Validity Act that a constitutional amendment had to be enacted 'in such manner and form' as the law required from time to time. On this view, *Trethowan* is not relevant to the Westminster Parliament.¹²⁴ Another view is that there is a rule at common law that legislation may be enacted only in such manner and form as is laid down, that this rule applies to the UK Parliament, and that the 1865 Act put into statutory form a rule that is fundamental to the court's task of deciding whether a measure has the force of law.¹²⁵ The judgments in the Hunting Act case support the view that identifying an Act of Parliament depends on the rules as to 'manner and form' currently required of legislation. But they are not conclusive of how a future court would resolve a dispute concerning the Westminster Parliament on facts resembling those in *Trethowan*.¹²⁶

The Human Rights Act 1998 provides an example of a change in procedure that might give rise to a 'manner and form' argument. By s 19, a minister in charge of a Bill in Parliament must, before it is debated on second reading, state either that the Bill is compatible with the rights protected by the 1998 Act or, if it is not so compatible, that the government wishes the Bill to proceed. Would failure by a minister to make such a statement affect the validity of the resulting Act? For several reasons, the answer to this question is no. The requirement of a ministerial statement would be seen as an internal procedure, enforceable only by Parliament. And a court would be unlikely to hold that in enacting s 19, Parliament was intending to alter the 'enrolled Act' rule.¹²⁷

We have seen that the doctrine of implied repeal has been used in support of the argument that Parliament may not bind its successors. Has Parliament the power to modify the doctrine of implied repeal itself? Two developments suggest that it can. The first, the 'metric measures' case,¹²⁸ concerned the relation between Community law and English law. The court held that Parliament could not abandon its sovereignty by stipulating that a statute may not be repealed. However, it also held that where (as with the European Communities Act 1972) Parliament legislates on a subject with 'overarching' constitutional importance, such an Act (unlike an 'ordinary' statute) is not subject to implied repeal; it may be repealed only where a later Parliament declared expressly that this is its intention.¹²⁹ Second, the scheme of the Human Rights Act 1998 in effect excludes the ordinary operation of implied repeal: if Parliament wishes in future to legislate in breach of the Convention rights protected by that Act, it will succeed in doing so only if it uses express words or in some other way makes absolutely clear its intention to legislate with that effect.¹³⁰

Summary

The argument in this chapter may be summarised as follows. In principle, a legislature must remain free to enact new laws on matters within its competence: if a conflict occurs between the laws enacted at different times, the courts apply the later of the two laws. The authority

¹²⁴ H W R Wade [1955] CLJ 172, 183; E C S Wade, Introduction to Dicey, *Law of the Constitution*, pp lxxiii–v.

¹²⁵ E.g. Jennings, *The Law and the Constitution*, p 153; R T E Latham (1939) *King's Counsel* 152, 161; O Dixon (1935) 51 LQR 590, 603.

¹²⁶ See in particular in *R (Jackson) v A-G*, Lady Hale's observations at [160]–[163].

¹²⁷ See N Bamforth [1998] PL 572, 575–82, citing *Mangamaro Enterprises v Attorney-General* [1994] 2 NZLR 451.

¹²⁸ *Thoburn v Sunderland Council* [2002] EWHC 195 Admin, [2003] QB 151. And see ch 6 D.

¹²⁹ *Thoburn v Sunderland Council* at [63].

¹³⁰ This effect arises from the novel duty of interpretation imposed by the Human Rights Act 1998, s 3; and see ch 14 C. For a different view, see Young, *Parliamentary Sovereignty and the Human Rights Act*, ch 2.

of Parliament includes power to legislate on constitutional matters, including both the composition of Parliament and the ‘manner and form’ by which new legislation may be made. While the courts may not of their own accord review the internal proceedings of Parliament, the scope for judicial decision could be extended if, by statute, Parliament altered the common law rules according to which the courts recognise or identify an Act of Parliament. The doctrine of parliamentary supremacy is no bar to the adoption of a written constitution for the United Kingdom which imposes judicially enforceable limits upon a future legislature, at least if such structural changes are made so that the new legislative process is materially different from the present process involving Lords, Commons and royal assent. However, if changes were *not* made in the structure of the legislature but an attempt were made to limit the powers of Parliament, the courts would be unlikely to regard the purported limits ousting the continuing legislative supremacy of Parliament. It is not possible to predict the outcome of changes made by Parliament to the ‘manner and form’ of the legislative process since, depending on the nature and reasons for such changes, the courts might still be influenced by a deep-seated belief in the proposition that Parliament cannot bind itself.

These general principles will now be discussed briefly in relation to some specific constitutional issues.

1. *Constitutional guarantees for Northern Ireland*¹³¹

An account is given elsewhere of the events by which the Irish Republic broke from the United Kingdom.¹³² In the Ireland Act 1949, it was declared that ‘in no event’ would Northern Ireland ‘or any part thereof’ cease to be part of the United Kingdom ‘without consent of the Parliament of Northern Ireland’.¹³³ However, the 1949 Act did not guarantee the continued existence of the Parliament of Northern Ireland. When that Parliament was abolished in 1973 by Westminster, a new guarantee was given that Northern Ireland would not cease to be part of the United Kingdom without consent of the majority of the people.¹³⁴

Today, the Northern Ireland Act 1998, s 1, declares that Northern Ireland ‘in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland’ voting in a poll held for the purpose. The guarantee is of great political significance. But has Parliament fettered itself from, say, ceding a border area to the Republic without first obtaining the consent of a majority of the people of Northern Ireland? Or could Parliament at a future date repeal the 1998 Act and provide nothing in its place? The strongest legal argument for the proposition that Parliament could not breach the guarantee takes the form that for the purposes of legislating for the future status of Northern Ireland, Parliament has redefined itself so that an additional stage, namely approval by a border poll, is mandatory. But would the courts hold that this intention had been so clearly expressed that a subsequent Parliament had lost the legal capacity to repeal the 1998 Act, expressly or by implication? It has been suggested that the Northern Ireland guarantee is an example of a limitation which Parliament may impose on itself, but which does not ultimately incapacitate Parliament from acting.¹³⁵ In reality, the political constraints against breach of the guarantee provide a much greater safeguard for the Unionists in Northern Ireland than reliance on litigation to establish that in 1998 Parliament had limited the powers of future Parliaments.

¹³¹ Calvert, *Constitutional Law in Northern Ireland*, pp 23–33; Heuston, *Essays in Constitutional Law*, ch 1; Hadfield, *The Constitution of Northern Ireland*, pp 104–5.

¹³² Ch 2 A.

¹³³ For an analogous provision in Gladstone’s first Home Rule Bill, see Marshall, *Parliamentary Sovereignty and the Commonwealth*, pp 63–6.

¹³⁴ Northern Ireland Constitution Act 1973, s 1.

¹³⁵ Mitchell, *Constitutional Law*, p 81.

2. British membership of the European Union

A later chapter will discuss the relationship between national law and Community law. Community law has been held by the European Court of Justice to prevail over any inconsistent provisions of the national law of the member states:

the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed . . . without the legal basis of the Community itself being called into question.¹³⁶

The European Communities Act 1972 gave effect within the United Kingdom to those provisions of Community law which were, according to the European treaties, intended to have direct effect within member states. This applied both to existing and future treaties and regulations. The Community organs therefore may legislate for the United Kingdom, as they do for all member states. So long as Britain remains a member of the EU, the Westminster Parliament is not the sole body with power to make new law for the United Kingdom.¹³⁷ Nor can Community law appropriately be described as delegated legislation.¹³⁸

The extent to which Community law overrides national law was seen in *R v Transport Secretary, ex p Factortame Ltd*:¹³⁹

Spanish fishing interests that had formed companies registered in the United Kingdom challenged the Merchant Shipping Act 1988 as being contrary to Community law. This Act, by defining the term 'British fishing vessels' in a restrictive way, sought to prevent non-British interests from having access to the British fishing quota. In interim proceedings to protect Spanish interests pending decision of the substantive case, the European Court of Justice held that a national court must set aside a rule of national law if this was the sole obstacle to the granting of temporary relief to protect Community rights. Thus the British courts must disregard s 21 of the Crown Proceedings Act 1947 (no injunctions to be granted against the Crown)¹⁴⁰ and must not apply the Merchant Shipping Act 1988. The law lord, Lord Bridge, challenged the view that 'this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament'. He stated that long before the United Kingdom joined the Community, the supremacy of Community law over the laws of member states was well established. 'Thus whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.'¹⁴¹

In *R v Employment Secretary, ex p EOC*,¹⁴² the House of Lords declared that provisions in the Employment Protection (Consolidation) Act 1978, making protection for part-time workers (who were mainly female) subject to conditions that did not apply to full-time workers (who were mainly male), were incompatible with the right of female workers under Community law to equal treatment with male workers.

¹³⁶ *Case 11/70, Internationale Handelsgesellschaft* case [1970] ECR 1125, 1134. And see ch 6 B.

¹³⁷ EU law may require extra procedures to be observed before an Act of the UK Parliament is fully enforceable: see *R v Budimir* [2010] EWCA Crim 1846, [2011] 3 All ER 206.

¹³⁸ Cf Cmnd 3301, 1967, para 22.

¹³⁹ [1990] 2 AC 85 and (the same) (*No 2*) [1991] 1 AC 603. See also ch 6 D.

¹⁴⁰ See ch 26 D.

¹⁴¹ [1991] 1 AC at 659. And see *Thoburn v Sunderland Council* [2002] EWHC 195 Admin, [2003] QB 151 (upholding the sovereignty of Parliament but giving broad effect to the European Communities Act 1972).

¹⁴² [1995] 1 AC 1.

Accordingly, the British courts must not apply national legislation, whether enacted before or after the European Communities Act 1972, if to do so would conflict with Community law. In the late Sir William Wade's view, decisions such as *Factortame* effected a 'constitutional revolution', by holding that Parliament in 1972 did bind its successors.¹⁴³ A narrower explanation is that the 1972 Act created a rule of construction requiring the courts to apply UK legislation consistently with Community law, except where an Act expressly overrides Community law.¹⁴⁴ Whichever explanation is preferred, the primacy of Community law is an inescapable consequence of membership of the EU.

The European Union Act 2011 had its origin in an undertaking by the coalition government in 2010 to examine the case for a Bill to make it clear that ultimate authority remains with the Westminster Parliament. As well as creating a requirement for a national referendum on many future changes in EU law,¹⁴⁵ the Act (s 18) declared that EU law has effect in the United Kingdom only by reason of the European Communities Act 1972 or any other UK Act. This confirmed the long-established rule based on the 'dualism' of national and international law, by which treaties entered into by the government have effect in national law only when Parliament has authorised this.¹⁴⁶ The need for this declaratory statement was much debated.¹⁴⁷ The government claimed that it was needed to guard against any argument that EU law constituted a new autonomous legal order that might be binding on Parliament; possibly it served a political purpose as a limited concession to Euro-sceptics that would not prejudice British membership of the EU.

3. The Human Rights Act 1998

The doctrine that Parliament may not bind its successors is a major obstacle to enactment of a Bill of Rights intended to protect human rights against legislation by later Parliaments. In outlining its scheme for the Human Rights Act, the government in 1997 denied that it was trying to transfer power from future Parliaments to the courts:

To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly this Government has no mandate for any such change.¹⁴⁸

This stance applied to both existing and future Acts of Parliament, although Parliament in 1998 undoubtedly could have provided that the rights protected by the Human Rights Act should prevail over all *existing* statutes. On whether those rights should be entrenched against *subsequent* legislation, the government mentioned the procedure for amending the US constitution and stated:

an arrangement of this kind could not be reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament. We do not believe that it is necessary or would be desirable to attempt to devise such a special arrangement for this Bill.¹⁴⁹

¹⁴³ (1996) 112 LQR 568.

¹⁴⁴ P Craig (1991) 11 YBEL 221, 251. And see ch 6 D.

¹⁴⁵ See ch 6 E.

¹⁴⁶ Note 60 above.

¹⁴⁷ See *The EU Bill and Parliamentary Sovereignty*, European Scrutiny Committee, 10th report (HC 633, 2010–11) vols 1 and 2.

¹⁴⁸ *Rights Brought Home*, Cm 3872 (1997), para 2.13. And see ch 14 C.

¹⁴⁹ *Ibid*, para 2.16 (emphasis supplied). Note use of the word 'attempt' in the italicised phrase.

Certainly, if a wholly new constitution for the United Kingdom were to be created, it could include entrenched fundamental rights. Short of that, are there ways in which fundamental rights could be protected against infringement by a future Parliament? In 1979, a committee of the House of Lords, considering the desirability of a Bill of Rights for the United Kingdom, said:

there is no way in which a Bill of Rights could protect itself from encroachment, whether express or implied, by later Acts. The most that such a Bill could do would be to include an interpretation provision which ensured that the Bill of Rights was always taken into account in the construction of later Acts and that, so far as a later Act could be construed in a way that was compatible with a Bill of Rights, such a construction would be preferred to one that was not.¹⁵⁰

As will be seen later, the Human Rights Act did not attempt to bind future Parliaments from legislating in breach of rights protected by the Act. Instead, the Act (s 3) imposed a new duty on the courts to interpret all legislation, whatever its date, consistently with the Convention, *if such an interpretation is possible*.¹⁵¹ If such an interpretation is not possible, the conflicting provision remains in effect, but it may be declared by a superior court to be incompatible with Convention rights, in which case the government may make a ‘remedial order’ removing the incompatibility.¹⁵² This scheme preserves the formal authority of Parliament, while extending the powers of the judiciary to subject Parliament’s work to detailed scrutiny. As Judge LJ said in 2001, ‘The Act is carefully drafted to ensure that the court cannot and must not strike down or dispense with any single item of primary legislation.’¹⁵³ Yet under the scheme of the Act, all other Acts of Parliament (regardless of their date) are subject to judicial scrutiny to determine whether they are compatible with the Convention rights.

4. Abolition of the House of Lords

In chapter 8 we examine the role of the House of Lords both in legislation generally and under the Parliament Acts 1911 and 1949. Here we deal only with whether the legislative authority of Parliament extends to abolishing one component part of the supreme legislature (not with whether this would be a desirable change). If, as suggested earlier, the legislative supremacy of Parliament is founded to some extent on decisions of the courts, the change to a unicameral Parliament or the replacement of the Lords by an elected Senate would not necessarily require the courts to accept that the newly constituted legislature had unlimited power to legislate. Arguably the change could be regarded as a legal revolution or a breach in legal continuity,¹⁵⁴ but would this be accurate if the courts were simply to give full effect to a change authorised by the former legislature?

Several practical issues might arise. First, it might be argued politically that the reconstruction of Parliament would be so radical as to require the approval of the electorate given by referendum. Second, would the new legislation include any answer to the question we are considering? For instance, if that legislation were to include a Bill of Rights that was declared to be incapable of amendment by the new legislature, the courts must then choose between (a) giving effect to that declaration by the former legislature, or (b) holding that the new legislature was as legislatively supreme as its predecessor (contrary to that declaration). It could also be relevant whether the legislation provided any procedure for enabling the Bill of Rights to be amended or suspended in the event of emergency.

¹⁵⁰ HL 176 (1977–8), para 23. Contrast the view of the Northern Ireland Standing Advisory Committee on Human Rights in 1977: Cmnd 7009, 1977.

¹⁵¹ As to which see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

¹⁵² Human Rights Act 1998, ss 4, 5 and 10.

¹⁵³ *Re K (a child)* [2001] Fam 377, para 121.

¹⁵⁴ For the main arguments, see P Mirfield (1979) 95 LQR 36 and G Winterton (1979) 95 LQR 386. And Dicey, *The Law of the Constitution*, pp 64–70.

Another question is whether the House of Lords could be lawfully abolished against the wishes of that House, by use of the Parliament Acts 1911 and 1949? In *Jackson v A-G*, it was held that the Parliament Acts could be used to achieve major constitutional changes without consent of the upper House.¹⁵⁵ The rejection of the ‘delegated legislation’ argument in that case strengthens the view that these major changes include abolition of the Lords. But the question did not arise for decision, and most of the judgments do not deal with it.¹⁵⁶

D. The Treaty of Union between England and Scotland

In section C, we discussed whether the Westminster Parliament may impose legal limitations upon its successors. The Anglo-Scottish Union of 1707 raises the different question, ‘Was the United Kingdom Parliament born unfree?’¹⁵⁷ The main features of the Treaty of Union have already been outlined.¹⁵⁸ Now we examine more closely provisions of the Treaty concerning the power to legislate after the Union. The Treaty contemplated that the new Parliament of Great Britain would legislate both for England and Scotland; but no grant of general legislative competence to Parliament was made. Article 18 provided that the laws concerning regulation of trade, as well as customs and excise duties, should be uniform throughout Britain; subject to this, all other laws within Scotland were to remain in force,

but alterable by the Parliament of Great Britain, with this difference betwixt the laws concerning public right, policy, and civil government, and those which concern private right; that the laws which concern public right, policy and civil government may be made the same throughout the whole United Kingdom, but that no alteration be made in laws which concern private right except for evident utility of the subjects within Scotland.

By art 19, the Court of Session and the Court of Justiciary were to remain ‘in all time coming’ within Scotland as then constituted and with the same authority and privileges as before the Union, ‘subject nevertheless to such regulations for the better administration of justice as shall be made by the Parliament of Great Britain’. Other courts were to be subject to regulation and alteration by Parliament. No causes in Scotland were to be capable of being heard by the courts of Chancery, Queen’s Bench, Common Pleas (or any other court in Westminster Hall). An Act for securing the Protestant religion and Presbyterian Church government in Scotland was passed at the same time by the English and Scottish Parliaments and was declared to be a fundamental and essential condition of the Treaty of Union ‘in all time coming’.

While the framers of the Union intended the new Parliament to be the sole legislature, they distinguished between matters on which Parliament would be free to legislate, matters on which it would have limited authority to legislate, and matters which were declared fundamental and unalterable. The Treaty made no provision for future amendment of itself or for future renegotiation of the Union. The former English and Scottish Parliaments ceased to exist. No machinery was provided for applying the distinction in art 18 between laws concerning ‘public right, policy and civil government’ and laws concerning ‘private right’ or,

¹⁵⁵ In 2000, the royal commission on reform of the House of Lords recommended that the Parliament Acts be amended to prevent them being further amended by use of the Parliament Acts: Cm 4534, para 5.15.

¹⁵⁶ But note, at para [101], Lord Steyn’s observations (obiter) on this point.

¹⁵⁷ Mitchell, *Constitutional Law*, pp 69–74; T B Smith [1957] PL 99; D N MacCormick (1978) 29 NILQ 1. Also Munro, *Studies in Constitutional Law*, pp 137–42; M Upton (1989) 105 LQR 79; *Stair Memorial Encyclopedia: The Laws of Scotland*, vol 5, pp 137–62 (T B Smith) and 2002 reissue, pp 29–83 (N Walker); HLE, vol 8(2), pp 54–8; MacCormick, *Questioning Sovereignty*, ch 4.

¹⁵⁸ Ch 2 A.

in the latter case, for discovering what changes might be for ‘evident utility’ of the Scottish people.

The argument that the Union imposed limitations upon the new Parliament can be summarised as follows: the new Parliament came into being by virtue of the Union; its powers were limited by the guarantees in the Treaty, which had been enacted by the separate Parliaments before the united Parliament was born. Even if both the English and Scottish Parliaments were supreme before 1707,¹⁵⁹ each committed suicide in favour of a common heir with limited powers. The Treaty of Union, concludes the argument, is a fundamental constitutional text which prevents the British Parliament from itself enjoying the attribute of legislative supremacy. When, as in *Cheney v Conn*, an English judge remarks, ‘what the statute says and provides is the highest form of law that is known to this country’,¹⁶⁰ a Scots lawyer might reply: ‘Not so: the Treaty of Union is a higher form of law and may prevail over inconsistent Acts of Parliament.’

This argument is subject to both theoretical and historical difficulties. First, no legislature other than the British Parliament was created. If circumstances changed, and amendments to the Union became desirable, how could they be made except by Act of Parliament? Thus in 1748, the heritable jurisdictions were abolished and, when Scottish local government was reformed in 1975, the royal burghs were abolished.¹⁶¹ In 1853, the Universities (Scotland) Act abolished the requirement that professors in the ancient Scottish universities should be members of the Church of Scotland, thus repealing an ‘unalterable’ provision of the Act for securing the Presbyterian Church. Second, the distinction between laws concerning ‘public right, policy and civil government’ and laws concerning ‘private right’ is a difficult one. For example, power to tax private property or to acquire land compulsorily for public purposes concerns both public and private right; and is the law of education a matter of public or private right? Third, the test of ‘evident utility’ for changes in the law affecting private right is obscure: who is to decide – Scottish MPs, the Westminster Parliament, Scottish Ministers, the courts or other bodies in Scotland?¹⁶²

Moreover, after the Union the Westminster Parliament conducted its affairs exactly as before, subject only to its enlargement by members from Scotland.¹⁶³ As dominant partners in the Union, the English assumed that continuity from pre-Union days was unbroken. On a matter left silent by the Treaty of Union, the House of Lords in its judicial capacity formerly heard appeals from Scotland in civil cases, following the case of *Greenshields* in 1709 (the House of Lords was not a court within Westminster Hall within the meaning of art 19 of the Union) but it had no jurisdiction in Scottish criminal cases, a position that is to an extent maintained in the jurisdiction of the present Supreme Court.¹⁶⁴ Finally, even if the framers of the Union intended there to be limitations on the British Parliament, was this sufficient to empower the courts to hold Acts of Parliament invalid that conflicted with the Treaty? In Dicey’s view, the subsequent history of the Union ‘affords the strongest proof of the futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body’.¹⁶⁵

¹⁵⁹ On whether the Scottish Parliament was supreme before 1707, Donaldson, *Scotland: James V–James VII*, ch 15; Dicey and Rait, *Thoughts on the Union between England and Scotland*, pp 19–22, 242–4.

¹⁶⁰ Page 53 above.

¹⁶¹ Cf arts 20 and 21 of the Treaty of Union.

¹⁶² The court was prepared to find a statute to be of ‘evident utility’ in *Laughland v Wansborough Paper Co* 1921 1 SLT 341, but cf *Gibson v Lord Advocate* (below).

¹⁶³ Hence the comment by Bryce, *Studies in History and Jurisprudence*, vol 1, p 194, that in 1707 England altered the constitution of the enlarged state no further than by admitting additional members to Parliament and suppressing certain offices in Scotland.

¹⁶⁴ Constitutional Reform Act 2005, s 40(3).

¹⁶⁵ Dicey, *The Law of the Constitution*, p 65; and cf Dicey and Rait, p 252.

These matters have been debated in several Scottish cases.

In *MacCormick v Lord Advocate*,¹⁶⁶ the Rector of Glasgow University challenged the Queen's title as 'Elizabeth the Second', on the grounds that this was contrary to historical fact and contravened art 1 of the Treaty of Union. At first instance, Lord Guthrie dismissed the challenge for the reason, among others, that an Act of Parliament could not be challenged in any court as being in breach of the Treaty of Union or on any other ground. In the Inner House of the Court of Session, the First Division dismissed the appeal against Lord Guthrie's decision, but on narrower grounds. After holding that MacCormick had no legal title or interest to sue, that the royal numeral was not contrary to the Treaty, and that the Royal Titles Act 1953 was irrelevant, Lord President Cooper said: 'The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law.' He had difficulty in seeing why it should have been supposed that the Parliament of Great Britain must have inherited all the peculiar characteristics of the English Parliament but none of the Scottish Parliament. He could find in the Union legislation no provision that the Parliament of Great Britain should be 'absolutely sovereign' in the sense that it should be free to alter the Treaty at will. He reserved opinion on whether breach of such fundamental law as is contained in the Treaty would raise a justiciable issue; in his view there was no precedent that the courts of Scotland or England had authority to determine 'whether a governmental act of the type here in controversy is or is not conform to the provisions of a Treaty, least of all when that Treaty is one under which both Scotland and England ceased to be independent States and merged their identity in an incorporating union'. Lord Russell, who concurred, suggested that a political remedy would be more suitable for MacCormick than a judicial remedy.

Lord Cooper's judgment went beyond what was necessary for decision of the case and uncertainty remained on some key issues. In particular, the denial that the courts have jurisdiction to decide whether 'a governmental act of the type here in controversy' conformed to the Treaty must be read in relation to the disputed royal title, which did not concern matters of private right in Scotland.

In 1975, a Scottish fisherman unsuccessfully claimed that British membership of the European Community was incompatible with the Treaty of Union.

In *Gibson v Lord Advocate*, Gibson claimed that an EC regulation granting EC nationals the right to fish in Scottish waters and the European Communities Act 1972, which gave this legal effect in Britain, were contrary to art 18 of the Union, since this was a change in the law concerning private right which was not for the 'evident utility' of the Scottish people. Lord Keith held that control of fishing in territorial waters was a branch of public law, which might be made the same throughout the United Kingdom and was not protected by art 18. Obiter, he said that the question whether an Act of Parliament altering Scots private law was for the 'evident utility' of the Scottish people was not a justiciable issue. 'The making of decisions upon what must essentially be a political matter is no part of the function of the court.'¹⁶⁷

¹⁶⁶ 1953 SC 396.

¹⁶⁷ 1975 SLT 134.

Both in *MacCormick* and in *Gibson* the question was held open of the validity of legislation seeking to abolish the Court of Session or the Church of Scotland, both being institutions safeguarded by the Union. Short of such an extreme situation, the Scottish courts are reluctant to claim a power to review the validity of Acts of Parliament. This attitude was maintained when the Court of Session declined to hold that the community charge (or poll tax) legislation, which applied to Scotland a year earlier than in England and Wales, was contrary to art 4 of the Treaty of Union.¹⁶⁸

The Scotland Act 1998 conferred on the courts jurisdiction to decide ‘devolution issues’, namely questions as to the powers of the Scottish Parliament and Executive.¹⁶⁹ But this jurisdiction does not enable any court to review the validity of Acts of the Westminster Parliament. A related question is whether the Scotland Act affected the historical jurisdiction of the Scottish courts. To avoid any doubt on this point, section 37 of the 1998 Act declares that the Union with Scotland Act 1706 and the Union with England Act 1707 shall ‘have effect subject to this Act’. This provision aims ‘to ensure that neither the Scotland Act 1998 nor legislation or actions authorised under its terms should be vulnerable to challenge on the ground of their inconsistency with the Acts of Union’.¹⁷⁰

E. Conclusions

This chapter has examined whether there are legal limits on the legislative supremacy of Parliament, in particular whether there are, or could be, any limits capable of being enforced judicially. While British tradition has been strongly against judicial review of primary legislation, the courts must if necessary decide whether a document for which legislative authority is claimed is indeed an Act of Parliament.¹⁷¹ While the basic rule of legislative supremacy is a matter of common law that has political significance, it cannot be demonstrated from existing precedents that under no circumstances could this rule be qualified by judicial decision – still less that the rule could not be changed by Act of Parliament. It is therefore not possible to assert dogmatically that the legislative supremacy of Parliament will continue to be the primary rule of constitutional law in the United Kingdom. According to Lord Hope in *R (Jackson) v Attorney-General*, ‘Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute.’¹⁷² Indeed, the impact of European integration has made extensive inroads into Dicey’s doctrine of legislative supremacy. The Human Rights Act stops short of enabling the courts to set aside an Act of Parliament, but it authorises them to review legislation for compliance with the European Convention on Human Rights. And the advent of devolution means that Westminster is not the only legislature in the United Kingdom.

¹⁶⁸ *Pringle, Petitioner* 1991 SLT 330 and *Murray v Rogers* 1992 SLT 221. See N C Walker and C M G Himsworth [1991] JR 45; D J Edwards (1992) 12 LS 34; and *R (Jackson) v A-G*, note 119 above at para [106] (Lord Hope).

¹⁶⁹ See ch 2 B.

¹⁷⁰ Himsworth and Munro, *The Scotland Act 1998*, p 52. In 1999, the HL Committee of Privileges decided that removal of Scottish peers from the House of Lords under what became the House of Lords Act 1999 would not breach the Treaty of Union, art 22: *Lord Gray’s Motion* [2000] 1 AC 124; and Himsworth and O’Neill, pp 112–113.

¹⁷¹ This function was performed in *R (Jackson) v A-G*, note 119 above.

¹⁷² *Ibid*, para [104]. And see A W Bradley, in Jowell and Oliver (eds), *The Changing Constitution*, 7th edn, ch 2.

Political significance of legislative supremacy

It is not easy to assess the political significance of the legislative supremacy of Parliament. For one thing, constitutional and legal rules tend to reflect political facts, but sometimes only with a considerable time lag. Moreover, the doctrine has always been affected by a tinge of unreality since it would empower Parliament to do many unlikely, immoral or undesirable things which no one wishes it to do. Does Parliament really need power to condemn all red-haired males to death or to make attendance at public worship illegal? Or to create criminal offences retrospectively?

Yet it would be wrong to ignore the political argument for retaining supremacy, particularly when the wishes of a newly elected House of Commons can be identified with the will of the majority. Legislative supremacy is well suited to a centralised, unitary system of government in which the policies of the executive are supported by the dominant political voice in Parliament, and in which the judiciary exercise an important but subordinate role. Even in such a system, there are many factors that limit the use to which the executive can put Parliament's legislative powers. Dicey suggested that political sovereignty, as opposed to legislative sovereignty, lay in the electorate and that ultimately the will of the electorate would prevail on all subjects determined by the British government.¹⁷³ Certainly, the electoral system influences the use of legislative powers, but this influence is generalised and sporadic in its effect: and this depends in turn on the political parties, on the media, on economic and social groups and on other means by which public opinion is expressed. Moreover, the electoral system produces a House of Commons which does not accurately reproduce the distribution of views among the electorate and provides only weak protection for unpopular minorities.

Parliament and the electorate

Under the British system, the electorate takes no direct part in legislative decision-making, save by electing the House of Commons. In some constitutions, for example in Ireland and Australia, constitutional amendments take effect only if they are approved by referendum. In other constitutions (for example, Denmark and Switzerland) legislative proposals may be subject to referendum. Until 1975, the United Kingdom found no place for direct democracy, apart from the border poll in Northern Ireland.¹⁷⁴ Where major political issues are concerned, the outcome of a general election may indicate the degree of popular support for key changes. In 1910, two elections were held because of the legislative veto of the Lords and the need to gain support for overcoming that veto. In general, however, it is difficult to decide from the result of a general election the state of opinion on particular issues. Since the party which wins an election can claim to have a mandate to implement its manifesto, a government cannot be criticised for carrying out its election programme. But this does not prevent a government from carrying out major reforms which have not been put to the electorate.

We have seen that, mainly because of the division of opinion within the Labour party, a referendum on Britain's membership of the Communities was held in 1975. In 1979, and again in 1997, referendums were held in Scotland and Wales on schemes for a Scottish Parliament and a Welsh Assembly.¹⁷⁵ There is a clear argument to be made for use of the referendum on other major constitutional issues, such as changing the electoral system. While advisory referendums do not directly affect the authority of Parliament, it would affect

¹⁷³ Dicey, *The Law of the Constitution*, p 73. And see p 50 above.

¹⁷⁴ Page 65 above.

¹⁷⁵ Ch 2 B.

the position of Parliament if referendums were to become mandatory for certain purposes. It has been argued that referendums should be used ‘as an extra check against government, an additional protection to that given by Parliament’.¹⁷⁶ This would entrench certain matters against action by the elected majority in the Commons.

What aspects of the constitution should be protected in this way? There is a case to be made for requiring a referendum whenever it is proposed to transfer the powers of Parliament; as John Locke said, ‘it being but a delegated power from the People, they who have it cannot pass it to others’.¹⁷⁷ Recent use of referendums has been on an ad hoc basis, with the ground rules being laid down afresh for each referendum. The Political Parties, Elections and Referendums Act 2000 introduced rules on public funding for campaign groups, and broke new ground with rules on spending limits during a referendum campaign, and a supervisory role for the Electoral Commission.¹⁷⁸

Summary

The view taken in this chapter has been that Parliament’s legislative authority includes power to make new arrangements under which future Parliaments would not necessarily be supreme. The argument for retaining legislative supremacy is strengthened if it can be shown that the political system provides safeguards against legislation which would be contrary to fundamental constitutional principle or basic human rights. It is, however, doubtful whether the political system does adequately protect individuals or minority groups who may be vulnerable to oppressive action by the state. In reality, Parliament’s role within British government depends less on exercising absolute legislative power than on its effectiveness as a forum in expressing public opinion and in exercising control over government. And the United Kingdom’s place in the EU has necessarily caused cherished constitutional tenets to be revised, in order to gain the benefits of a more closely integrated Europe.

¹⁷⁶ Bogdanor, *The People and the Party System*, p 69.

¹⁷⁷ *Second Treatise on Civil Government*, quoted in Bogdanor, p 77.

¹⁷⁸ See K D Ewing [2001] PL 542, 562–5; and ch 7 E.

CHAPTER 4

The rule of law

During 1971, at what we now know was an early stage of open strife between the communities in Northern Ireland, the IRA increased the ferocity of its campaign of violence in Northern Ireland, shooting soldiers and police and blowing up buildings. Early in August, the government of Northern Ireland, after consulting with the UK government, decided to exercise the power of internment available to it under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922.¹ This power could be used against persons suspected of having acted or being about to act in a manner prejudicial to the preservation of peace or the maintenance of order. On 9 August, 342 men were arrested. By November 1971, when the total arrested had risen to 980, 299 of those arrested were being interned indefinitely; the remainder were held under temporary detention orders or had already been released.

The security forces saw in internment an opportunity of obtaining fresh intelligence about the IRA. Fourteen detainees were interrogated in depth. The procedures of interrogation included keeping the detainees' heads covered with black hoods; subjecting them to continuous and monotonous noise; depriving them of sleep; depriving them of food and water, except for one slice of bread and one pint of water at six-hourly intervals; making them stand facing a wall with legs apart and hands raised. It was later held by a committee of inquiry that these procedures constituted physical ill-treatment.²

In November 1971, after these facts had been established, three Privy Counsellors were asked to consider whether the procedures 'currently authorised' for interrogating persons suspected of terrorism needed to be changed. They produced two reports.³ Two members, a former Lord Chief Justice and a former Conservative Cabinet minister, recommended that the procedures could continue to be used subject to certain safeguards, including the express authority of a UK minister for their use, the presence of a doctor with psychiatric training at the interrogation centre, and a complaints procedure. This report did not express any view on the legality of the interrogation procedures, but stated that valuable information about the IRA had been discovered through the interrogation.

The minority report, by Lord Gardiner, a former Labour Lord Chancellor, held that the interrogation procedures had never been authorised:

If any document or minister had purported to authorise them, it would have been invalid because the procedures were and are illegal by the domestic law and may also have been illegal by international law.

Should legislation be introduced enabling a minister in time of emergency to fix in secret the limits of permissible ill-treatment to be used in interrogating suspects? Lord Gardiner viewed with abhorrence any proposal that a minister should be empowered to make secret law. Nor could he agree that a minister should fix secret limits without the authority of Parliament, 'that is to say illegally', and then if found out ask Parliament for an Act of Indemnity: that, he said, would be a flagrant breach of the whole basis of the rule of law and of the principles of democratic government.

¹ The power did not survive into the Terrorism Act 2000; see ch 20 C. On the internments in 1971–6, see R J Spjut (1986) 49 MLR 712.

² Cmnd 4823, 1971 (Compton Report).

³ Cmnd 4901, 1972 (Parker Report).

The government accepted Lord Gardiner's report and Prime Minister Heath stated that the interrogation procedures would not be used again. When those who had been interrogated sued the government for damages for their unlawful treatment, liability was not contested and substantial awards of damages were made. The European Commission on Human Rights held that the interrogation procedures amounted to inhuman and degrading treatment and also torture, contrary to art 3 of the European Convention on Human Rights. When the Irish government referred the case to the European Court of Human Rights, the court held that the procedures were inhuman and degrading treatment but did not amount to torture.⁴

No clearer illustration could be given of the need to adhere to the rule of law if citizens are to be protected against arbitrary and harsh acts of government. However lawless may have been the acts of the IRA, and however seriously those acts infringed life and liberty, government must not retaliate with measures which are not only unlawful but are of such a nature that it would be impossible on moral and political grounds to make them lawful. Controversial as the power of internment was, it was authorised by the legislature and its use was a matter of public knowledge and admitted political responsibility. But in law the power to intern does not include power to interrogate or to administer physical ill-treatment or torture.⁵

By similar reasoning, while use of reasonable force is permitted in self-defence or in the prevention of crime or the arrest of offenders, and in some situations the use of firearms may be justified,⁶ the adoption of a 'shoot to kill' policy by the police or armed forces would be seriously objectionable. This was alleged to have occurred in 1988 when three IRA members were shot dead by British forces in Gibraltar while organising a terrorist attack. The European Court of Human Rights held that force resulting in the taking of life could be used only in 'absolute necessity' for purposes stated in the European Convention on Human Rights (art 2). Claims that the three deaths were premeditated were not upheld; but the court held (by 10–9) that, on what was known of the arrest operation, the killings were not justified by 'absolute necessity'.⁷ The British government was angered by this decision, but reluctantly complied with the court's order to reimburse the dead terrorists' families for their legal costs.

The above events occurred before Northern Ireland had entered a more peaceful stage in its history. Since the 9/11 atrocities in the USA, many urgent questions have been raised as to the legality (in national and international law) of measures taken in the 'war against terrorism'. One aim of the Bush administration in establishing a detention centre at the Guantanamo Bay naval base on Cuba was to place detainees outside the protection of any legal system, but in 2004 the US Supreme Court held that this had not been achieved.⁸ There can now be no doubt that procedures amounting to torture were authorised by the Bush administration.

In the United Kingdom, two particularly significant decisions have arisen from the 'war against terror': (1) indefinite detention without trial under the Anti-Terrorism, Crime and

⁴ *Ireland v UK* (1978) 2 EHRR 25; and see ch 14 B. In 2004, Lord Hope wrote: 'It seems likely that the mixture of physical and psychological pressures that were used in the case of the IRA suspects would now be regarded as torture . . .': (2004) 53 ICLQ 807, 826. The UN Convention against Torture was signed by the UK in 1984 and ratified in 1988 after enactment of the Criminal Justice Act 1988, s 134.

⁵ For the report of the Bennett inquiry into police interrogation procedures in Northern Ireland in 1975–78, see Cmnd 7497, 1979.

⁶ See ch 20 A.

⁷ *McCann v UK* (1995) 21 EHRR 97. And see Windlesham and Rampton, *Report on 'Death on the Rock'*.

⁸ *Rasul v Bush* 124 S Ct 2686 (2004); *Hamdi v Rumsfeld* 124 S Ct 2633 (2004); *Boumediene v Bush* 128 S Ct 2229 (2008). See D Golove (2005) 3 *Int J of Const Law* 128; S Hannett [2008] PL 636. Also Lord Steyn (2004) 53 ICLQ 1; Sands, *Lawless World* and (same author) *Torture Team*.

Security Act 2001 was held to breach the European Convention on Human Rights;⁹ and (2) evidence obtained or likely to have been obtained by torture committed abroad by a foreign state's agents was held to be inadmissible in proceedings before the Special Immigration Appeals Commission.¹⁰ The decisions underline the continuing relevance of values associated with the 'rule of law'. In the first case, Lord Nicholls said that 'indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law',¹¹ Lord Hoffmann said that there was 'nothing more antithetical to the instincts and traditions of the people of the United Kingdom'.¹² A Court of Appeal judge has written of this decision: 'It is a powerful statement by the highest court in the land of what it means to live in a society where the executive is subject to the rule of law.'¹³

A. Historical development

In a review of the history of political philosophy, Anthony Quinton has written: 'In all its historical variations the state has sought to discharge two connected functions: the maintenance of order within its domain by the promulgation and enforcement of law and the defence of the nation against external enemies'.¹⁴ To perform these functions, the state possesses coercive powers that may be used to oppress the people as well as confer benefits upon them. Law is an instrument for exercising state power that in some circumstances is also a means of protecting the people against arbitrary or abusive government. Aristotle argued that government by laws was superior to government by men.¹⁵ But one dominant theme in the story of western civilisation in the last 500 years has been the struggle for liberty and rights against absolutism in its several forms, including the absolutism of the state and its use of law.¹⁶

Bracton, in the 13th century, maintained that rulers were subject to law: 'The King shall not be subject to men, but to God and the law: since law makes the King.'¹⁷ Magna Carta and its later confirmations expressed the principle that justice according to law was due both to the ruler and to other classes in the feudal hierarchy. When renaissance and reformation in the 16th century weakened the idea of a universal natural law, emphasis shifted to the function

⁹ *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68.

¹⁰ *A v Home Secretary (No 2)* [2005] UKHL 71, [2006] 2 AC 221. At [101], Lord Hope said: '[In times of emergency] where the rule of law is absent, or is reduced to a mere form of words to which those in authority pay no more than lip service, the temptation to use torture is unrestrained.'

¹¹ *A v Home Secretary* (above) at [74].

¹² *Ibid*, at [86].

¹³ M Arden (2005) 121 LQR 604, 622. The above account of interrogation of IRA suspects first appeared in this book in 1977. It should by 2013 have been possible to relegate this to the pages of history, since a government assurance was given in 1972 (HC Debs, 2 March 1972, col 743), repeated by the Attorney General in 1977, that the unlawful techniques had been prohibited. Sadly, events involving the death of an Iraqi citizen while in the custody of British troops in Basra caused serious concern at Westminster regarding 'discrepancies' in evidence from military sources on use of the techniques: Joint Committee on Human Rights, 28th report (2007–08), HL Paper 157, HC 527; 23rd report (2008–09), HL Paper 153, HC 553. And see *R (Al-Skeini) v Defence Secretary* [2007] UKHL 26, [2008] AC 153 and *Al-Skeini v United Kingdom* (2011) 30 BHRC 561. A document-based inquiry led by Sir Peter Gibson into issues of interrogation and rendition found there to be many matters needing further investigation: *Report of the Detainee Inquiry* (Cabinet Office, 2013, and HC Debs, 19 December 2013, col 913). Further inquiries were entrusted to the Intelligence and Security Committee at Westminster.

¹⁴ Kenny (ed.) *The Oxford History of Western Philosophy*, ch 6 (A Quinton), p 296.

¹⁵ d'Entrèves, *The Notion of the State*, p 71.

¹⁶ See Grayling, *Towards the Light*.

¹⁷ Maitland, *Constitutional History*, pp 100–4; McIlwain, *Constitutionalism Ancient and Modern*, ch 4.

of law as an aspect of the sovereignty of the state.¹⁸ In Britain, the 17th-century constitutional settlement rejected the claims of absolute monarchy based on the divine right of kings, in favour of a mixed system of government that relied on the authority of the Houses of Parliament and the common law courts.

The Bill of Rights in 1689 affirmed that the monarchy was subject to the law. Not only did it force the Crown to govern through Parliament, but it also established the right of individuals to challenge unlawful interference in respect of their life, liberty and property.

In *Entick v Carrington*, two King's Messengers were sued for having unlawfully broken into the plaintiff's house and seized his papers: the defendants relied on a warrant issued by one of the Secretaries of State ordering them to search for Entick and bring him with his books and papers before the Secretary of State for examination. The Secretary of State claimed that the power to issue such warrants was essential to government, 'the only means of quieting clamours and sedition'. The court *held* that, in the absence of a statute or judicial precedent upholding the legality of such a warrant, the practice was illegal. Lord Camden CJ said: 'What would the Parliament say if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation . . . And with respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction.'¹⁹

The 'general warrant' cases sought to protect rights to liberty and property, but such rights were not absolute. In 1772 Lord Mansfield held that the common law did not recognise the right of a slave-owner to enforce ownership of a slave brought from Jamaica to England.²⁰ The procedure by which individual liberty was protected was that of habeas corpus, a common law writ which had been rendered more effective by statute.²¹ Formal adherence to the law was one of the public values of 18th-century Britain, although not all the people gained equally from it.²² Economic and social developments since 1765 have qualified the forthright declaration of Lord Camden that in the absence of precedent no common law powers of search and seizure will be recognised,²³ but *Entick v Carrington* still exercises influence on judicial attitudes to the claims of government.

Dicey's exposition of the rule of law

One reason for this is found in the work of A V Dicey, whose lectures at Oxford were first published in 1885 under the title, *Introduction to the Study of the Law of the Constitution*.²⁴

¹⁸ For the rule of law in 16th-century England, see Elton, *Studies in Tudor and Stuart Politics and Government*, vol 1, p 260.

¹⁹ (1765) 19 St Tr 1030, 1067, 1073. And see *Wilkes v Wood* (1763) Lofft 1.

²⁰ *Somerset v Steuart* (1772) 20 St Tr 1. See for Scotland *Knight v Wedderburn* (1778) Mor 14545.

²¹ See ch 25 D.

²² Thompson, *Whigs and Hunters*, pp 258–69. And see Tomkins, *Our Republican Constitution*. In the age of colonialism, British rule was not always characterised by adherence to law: see Kostal, *A Jurisprudence of Power*, examining the impact on opinion in London of atrocities during the Jamaica uprising in 1865.

²³ Ch 15 D. And see *Malone v Metropolitan Police Commissioner* [1979] Ch 344.

²⁴ The main text was settled by Dicey in 1908; it appears in the 10th edn (with introduction by E C S Wade). See also Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, and the symposium of articles at [1985] PL 587.

Dicey's aim was to introduce students to 'two or three guiding principles' of the constitution, foremost among these being the rule of law. The spirit of *Entick v Carrington* seems to run through Dicey's arguments, but he expressed the doctrine of the rule of law in the form of several statements describing the English constitution, some of them derived from authors who immediately preceded him.²⁵ Dicey gave to the rule of law three meanings:

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government . . . ; a man may with us be punished for a breach of law, but he can be punished for nothing else.

Thus no-one could be made to suffer penalties except for a distinct breach of law established before the ordinary courts. In this sense Dicey contrasted the rule of law with systems of government based on the exercise by those in authority of wide or arbitrary powers of constraint, such as a power of detention without trial.

Second, the rule of law meant

equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.

In Dicey's view, this implied that no one was above the law; that officials like private citizens were under a duty to obey the same law; and that there were no 'administrative courts' to decide claims by citizens against the state or its officials.

Third, the rule of law meant

that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.²⁶

So the rights of the individual were secured not by guarantees in a formal document but by the ordinary remedies of private law available against those who unlawfully interfered with someone's liberty, whether they were private citizens or officials.

Assessment of Dicey's views²⁷

These three statements about the rule of law raise many questions. In the first, what is meant by 'regular law'? Does this include, for example, social security law, anti-discrimination law or the Terrorism Act 2000? Does 'arbitrary power' refer to powers of government that are so broad they could be used for a wide variety of different purposes; powers that are capable of abuse if they are not properly controlled; or powers that directly infringe individual liberty (for example, power to detain a citizen without trial)? If 'arbitrary power' and 'wide discretionary authority' alike are unacceptable, how may the limits of acceptable authority be settled? If it is contrary to the rule of law that discretionary authority should be given to

²⁵ H W Arndt (1957) 31 ALJ 117.

²⁶ Dicey, pp 202–3.

²⁷ See Jennings, *The Law and the Constitution*, ch 2 and app 2; F H Lawson (1959) 7 *Political Studies* 109, 207; H W Arthurs (1979) Osgoode Hall LJ 1; Lord Bingham [2002] PL 39; Craig, *Public Law and Democracy*, ch 2; Loughlin, *Public Law and Political Theory*, ch 7. For endorsement of Dicey's approach, see Allan, *Law, Liberty and Justice*, ch 2, and *Constitutional Justice*, ch 1. A devastating dissection of Dicey's methodology is in Allison, *The English Historical Constitution*, ch 7.

government departments or public officers, then the rule of law applies to no modern constitution. Today the state regulates national life in multifarious ways. Discretionary authority in most spheres of government is inevitable. While there are still certain powers which we are unwilling to trust to the executive (for example, the power to detain individuals without trial) except when national emergencies dictate otherwise,²⁸ attention has to be given not so much to attacking the existence of discretionary powers as to establishing legal and political safeguards by which the use of such powers may be controlled.²⁹ Doubtless Dicey would have regarded as arbitrary many powers of government on which social welfare and economic regulation now depend.

Dicey's second meaning stresses the equal subjection of all persons to the 'ordinary law'. The 14th Amendment to the US Constitution provides that no state shall 'deny to any person within its jurisdiction the equal protection of the law', a provision which has been a fertile source of constitutional challenges to discriminatory state legislation. Similar provisions are in the constitutions of India, Germany and Canada.³⁰ In fact, the legislature must frequently distinguish between categories of person by reference to economic or social considerations or legal status. Landlords and tenants, employers and employees, company directors and shareholders, British citizens and aliens – these and innumerable other categories are subject to differing legal rules. What a constitutional guarantee of equality may achieve is to enable legislation to be invalidated which distinguishes between citizens on grounds which appear irrelevant, unacceptable or offensive (for example, discrimination between persons on grounds of sex, race, origin or colour).³¹ Dicey had in mind no such jurisdiction. The specific meaning he attached to equality before the law was that all citizens (including officials) were subject to the ordinary courts should they transgress the law which applied to them, and that there should be no separate administrative courts, as in France, to deal with unlawful conduct by officials.³² He believed that *droit administratif* in France favoured the officials and that English law through decisions such as *Entick v Carrington* gave better protection to the people.

These views of Dicey long impeded the proper understanding of administrative law. Today the need for such law cannot be denied. Administrative courts in most European countries, including France, protect the individual against unlawful acts by public bodies. Britain has no administrative courts on the French model, but in 2000 a section of the High Court in London was renamed the Administrative Court. This change of name was justified by the vast expansion in public law litigation in the previous three decades.³³

Dicey's third meaning of the rule of law expressed the view that the principles of common law declared by the judges are the basis of the citizen's rights and liberties. Dicey had in mind the fundamental political freedoms – freedom of the person, freedom of speech, freedom of association. Someone whose freedoms were infringed could seek a remedy in the courts and did not need to rely on constitutional guarantees. Dicey believed that the common law gave better protection to the citizen than a written constitution. The Habeas Corpus Acts, which made effective the remedy by which persons unlawfully detained might be set free, were 'for practical purposes worth a hundred constitutional articles guaranteeing individual liberty'.³⁴ Today, we cannot share Dicey's faith in the common law as the primary

²⁸ Chs 15 C and 20 D. And see *A v Home Secretary* (note 9 above).

²⁹ Davis, *Discretionary Justice*.

³⁰ India, 1949 Constitution, art 14; Federal Republic of Germany, Basic Law, art 3; Canadian Charter of Rights and Freedoms, s 15.

³¹ Ch 14 A; and Feldman, *Civil Liberties and Human Rights*, ch 3.

³² See Brown and Bell, *French Administrative Law*; and ch 21.

³³ See chs 24 and 25.

³⁴ Dicey, p 199. And see ch 25 D.

means of protecting our liberties against the state. First, liberties at common law may be eroded by Parliament and thus they have a residual character (namely, what is left after all statutory restrictions have taken effect). Second, the common law does not assure the economic or social well-being of the people. Third, there is now wide support in many countries both for a formal declaration of basic rights (such as is provided by the European Convention on Human Rights) and for the creation of judicial procedures for protecting those rights.³⁵

Dicey's view of the rule of law, like his view of parliamentary sovereignty, was based on assumptions about the British system of government that no longer apply. Although he did not satisfactorily resolve the potential conflict between the two notions of the rule of law and the supremacy of Parliament,³⁶ a judicial formulation of the relationship implies the need for equilibrium and balance rather than conflict:

The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.³⁷

We have seen that Dicey's views on the sovereignty of Parliament remain influential today. The same cannot be said of his treatment of the rule of law. But this is no reason for assigning the rule of law and its meaning today to the margins of legal debate. Indeed, in the Constitutional Reform Act 2005 (s 1), Parliament declared (without offering a definition) that the Act 'does not adversely effect . . . the existing constitutional principle of the rule of law'. The next section seeks to explore the main aspects of the rule of law today, in a discussion which is not cast in the Diceyan mould.

B. The rule of law and its implications today

Emphasis will be placed on three related ideas. First, statements of the rule of law embody a preference for orderly life within an organised community, rather than a situation of anarchy or strife in which there is no security for persons, their well-being or their possessions. Some stability in society is a precondition for the existence of a legal system. Second, the rule of law expresses the fundamental principle that government must be conducted according to law and that in disputed cases what the law requires is declared by judicial decision. This principle is manifest in innumerable decisions of the courts, and represents existing law. Third, the rule of law refers to a rich body of opinion on matters such as the powers that the state should or should not have (for example, whether ministers should have power to detain without trial), the procedures to be followed when action is taken by the state (for example, the right to a fair hearing in criminal trials), and the values inherent in a system of justice. This third idea is relevant to debates about what the law should be, particularly when our lives are challenged by events such as unrest on the streets or international terrorism, whether these debates occur in Parliament or in a court when new issues are confronted by the judges.

The relation between the second and third ideas may be put in this way. The requirement that government be conducted according to law (the principle of legality) is a necessary condition for the rule of law; but insistence on legality alone does not ensure that the state's

³⁵ Ch 14.

³⁶ Dicey, ch 13. For an approach that sees no such conflict, see Allan, *Law, Liberty and Justice*, chs 3, 11; and (same author) *Constitutional Justice*, ch 7.

³⁷ *X v Morgan-Grampian Ltd* [1991] AC 1, 48 (Lord Bridge).

powers are consistent with values such as liberty and due process. This emphasis is found in case-law of the European Court of Human Rights.³⁸

These three aspects of the rule of law are now examined in more depth.

Three aspects of the rule of law

1. Law and order better than anarchy

In the limited sense of law and order, the rule of law may appear to be preserved by a dictatorship or a military occupation as well as by a democratic form of government. Under a government which is not freely elected, courts of law may function, settling disputes between private citizens and such disputes between citizens and government officials as the regime permits to be so decided. However, constitutionalism and the rule of law will not thrive unless legal restraints apply to the government. The maintenance of law and order and the existence of political liberty are not mutually exclusive, but interdependent. As the Supreme Court of Canada has said, ‘democracy in any real sense of the word cannot exist without the rule of law.’³⁹ The Universal Declaration of Human Rights states: ‘It is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.’⁴⁰ In a democracy, it must be possible by political means to change a government without threatening the existence of the state. Unless this possibility exists, the state becomes identified with coercive might and the role of law within the state is emptied of moral content, for ‘the State cannot be conceived in terms of force alone’.⁴¹

2. Government according to law

The principle of legality requires that the organs of the state operate through law. If the police need to detain a citizen or if taxes are levied, the officials concerned must be able to show legal authority for their actions. In Britain, their authority may be challenged before a court of law, as was done in *Entick v Carrington*. Acts of public authorities which are beyond their legal powers may be declared ultra vires and quashed by the courts.⁴² In a striking instance, the High Court held (30 years after the event) that the enforced removal of some 1,000 British citizens from the Chagos islands in the Indian Ocean to make way for the US military base on Diego Garcia had lacked legal authority.⁴³ It is because of the principle of legality that legislation by Parliament is necessary if (for instance) the police are to have additional powers to combat crime; and for this reason the rule of law serves as a buttress for democracy.⁴⁴

In the British tradition of government according to law, it is from the ordinary courts that a remedy for unlawful acts of government may be obtained: the Human Rights Act 1998 extended this jurisdiction by requiring all courts where possible to interpret legislation in conformity with the European Convention on Human Rights.⁴⁵ In many European legal

³⁸ See ch 14 B.

³⁹ *Reference Concerning Certain Questions Relating to the Secession of Quebec* (1998) 161 DLR (4th) 385, 416–17.

⁴⁰ Preamble, 3rd para.

⁴¹ d’Entrèves, *The Notion of the State*, p 69.

⁴² Ch 24.

⁴³ *R v Foreign Secretary, ex p Bancoult* [2001] QB 1067; A Tomkins [2001] PL 571. According to Ewing and Gearty, *The Struggle for Civil Liberties*, ch 1, the principle of legality is the essence of the rule of law. And see *R v Home Secretary, ex p Pierson* [1998] AC 539, 587–9 (Lord Steyn).

⁴⁴ On the relevance of the rule of law to government, see Jowell and Oliver (eds), *The Changing Constitution*, 7th edn, ch 1 (J Jowell). In the case of the Chagos islands (previous note) further ‘powers of government’ were conferred not by Parliament, but by the secret procedure of a prerogative Order in Council: *R v Foreign Secretary, ex p Bancoult (No 2)* [2008] UKHL 61, [2009] 1 AC 453.

⁴⁵ Ch 14 C.

systems, jurisdiction in public law is assigned to administrative courts. Such courts vary greatly in structure and procedure, but their power to review the legality of executive acts has much in common with the work of the Administrative Court in London.

Public authorities and officials must be subject to effective sanctions if they depart from the law. Often the sanction is that their acts are declared invalid by the courts. Another sanction is the duty to compensate those whose rights have been infringed. Today it is unlikely that the British Prime Minister would be sued for damages, not because of any immunity from such action but because his or her decisions do not normally have direct legal effect; yet in 1959 the Premier of Quebec was held liable in damages for having maliciously and unlawfully directed a licensing authority to cancel the licence of a restaurant proprietor who had repeatedly but lawfully provided bail for Jehovah's Witnesses accused of police offences.⁴⁶ In Britain, government departments are liable to be sued for their wrongful acts under the Crown Proceedings Act 1947.⁴⁷ That Act preserved the personal immunity of the Sovereign, an immunity which in other legal systems is enjoyed by the head of state. Thus in the USA, the President in office is immune from liability for his unlawful acts and he is irremovable except on a successful impeachment. If the President is removed, he can then be sued or prosecuted for unlawful acts which he may have committed. Even a President in office may not disregard the law.

In the course of criminal investigations into the Watergate affair, the special prosecutor appointed by the Attorney-General requested President Nixon to produce tape-recordings of discussions which the President had had with his advisers. When presidential privilege was claimed for the tapes, the US Supreme Court held that the claim had to be considered 'in the light of our historic commitment to the rule of law'. The court rejected the claim and ordered the tapes to be produced, since 'the generalised assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial'.⁴⁸

Nixon then resigned rather than face impeachment proceedings before a hostile Congress. In 1998–99, when President Clinton was impeached, he was acquitted by the Senate on charges that included one of giving false testimony to a federal grand jury in the Lewinsky affair.⁴⁹ In 1999, presidential immunity of a different kind came before the House of Lords: General Pinochet, former President of Chile, was held liable to be extradited to Spain to stand trial on charges of conspiring to commit torture contrary to international law, relating to events while he was in office.⁵⁰ No general immunity applies to government ministers. In 1993, the Law Lords held that the Home Secretary was liable for contempt of court, in that he failed to order the return to the United Kingdom of a Zairean teacher who had claimed refugee status, despite an order by a High Court judge that this should be done. Lord Templeman said: 'For the purpose of enforcing the law against all persons and institutions, . . . the courts are armed with coercive powers exercisable in proceedings for contempt of court.' The Home Secretary's argument that the courts had no such powers against ministers 'would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War'.⁵¹

⁴⁶ *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689.

⁴⁷ Ch 26.

⁴⁸ *US v Nixon* 418 US 683 (1974); for public interest immunity in Britain, see ch 26 D.

⁴⁹ Gerhardt, *The Federal Impeachment Process*, ch 14. And see Berger, *Impeachment*.

⁵⁰ *R v Bow Street Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147.

⁵¹ *M v Home Office* [1994] 1 AC 377, 395.

In a system in which Parliament is supreme, and so long as the Cabinet has a majority in the Commons, legal authority for new powers may not be difficult for the government to obtain, and fundamental rights are not protected against legislative invasion. The supreme Parliament may grant the executive powers which drastically affect individual liberty, as it did in 2001 when it authorised the indefinite detention without trial of foreign nationals suspected of terrorist involvement.⁵² If all that the rule of law means is that official acts must be clothed with legality, this gives no guarantee that other fundamental values are not infringed.

3. *The rule of law as a broad doctrine affecting the making of new law*

If law is not to be merely a means of achieving whatever ends a particular government may favour, the rule of law must go beyond the principle of legality. The experience and values of the legal system are relevant not only to the question, ‘What legal authority *does* the government have for its acts?’ but also to the questions, ‘What powers *ought* the government to have? And how *ought* those powers to be exercised?’ If, for example, the government wishes to introduce penal sanctions for conduct contrary to its economic or social policies, the new legislation ought to respect principles of fair criminal procedure. That obligation is reinforced by the Human Rights Act 1998 and the right to a fair trial under the European Convention on Human Rights, art 6.

As a broad principle influencing development of the law, the content of the ‘rule of law’ has been much debated. What *are* the essential values which have emerged from centuries of legal experience? Are they absolute values, or are there circumstances in which political necessity justifies the legislature in departing from them? To revert to the example of interrogation in depth with which this chapter began, could it ever be justified to use such methods to compel those suspected of terrorist activities to reveal information? Could there be legislation to authorise this that would not also open the way for measures amounting to torture or degrading treatment in breach of art 3, ECHR?

Since 2001, there have been many claims that measures amounting to torture have been used by states against suspected terrorists. In 2005, as we have seen, the Law Lords held that evidence that might have been obtained by means of torture committed abroad is inadmissible in special immigration proceedings. Having surveyed national and international rules against torture, Lord Bingham said:

it would of course be within the power of a sovereign Parliament (in breach of international law) to confer power on [a tribunal] to receive third party torture evidence. But the English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention.⁵³

For legislation to connive at the use of torture would indeed be to erode the rule of law. The same may be said of proposals to administer justice in secret, especially if the aim is to prevent sensitive evidence being made known to an accused person and his or her legal representatives. Yet a controversial result of the present role of the security and intelligence agencies is that a majority ruling by the UK Supreme Court that the courts have no inherent authority to permit civil justice in secret without disclosure to one of the parties was soon followed by legislation to permit this, albeit subject to certain safeguards in the legislation.⁵⁴

⁵² See *A v Home Secretary* (note 9 above) and ch 20 D.

⁵³ *A v Home Secretary* (No 2) (note 10 above), [51].

⁵⁴ *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 All ER 1; and Justice and Security Act 2013, part 2 (and see ch 20 C). Cf *Home Office v Tariq* [2011] UKSC 35, [2012] 1 All ER 58 (closed procedure authorised by regulations, no breach of EU law or art 6 ECHR). See also *A v United Kingdom* (2009) 26 BHRC 1 and *A v Home Secretary* (No 3) [2009] UKHL 28, [2010] 2 AC 269.

There may of course be room for disagreement over the ‘rule of law’ aspects of a particular situation. In 2008, the Divisional Court relied on the rule of law in holding that the Director of the Serious Fraud Office acted unlawfully in dropping an investigation into charges of bribery against BAE Systems plc, in the light of threats from Saudi Arabia to take action that would damage UK security, if the investigation continued. The Law Lords disagreed, holding that the Director’s decision had been properly made and that the ordinary principles of judicial review gave effect to the rule of law.⁵⁵

Is the rule of law then in this broad sense too subjective and uncertain to be of any value? Would discussion of changes in the law be clearer if the ‘rule of law’ were excluded from the vocabulary of debate? One attempt to ascertain the values inherent in law was made by Lon Fuller, who argued that the enactment of secret laws would be contrary to the essential nature of a legal system, as would heavy reliance on retrospective legislation or on legislation imposing criminal sanctions for conduct which is not defined but may be deemed undesirable by an official.⁵⁶

Joseph Raz argues that the term ‘rule of law’ should be limited to formal values associated with the legal system. Thus, laws should be prospective, open, certain and capable of guiding human conduct; judges should be independent and the courts accessible; and litigants should receive a fair hearing. While these standards may ensure formal conformity to the rule of law, Raz emphasises that they do not ensure that the substance of the law meets the needs of the people; and that conformity to legal values is a matter of degree, to be balanced against competing claims.⁵⁷

While Raz regards the rule of law as dealing with matters of form, other jurists favour a more substantive concept.⁵⁸ But the distinction between form and substance is not always clear-cut (is the case against ‘arbitrary power’ based on matters of form or substance or both?). For Raz, the rule of law is ‘compatible with gross violations of human rights’, but he also argued that ‘deliberate disregard for the rule of law violates human dignity’.⁵⁹ He rightly warns against identifying the rule of law with utopia. But is the rule of law observed under a dictatorship in which the judges diligently apply the dictator’s edicts, including one that permits indefinite detention without trial for those suspected of undesirable activity?

Many would conclude that the rule of law in a strong sense thrives only alongside values of human dignity, liberty and democracy. This view was shared by the late Lord Bingham, for many years the presiding Law Lord; his book *The Rule of Law* identified eight principal ingredients of the concept:⁶⁰

- (1) The law must be accessible and so far as possible intelligible, clear and predictable.
- (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
- (3) The laws should apply equally to all, save to the extent that objective differences justify differentiation.

⁵⁵ *R (Corner House Research) v Director of SFO* [2008] UKHL 60, [2009] AC 756. See J Jowell [2008] JR 273 and Lord Steyn [2009] PL 338.

⁵⁶ Fuller, *The Morality of Law*. Allan, *Constitutional Justice* endorses Fuller’s approach. For a vivid illustration of the perversion of legal process, see Lord Steyn’s quotation from Kafka’s *The Trial* in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, [95].

⁵⁷ J Raz (1977) 93 LQR 195. See also Raz, *Ethics in the Public Domain*, ch 16.

⁵⁸ See P Craig [1997] PL 467 and (the same) in Feldman (ed.), *English Public Law*, ch 13 B.

⁵⁹ J Raz (1977) 93 LQR 195, 204 and 205.

⁶⁰ See also his analysis of the rule of law at [2007] CLJ 67.

- (4) Public officers at all levels must exercise their powers in good faith, fairly, for the purposes for which the powers are conferred, without exceeding the limits of such powers and not unreasonably.
- (5) The law must afford adequate protection for fundamental human rights.
- (6) Means must be provided for resolving, without excessive cost or delay, civil disputes which the parties themselves cannot resolve.
- (7) Adjudicative procedures provided by the state should be fair.
- (8) The state must comply with its obligations in international law as in national law.

Among British judges there is an important vein of belief in the values to be upheld in a legal system. The nature of these values can be discovered from judicial decisions⁶¹ and from many articles and lectures by judges.⁶²

International aspects of the rule of law

Since 1945, there have been constant efforts to further the rule of law in international relations and to secure respect for human rights. The Universal Declaration of Human Rights, adopted in 1948, was followed by the European Convention on Human Rights (ECHR), signed at Rome in 1950.⁶³ The Convention recognised that European countries have ‘a common heritage of political traditions, ideals, freedom and the rule of law’ and created machinery for protecting certain human rights. In *Golder’s* case, upholding the right of a convicted prisoner in the United Kingdom to obtain legal advice regarding a civil action against the prison authorities, the European Court of Human Rights said, ‘in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts’.⁶⁴

Both the Convention and the case-law of the Strasbourg Court support the analysis of the rule of law made in this chapter.⁶⁵ The Convention seeks to protect individuals against the arbitrary or unlawful exercise of state power, and it requires national legal systems to bear the primary burden of protecting Convention rights. In respect of those Convention rights that (unlike the right not to be tortured) are not absolute, any restrictions in the public interest must (among other things) satisfy the test of being ‘prescribed by law’. This test means (in outline) that (1) the restriction must be authorised in national law and (2) the ‘quality’ of the national law must be compatible with the Convention.⁶⁶ In English law, it was formerly held that public authorities might do anything which did not interfere with the rights of individuals, even if they had no express authority for such action.⁶⁷ This approach is not acceptable where Convention rights are concerned.

⁶¹ See D Feldman (1990) 106 LQR 246. On the power of the court to stay proceedings which ‘have only been made possible by acts which offend the court’s conscience as being contrary to the rule of law’, see *R v Horseferry Road Magistrates, ex p Bennett* [1994] 1 AC 42, 76 (Lord Lowry).

⁶² Articles by senior judges include: J Laws (1994) 57 MLR 213, [1995] PL 72, [1996] PL 622, [1997] PL 455, [1998] PL 221; R Scott [1996] PL 410 and 427; S Sedley (1994) 110 LQR 260; Lord Steyn [1997] PL 84, (2004) 53 ICLQ 1; and Lord Woolf [1995] PL 57, [2004] CLJ 317.

⁶³ Ch 14 B. For the background, see Simpson, *Human Rights and the End of Empire*.

⁶⁴ *Golder v UK* (1975) 1 EHRR 524.

⁶⁵ Although the background to the term ‘rule of law’ is the common law, French law knows the term ‘état de droit’ and German law the concept of ‘rechtsstaat’. The three concepts are the subject of a rich comparative analysis in Heuschling, *État de droit, Rechtsstaat, Rule of Law*.

⁶⁶ See *Sunday Times v UK* (1979) 2 EHRR 245; *Malone v UK* (1984) 7 EHRR 14. Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, pp 344–8.

⁶⁷ *Malone v Metropolitan Police Commissioner* [1979] Ch 344; cf *R v Somerset CC, ex p Fewings* [1995] 3 All ER 20.

The ECHR, established through the Council of Europe, is one of many multilateral treaties that encourage states to protect human rights. Treaties adopted under the United Nations include the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention against Torture.⁶⁸

Social and economic aspects of the rule of law

The rule of law movement has broadened to include social and economic goals which lie far beyond the typical values associated with the courts, legal process and the legal profession. Such a broadening of the ‘rule of law’ raises issues that often arise from government policies in relation to the economy and social welfare. One extreme view is that individual autonomy and the ability to plan one’s affairs will be prejudiced if governments retain powers to intervene in social and economic affairs.⁶⁹ Now certainty and predictability are values often associated with law. In a different context, Lord Diplock said in 1975: ‘The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know what are the legal consequences that will flow from it.’⁷⁰ But, however desirable it may be that discretionary powers of government should be controlled by rules,⁷¹ the principle is difficult to apply to the state’s responsibilities for the economic and social well-being of its people.

A related question is whether legal protection for classic civil and political rights (such as personal liberty, freedom of expression and the right to vote) can or should be extended to economic and social rights (such as rights relating to employment, social security, health care and housing).⁷² Protection for rights of these kinds is found in the national constitutions of many EU member states, and in other countries where new constitutions have recently been adopted. Some economic and social rights are, however, subject to problems of definition, implementation and enforcement, while others (such as employment rights) are addressed to private law relationships as well as the relationship between the individual and the state. But it is certainly arguable that individuals ought to have enforceable rights to the delivery of some public goods, such as education or medical care. In South Africa, constitutionally-protected social rights (including rights to housing, health care, food and shelter) are enforceable by the Constitutional Court.⁷³

Within the Council of Europe, there has since 1995 been a collective complaints procedure to enable cases to be taken to the Social Rights Committee by organisations claiming that a member state is in breach of an obligation under the European Social Charter. The United Kingdom has ratified the Social Charter of 1961, but not the collective complaints protocol, nor the Revised Social Charter of 1996, in which the collective complaints procedure is also included.⁷⁴ Otherwise, the Social Charter has become an important source used by the Strasbourg court in the interpretation of Convention rights (particularly in relation to

⁶⁸ For the texts, see Brownlie and Goodwin-Gill, *Basic Documents on Human Rights*.

⁶⁹ See the analysis of rule of law concepts in Hayek, *The Constitution of Liberty*; for a critique, see Loughlin, *Public Law and Political Theory*, pp 84–101.

⁷⁰ *Black-Clawson International Ltd v Papierwerke AG* [1975] AC 591, 638.

⁷¹ Davis, *Discretionary Justice*, ch 3.

⁷² See S Fredman and M Wesson in Feldman (ed.), *English Public Law*, ch 10. Also K D Ewing (2001) 5 Edin LR 297; G van Beuren [2002] PL 456 and [2013] PL 821; and in Rosenfeld and Sajó (eds), *Oxford Handbook of Comparative Constitutional Law*, ch 49 (D M Davis) and ch 50 (K D Ewing).

⁷³ See *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); and M Wesson [2007] PL 748.

⁷⁴ See Harris and Darcy, *The European Social Charter*. The EU Charter of Fundamental Rights (2000) includes both civil and political rights, and social and economic rights, and it seeks to break down the traditional distinction between the two: Fredman and Wesson (above) pp 473–8. See also ch 6 B.

articles 4 and 11).⁷⁵ In the United Kingdom, much detailed social legislation has long existed, and individuals may usually enforce rights under that legislation by appealing to the appropriate tribunal (where one exists) or, where there is no right of appeal, by recourse to judicial review.⁷⁶

Conclusion

In his study of the rule of law, Lord Bingham concluded that the core of the principle is ‘that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.’⁷⁷ Surrounding this core are many principles of legal, political and democratic significance. A government’s developing response to changing social needs may require these principles to be re-assessed, but no government should suppose that new areas of public action (such as the regulation of public utilities) can be insulated from the scope of law and subjected only to administrative or political controls. Through the EU, the United Kingdom is part of a supranational legal system which regulates important areas of economic and social activity.

Challenges to the orderly working of law and society are presented by phenomena such as hijacking, urban terrorism, direct action by militant groups, civil disobedience, and violent demonstrations. All these are sometimes described indiscriminately as a threat to the rule of law (by which may be meant a challenge to the authority of established institutions). There are many distinctions to be drawn between these different forms of political or criminal action. But, if we leave aside acts of criminal violence at one end of the scale and peaceful political action at the other, do acts of non-violent civil disobedience endanger the legal system? In particular, does the rule of law require obedience to the law at all times from all citizens and organisations?⁷⁸ It may be argued both that in a democracy there are important reasons for obeying the law which do not exist in other forms of government, and that there are forms of principled disobedience that do not run counter to the general justification for obedience. The last point applies particularly to actions that are planned to improve the working of democratic decision-making.⁷⁹ The claims of the state are not absolute, and individuals may be driven by their conscience to resist a law that they regard as unjust or immoral. Such action does not conflict with there being a general obligation to obey the law, including legal rules with which an individual disagrees.

Modern society requires willingness from most people for most of the time to observe the law, even law that is unpopular. It deserves to be remembered that law, like the democratic process, may protect the weaker and underprivileged sections of society against those who can exercise physical or economic force.

C. The separation of powers

In this section, we examine briefly a principle which is found, in one form or another, in most modern constitutions. The need for some ‘separation of powers’ within the state is essential

⁷⁵ *Demir and Baycara v Turkey* [2008] ECHR 1345, (2009) 48 EHRR 54.

⁷⁶ Chs 23 A and 24.

⁷⁷ *The Rule of Law*, p 8.

⁷⁸ Marshall, *Constitutional Theory*, ch 9; Dworkin, *Taking Rights Seriously*, ch 8; Allan, *Law, Liberty, and Justice*, ch 5.

⁷⁹ Singer, *Democracy and Disobedience*. The Strasbourg Court has recognised that direct action may involve Convention rights to freedom of expression and association: *Steel v UK* (1998) 28 EHRR 603. See H Fenwick and G Phillipson [2000] PL 627 and (2001) 21 LS 535.

both in the interests of democracy but also for the legal system, where an independent judiciary is essential if the rule of law is to have any substance.⁸⁰

The need for the separation of powers in what may be called a strong sense of the term has often been downplayed in respect of the United Kingdom. Thus Dicey referred in passing to the doctrine as being ‘the offspring of a double misconception’⁸¹ In 1995, Lord Mustill, a senior judge, sought to recognise its significance:

It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.⁸²

This model for the exercise of legislative, executive and judicial powers may be seen at work in such fields as the law of taxation, criminal law and in administrative law. In reality, the validity of the model is more complex than the quotation suggests. Three questions need to be asked:

- (a) to what extent are the three functions (legislative, executive and judicial) distinguishable?
- (b) how and why should these three functions be ‘separated’?
- (c) to what extent are these functions exercised separately in the United Kingdom?

To what extent are the three functions (legislative, executive and judicial) distinguishable?

The *legislative function* involves the enactment of general rules determining the structure and powers of public authorities and regulating the conduct of citizens and private bodies. We have seen that supreme legislative authority in the United Kingdom is exercised by Parliament, generally on the proposal of the government, but not all new laws are made directly at Westminster. Parliament has created devolved assemblies in Scotland, Wales and Northern Ireland and frequently confers legislative powers on executive bodies such as ministers, government departments and local authorities. Under the European Communities Act 1972, some legislative authority for all EU member states, including the United Kingdom, is exercised at the European level. Despite the severe limits placed by history on the authority of the Crown to legislate without Parliament, a few legislative powers of the Crown have survived, and an attempt by the government to use such a power to pre-empt legislation by Parliament was the subject of judicial review in 1995.⁸³ As regards legislation by Parliament, the courts decide the effect of that legislation by the process of interpretation; and in the area of the common law the courts still exercise a role that may involve the making of new law. Moreover, in most areas of government, ministers and departments regularly formulate policies for the exercise of statutory powers and apply those policies to specific individuals:

⁸⁰ Vile, *Constitutionalism and the Separation of Powers*; Allan, *Law, Liberty and Justice*, chs 1, 3, 8 and Allan, *Constitutional Justice*, ch 2. Also Mount, *The British Constitution Now*, pp 81–92; N W Barber [2001] CLJ 59 and Barber, *The Constitutional State*, ch 3.

⁸¹ Dicey, *Law of the Constitution*, p 338. For a critical analysis, see Jennings, *Law and the Constitution*, pp 18–28 and App 1. Robson, a contemporary of Jennings, called separation of powers ‘that antique and rickety chariot . . . , so long the favourite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas’: *Justice and Administrative Law*, p 14.

⁸² *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513, 567.

⁸³ *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513 (E Barendt [1995] PL 357).

the power to make general rules and policies carries with it the power to make sub-rules and more detailed policies and may often become blurred with the making of decisions based on a person's individual circumstances.⁸⁴

The *executive function* is more difficult to define, since it broadly comprises the whole body of authority to govern, other than that involved in the legislative functions of Parliament and the judicial functions of the courts. The authority to govern includes such matters as initiating and implementing legislation, maintaining order and state security, promoting social welfare and the economy, and conducting the external relations of the state. Historically, the executive was identified with the monarch, but today the executive in a broad sense comprises all ministers, officials and public authorities by which functions of government are exercised. Executive functions are also performed by devolved authorities in Scotland, Wales and Northern Ireland, by local authorities and at a European level by the EU.

The primary *judicial function* is to determine disputes in accordance with the laws made by Parliament and decisions of the superior courts, and extends to matters of private and public law. It is exercised in the civil and criminal courts and in tribunals. In matters of Community law, judicial functions are exercised by the European Court of Justice and the Court of First Instance. Under the Human Rights Act 1998, all UK courts and tribunals must take account of decisions made by the European Court of Human Rights.

How and why should the functions be 'separated'?

Within a system of government based on law, the primary organs for performing legislative, executive and judicial functions are respectively the legislature, the executive and the courts. As a legal historian remarked:

This threefold division of labour, between a legislator, an administrative official, and an independent judge, is a necessary condition for the rule of law in modern society and therefore for democratic government itself.⁸⁵

In Britain, Parliament, the courts and central government all owe their historical origin to the monarchy. Before these institutions developed as distinct entities, the King and his Council dealt variously with legislative, executive and judicial work. Today these tasks are all performed in the name of the Crown, but with a differentiation of process and personnel: it is the relationships between these three distinct institutions that are of concern for present purposes.⁸⁶

The doctrine of separation is associated particularly with the French jurist, Montesquieu (1689–1755), who based his exposition on an idealised view of the English constitution in his day. For him, the essence of the doctrine was the achievement of liberty.

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty . . . Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.⁸⁷

The framers of the US constitution of 1787 were fully aware of these implications for liberty. In a famous paper James Madison described the need for separation as a political truism:

⁸⁴ See ch 22 E.

⁸⁵ Henderson, *Foundations of English Administrative Law*, p 5.

⁸⁶ See Vile, note 80 above, for reassessment of the link between legal values and separation of powers; also Marshall, *Constitutional Theory*, ch 5, and Munro, *Studies in Constitutional Law*, ch 9.

⁸⁷ Montesquieu, *The Spirit of the Laws* (ed. Cohler, Miller and Stone), book XI, ch 6.

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.⁸⁸

But Madison's aim was to show that complete separation between legislature, executive and judiciary was neither possible nor desirable, and he defended the 1787 constitution for the manner in which it provided an elaborate structure of mutual restraints and influences ('checks and balances') between Congress, the President and the courts.

Certainly the separation of powers is a prominent feature of the US constitution, but so also is the structure of checks and balances that it created. Legislative power is vested in Congress, consisting of the Senate and House of Representatives (art 1), executive power in the President (art 2) and judicial power in the Supreme Court and such other federal courts as might be established (art 3). The President holds office for a term of four years and is elected separately from Congress, so he may be of a different party from that which has a majority in either or both Houses. Neither the President nor members of his Cabinet may sit or vote in Congress; they have no direct power of initiating Bills or securing their passage through Congress. While the President has a power to veto legislation passed by Congress, his veto may be overridden by a two-thirds vote in each House of Congress. Some key executive powers, such as the negotiation of treaties and the appointment of federal judges, are subject to approval or confirmation by the Senate. The President is not directly responsible to Congress: in normal circumstances he is irremovable, but the constitution enables the President to be removed from office by impeachment at the hands of the Senate, 'for treason, bribery, or other high crimes and misdemeanours' (art 2(4)).⁸⁹ Once appointed, the Supreme Court justices are independent of Congress and the President: they serve for life, but they too may be removed by impeachment. In one of its earliest decisions, *Marbury v Madison*, the Supreme Court assumed the power to declare acts of Congress and the President to be unconstitutional should they conflict with the constitution.⁹⁰

While most written constitutions contain separate chapters dealing with legislative, judicial and executive powers, they display no uniformity in the inter-relation of the institutions that exercise these powers. In France, for instance, the doctrine of separation has manifested itself very differently from the American version. Thus it is considered to flow from the separation of powers that the ordinary courts should have no jurisdiction to review the legality of acts of the legislature or executive.⁹¹ The constitutions of countries in the Commonwealth likewise vary widely in maintaining a 'separation' of powers. Under the Australian constitution, for example, delegation of legislative powers to executive agencies has been accepted more readily than the delegation to them of judicial powers.⁹² The former constitution of Sri Lanka was held to be based on an implied separation of powers, so that legislation to provide special machinery for convicting the leaders of an unsuccessful coup infringed the principle that judicial power was vested only in the courts.⁹³ Where the constitution is based on an express

⁸⁸ *The Federalist*, no 47.

⁸⁹ See Gerhardt, *The Federal Impeachment Process*. The prospect of impeachment caused President Nixon to resign in 1974 over the Watergate affair; impeachment proceedings against President Clinton in 1999 were not successful.

⁹⁰ 1 Cranch 137 (1803). Cf *US v Nixon* 418 US 683 (1974). On separation of powers issues under the US constitution, see Tribe, *Constitutional Choices*, part II. For reassessment of US-style separation of powers as a constitutional model, see B Ackerman (2000) 113 Harv LR 634.

⁹¹ See Bell, *French Constitutional Law*. The important powers of the Conseil d'Etat and the Conseil Constitutionnel over executive and legislative measures respectively are exercised outside the jurisdiction of the civil and criminal courts.

⁹² Lumb, Trone and Moens, *The Constitution of the Commonwealth of Australia*, pp 23–27.

⁹³ *Liyanage v R* [1967] 1 AC 259.

or implied separation of powers, the courts may have to decide whether a power created by new legislation should be classified as legislative, executive or judicial.⁹⁴ British courts do not have this task, since there is no constitutional restraint to prevent Parliament from vesting in executive bodies powers that are in essence legislative or judicial.⁹⁵

A comprehensive analysis of the separation of powers would have to deal with at least three meanings of the concept of 'separation'. First, that the same persons should not form part of more than one of the three branches (for example, that ministers as members of the executive should not sit in the legislature); second, that one branch of the state should not directly control the work of another (for example, that the executive should not be able to interfere in judicial decisions); and third, that one branch should not exercise the functions of another (so, for example, ministers should not have power to create criminal offences or to commit offenders to prison).

To what extent are these functions exercised separately in the United Kingdom?

Against this background, some features of the separation of powers are plainly incompatible with parliamentary government. Writing in 1867, Bagehot described the 'efficient secret' of the British constitution as 'the close union, the nearly complete fusion, of the legislative and executive powers'.⁹⁶ Bagehot's critics have rejected the concept of fusion, arguing that the close relationship between executive and legislature does not negate the constitutional distinction between the two. The fact that today all government ministers are required to be members of the Commons or the Lords has not taken away the distinction between the two institutions of Government and Parliament.⁹⁷ For instance, there is a statutory limit on the number of ministers who may be members of the Commons.⁹⁸ Most persons who hold positions within the executive (including the civil service, the armed forces and the police) are disqualified from the Commons. Only ministers are key figures in both Parliament and the executive. Moreover, the processes of the two Houses are very different from decision-making in Whitehall. No formula based on separation of powers can provide a lasting answer to the questions that arise from this relationship, but there are democratic reasons why a balance between Government and Parliament should be achieved. In 1978, the Select Committee on Procedure concluded that

the balance of advantage between Parliament and Government in the day to day working of the Constitution is now weighted in favour of the Government to a degree which arouses widespread anxiety and is inimical to the proper working of our parliamentary democracy.⁹⁹

That report led directly to the creation of the system of department select committees, that has done much to increase the accountability of government to Parliament, and in the 1990s some measures were taken to modernise the procedures of the Commons. More recent reforms have concentrated on the need to strengthen the position of the House vis-à-vis the

⁹⁴ *Hinds v R* [1977] AC 195 (Jamaica). And see *DPP of Jamaica v Mollinson* [2003] UKPC 6, [2003] 2 AC 411, para [13].

⁹⁵ But see European Convention on Human Rights, art 6(1) (below). And by judicial review, government departments may be required to observe statutory procedures for laying rules in Parliament: see p 109, cases at note 112.

⁹⁶ Bagehot, *The English Constitution*, p 65.

⁹⁷ Amery, *Thoughts on the Constitution*, p 28; also Vile, *Constitutionalism and the Separation of Powers*, pp 224–30, and Mount, *The British Constitution Now*, pp 39–47.

⁹⁸ Ch 7 G.

⁹⁹ HC 588–1 (1977–78), p viii.

executive and on the need for the House to gain more control over its business.¹⁰⁰ But it has been commented that within the British system, the public at large see ‘no visible distinction’ between Parliament and Government.¹⁰¹

Turning to the judicial branch, it must be stressed that independence of the judiciary calls for a strong form of separation between the courts on the one hand and the legislature and executive on the other. An obvious breach of that separation continued so long as the Lord Chancellor was both a senior Cabinet minister and head of the judiciary in England and Wales; and another breach continued so long as a committee of the House of Lords served as the final court of appeal. Under the Constitutional Reform Act 2005, the Lord Chief Justice became head of the judiciary in England and Wales, and the Supreme Court in 2009 took over the appellate function of the Lords. The courts are dependent on Parliament for their funding, but they must be able to function independently both of government and Parliament. Since the Act of Settlement 1700, the senior English judges have held office during good behaviour, not at pleasure of the executive. In 2005, Parliament declared that all ministers of the Crown ‘and all with responsibility for matters relating to the judiciary . . . must uphold the continued independence of the judiciary’.¹⁰² The need for judicial independence is reinforced by the European Convention on Human Rights, art 6(1) of which declares that ‘in the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by *an independent and impartial tribunal* established by law’ (emphasis supplied). Under the Tribunals, Courts and Enforcement Act 2007,¹⁰³ the judicial role of tribunal members has been recognised and their independent status enhanced.

The importance of judicial independence was reinforced in *M v Home Office*, when it was held that ministers are subject to the contempt jurisdiction of the courts: the Home Secretary was in contempt of court when he disobeyed a judge’s order to return to London a Zairean teacher who had sought asylum in England.¹⁰⁴ A perceptive summary of the position was given by Nolan LJ:

The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.¹⁰⁵

As for the relationship between the judiciary and the legislature, judges of the superior courts may be removed by the Crown on an address from both Houses, but only once since the Act of Settlement has Parliament exercised the power of removal.¹⁰⁶ Rules of Commons procedure protect judges from certain forms of criticism. The doctrine of legislative supremacy generally protects Acts of Parliament from being questioned in the courts but, as we have seen, the European Communities Act 1972 and the Human Rights Act 1998 have extended the jurisdiction of the courts.¹⁰⁷ The effect of their decisions may be altered by Parliament, both prospectively and also if necessary retrospectively. Because of the doctrine of precedent, the judicial function of declaring and applying the law enables the superior courts to make law by their decisions. But this power is much narrower than the ability of Parliament to legislate, since Parliament is unrestricted in its power to change established rules of law.

¹⁰⁰ See report of House of Commons Reform Committee (Wright committee), HC 1117, 2008–09; and HC 82, 2013–14.

¹⁰¹ HC 1117, 2008–09, p 9, quoting evidence by the Parliamentary Ombudsman.

¹⁰² Constitutional Reform Act 2005, s 3(1).

¹⁰³ See ch 23 A.

¹⁰⁴ [1994] 1 AC 377; see G Marshall [1992] PL 7, M Gould [1993] PL 568.

¹⁰⁵ *M v Home Office* [1992] QB 270, 314.

¹⁰⁶ Ch 13 B.

¹⁰⁷ And see chs 6 C and 14 C.

Conclusion

In the absence of a written constitution, there is no formal separation of powers in the United Kingdom. No legislation may be challenged on the ground that it confers powers in breach of the doctrine. The functions of legislature and executive are closely inter-related and ministers are members of both. Yet '[it] is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain'.¹⁰⁸

The formal process of legislation is different from the day-to-day conduct of government. Parliament frequently delegates power to legislate upon the executive, but it retains oversight of such delegated powers.¹⁰⁹ However close the relationship between Parliament and the executive may be, the continuing independence of the judiciary is a constitutional fundamental. We have not needed in this section to examine the conceptual difficulties that arise from the tripartite classification of legislative, executive and judicial powers. But if government is to be based on law, the constitutional structure must distinguish between the primary functions of law-making, law-executing and law-adjudicating. If these distinctions are abandoned, the concept of law itself can scarcely survive.¹¹⁰

¹⁰⁸ *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC at 567 (Lord Mustill).

¹⁰⁹ Ch 22.

¹¹⁰ See Allan, *Constitutional Justice*: 'When the idea of the rule of law is interpreted as a principle of constitutionalism, it assumes a division of governmental powers or functions that inhibits the exercise of arbitrary state power.' (p 31).

CHAPTER 5

Responsible and accountable government

A. The background

Within a democracy, those who govern must be accountable, or responsible, to those whom they govern. The power to govern derives directly from the votes of the electors, and from their continuing willingness to have their lives and well-being overseen by the government. Between general elections, one function of the elected representatives is to call the government to account openly for its acts and policies. This both requires government to justify its decisions by giving reasons for them, and enables decisions that appear unjustified or mistaken to be criticised. The process enables electors at their next opportunity to vote to make an informed appraisal of the government's record; until then it influences the formation of public opinion regarding the government.

In ordinary speech, the words 'responsible' and 'accountable' have several meanings; and the concept of responsible government takes several forms.¹ During the 1990s, because of some serious failures of accountability, attempts were made to identify the essential meaning of accountable government. In 1996, the Scott report on the 'arms for Iraq' affair contained penetrating criticism of incomplete and misleading answers given by ministers in Parliament to questions about the government's policy.² In the same year, a report by the Public Service committee of the House of Commons, while affirming that ministerial responsibility 'is a central principle of the British Constitution', examined the difficulties inherent in the principle.³ In 2001, an independent committee urged that Parliament must be at the apex of the system of scrutiny of the executive and must develop both a culture of scrutiny and more effective methods of securing accountability.⁴ In 2007, the Public Administration committee of the Commons referred to the 'robust system of political accountability' in the United Kingdom, but urged that the relationship between ministers and the civil service should ensure the 'ultimate accountability of the government' to the electorate.⁵

This chapter examines the political responsibility of government to Parliament, including both collective and individual responsibility. Another form of responsibility is the responsibility in law of ministers and officials for their acts. Whereas legal responsibility is ultimately a matter for the courts, political responsibility is enforced primarily through Parliament. A government's relationship with Parliament is too complex to be the subject of a complete code, but at the heart of that relationship are obligations which ought to be observed by every government. A guide to these obligations may now be found in two related documents, the *Ministerial Code* and the *Civil Service Code*,⁶ as well as in resolutions of each House at Westminster.

¹ Related principles include popular control of decision-making and political equality: see Weir and Beetham, *Political Power and Democratic Control in Britain*, ch 1. Tomkins, *Our Republican Constitution*, p 1, emphasises that the government is responsible to *Parliament*. For discussion of a much broader concept of accountability, see Bamforth and Leyland (eds), *Accountability in the Modern Constitution*.

² HC 115 (1995–6), vol IV, section K.8, pp 1799–806; and see R Scott [1996] PL 410.

³ HC 313–I (1995–6). For the government's response, see HC 67 (1996–7).

⁴ Hansard Society, *The Challenge for Parliament: Making Government Accountable* (the Newton report). See also HC 300 and 748 (1999–2000), Cm 4737, 2000, HC 321 (2000–01) and D Oliver [2001] PL 666.

⁵ HC 122 (2006–07). For the government's response, see HC 1057 (2007–08).

⁶ See respectively ch 11 C and E.

Origins of responsible government

So long as government was carried on by the King, the nature of monarchy made it difficult to establish any responsibility for acts of government. In mediaeval times, the practice developed by which the royal will was signified in documents bearing a royal seal, and applied by one of the King's ministers. In this practice lay 'the foundation for our modern doctrine of ministerial responsibility – that for every exercise of the royal power some minister is answerable'.⁷ With the responsibility of ministers came a specific understanding of the rule that 'the King can do no wrong'. This meant not that everything done on behalf of the King was lawful, but that the King's advisers and ministers were punishable for illegal measures that occurred in the course of government.⁸ Today responsibility for an Order in Council made by the Queen is borne by the Cabinet minister whose department decided that the order should be made.⁹

This responsibility was at one time enforced by the English Parliament through impeachment. Officers of state were liable to be impeached by the Commons at the bar of the House of Lords for the treason, high crimes and misdemeanours they were alleged to have committed. In the 17th century, impeachment became a political weapon wielded by Parliament for striking at unpopular royal policies.¹⁰ Following the granting of a royal pardon to Danby in 1679 to forestall his impeachment, the Act of Settlement provided that a royal pardon could not be pleaded in bar of an impeachment. The last instance of a purely political impeachment came when the Tory ministers who in 1713 negotiated the Peace of Utrecht were later impeached by a Whig House of Commons. Thereafter, only two impeachments occurred, of Warren Hastings between 1788 and 1795 for misgovernment in India and of Lord Melville in 1806 for alleged corruption. The power of impeachment is still in theory available to Parliament: but more modern means of achieving ministerial responsibility have rendered it obsolete in the United Kingdom.¹¹

The legal responsibility of government

The principle that government must be conducted according to law has already been discussed.¹² The Queen may not herself be sued or prosecuted in the courts. But servants or officers of the Crown who commit crimes or civil wrongs are, and always have been, subject to the jurisdiction of the courts. This jurisdiction extends to contempt of court.¹³ Superior orders or state necessity are no defence to such proceedings.¹⁴ Public authorities other than the Crown are at common law liable for the wrongful acts of their officials or servants.¹⁵ The departments of central government became liable to be sued under the Crown Proceedings Act 1947 and their decisions are subject to control by means of judicial review.¹⁶ It is with political responsibility that this chapter is concerned.

⁷ Maitland, *Constitutional History*, p 203. Cf art 106 of the Belgian Constitution (1994).

⁸ Chitty, *Prerogatives of the Crown*, p 5. For rules on the use of seals and recording of decisions, see Anson, *Law and Custom of the Constitution*, vol II, part I, pp 62–72; HLE, vol 8(2), pp 233, 518–19.

⁹ See *R (Bancoult) v Foreign Secretary* [2008] UKHL 61, [2009] 1 AC 453.

¹⁰ Maitland, *Constitutional History*, pp 317–18; Taswell-Langmead, *English Constitutional History*, pp 164–5, 353–4, 529–38; Clayton Roberts, *The Growth of Responsible Government in Stuart England*; Berger, *Impeachment*, ch 1.

¹¹ See Carnall and Nicholson (eds), *The Impeachment of Warren Hastings*, ch 7 (A W Bradley). Cf Dicey, *The Law of the Constitution*, p 499.

¹² Ch 4.

¹³ *M v Home Office* [1994] 1 AC 377.

¹⁴ Smith and Hogan, *Criminal Law*, pp 377–9; Dicey, pp 302–6; *Entick v Carrington*, p 78 above.

¹⁵ *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93.

¹⁶ Chs 24–26.

Development of responsibility to Parliament

After 1688 the doctrine of collective responsibility developed in fits and starts as the Cabinet system came into being.¹⁷ For much of the 18th century the Cabinet was a body of holders of high office whose relationship with one another was ill-defined; the body as a whole was not responsible to Parliament. Although the King rarely attended Cabinet meetings after 1717, it was the King's government in fact as well as in name, and the King could act on the advice of individual ministers. Under Walpole, the first 'Prime Minister', ministries were relatively homogeneous. Other Cabinets in the century were less united. Parliament could force the dismissal of individual ministers who were unpopular, but could not dictate appointments to the King. The King sometimes consulted those who were out of office without the prior approval of his ministers. There was no clear dividing line between matters dealt with by individual ministers and matters dealt with in the Cabinet. As late as 1806, it was debated in the Commons whether ministers must accept collective responsibility for the general affairs of government or whether only those ministers who carried policies into execution were individually responsible.¹⁸

By the early 19th century, as the scope for personal government by the Sovereign sharply declined, the tendencies towards the collective responsibility of the Cabinet became more marked. After 1832, it became evident that the Cabinet must retain the support of the majority in the House of Commons if it wished to continue in office. Just as it had earlier been recognised that a single minister could not retain office against the will of Parliament, so it was realised that all ministers must stand or fall together in Parliament, if the Cabinet were to function effectively.

By the mid-19th century, ministerial responsibility was the accepted basis of parliamentary government in Britain.¹⁹ Critics of the rule of Cabinet unity were reminded that 'the various departments of the Administration are but parts of a single machine . . . and that the various branches of the Government have a close connection and mutual dependence upon each other'.²⁰

The development of collective responsibility was accompanied by an expansion in government, not least in the period after 1832 when new central agencies were created to oversee areas of social administration, such as the reformed poor law and public health. After some experimenting with appointed public boards that were not directly responsible to Parliament and had no one in Parliament to defend them against their critics,²¹ a strong preference was expressed for vesting the new powers in a minister who sat in Parliament and could account to Parliament for what was done. The development of parliamentary procedures for financial scrutiny and for obtaining information through questions addressed to ministers enabled members to influence matters within the minister's responsibility.²² The corollary of this, as the civil service itself was reformed following the Northcote–Trevelyan report of 1854, was the anonymity and permanence of the civil servants who administered the new departments under the control or oversight of ministers.²³

¹⁷ Mackintosh, *British Cabinet*, ch 2.

¹⁸ Williams, *The 18th Century Constitution*, pp 123–5.

¹⁹ For a notable summary, see Grey, *Parliamentary Government*, p 4.

²⁰ Grey, p 57.

²¹ F M G Willson (1955) 33 *Public Administration* 43.

²² Chester and Bowring, *Questions in Parliament*, ch 2.

²³ Parris, *Constitutional Bureaucracy*, ch 3.

B. Collective responsibility

The meaning of collective responsibility

The doctrine of collective responsibility was stated in absolute terms by Lord Salisbury in 1878:

For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues . . . It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who, after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the most essential principles of parliamentary responsibility established.²⁴

It is now customary for an incoming Prime Minister to issue the *Ministerial Code*, that lays down the rules and principles that ministers must observe. The version that was issued after the formation of the coalition government in May 2010 stressed at the outset the principle of collective responsibility. Prime Minister Cameron's statement took this form:

The principle of collective responsibility, *save where it is explicitly set aside*, requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.²⁵

The italicised words were introduced into the Code in 2010 because, under the terms of the Coalition Agreement, the two coalition parties expressly reserved the right to differ on some aspects of the coalition programme. These included the holding of a referendum on the electoral system, a projected reduction in the size of the House of Commons and the question of a British Bill of Rights.²⁶

Today, collective responsibility embodies a number of related aspects. Like other principles of government, it is neither static nor unchangeable and may give way before more pressing political forces.

- (1) The Prime Minister and other ministers are collectively responsible to Parliament, and to the Commons in particular, for the conduct of national affairs. In practice, so long as the governing party retains its majority in the House, the Prime Minister is unlikely to be forced to resign or to seek a dissolution of Parliament.
- (2) When a Prime Minister dies or resigns, then even if the same party (or parties) continues in power, all ministerial offices are at the disposal of the new Prime Minister.
- (3) Although ministers are individually responsible to Parliament for the conduct of their departments, if members of the Commons seek to censure an individual minister, the government often will seek to resist this, so that collective responsibility may be a means of defending an incompetent or unpopular minister.
- (4) Subject to any contrary provisions during a coalition government, all ministers while in office share in the government's collective responsibility. As the Ministerial Code states bluntly: 'Decisions reached by the Cabinet or Ministerial Committees are binding on all

²⁴ *Life of Robert, Marquis of Salisbury*, vol II, pp 219–20.

²⁵ *Ministerial Code* (Cabinet Office, 2010), para 2.1 (emphasis supplied). See also *Cabinet Manual* (2011), ch 4.

²⁶ And see 'Agreements to Differ' below.

members of the Government.²⁷ All ministers are expected to support the government by voting in Parliament. Cabinet ministers who were also members of the National Executive Committee of the Labour party were in 1974 told by the Prime Minister that they must observe the conventions of collective responsibility at Executive meetings.²⁸

- (5) In principle, secrecy attaches to Cabinet proceedings, especially to what is said during a Cabinet discussion, but this does not prevent information about the subjects considered being made public. At this level of government, the Freedom of Information Act has made little difference, since the Cabinet Office's 'working assumption' is that Cabinet papers are not released in response to FoI requests 'to protect the confidential nature of collective decision-making'.²⁹ Exceptionally, a minister who has resigned may explain in detail the reasons for this decision, both in Parliament and the press.³⁰
- (6) To a lesser extent, secrecy attaches to dealings between departments. Decisions reached by the Cabinet or ministerial committees are 'normally announced and explained as the decision of the Minister concerned'.³¹ While it may generally be convenient to the government that the internal processes by which decisions are made should be protected from disclosure, again an element of concealment is involved in trying to maintain that different departments always agree with each other; the reality, especially in a period of coalition government, may be very different.

Collective responsibility serves a variety of political uses. As most governments are drawn from one party, it reinforces party unity and helps to maintain government control of the House of Commons. When there is a coalition government, it may be more difficult for the government to obtain a majority for a policy that is unpopular with MPs from one of the coalition parties.³² But some purposes served by the doctrine are controversial, in particular as regards the protection which should be given to the secrecy of decision-making, the authority of the Prime Minister,³³ and the need for the appearance of external unanimity. In some open processes of government, especially public inquiries, the separate views of government departments are regularly made public.³⁴ But there is an obvious advantage to the leaders of any political party in being able to present an outward appearance of unity.

As is clear from the *Ministerial Code*,³⁵ many important government decisions are taken outside Cabinet meetings, whether by the department primarily concerned or after various forms of consultation between departments. According to the Code, 'No definite criteria can be given for issues which engage collective responsibility'.³⁶ Even questions which raise major issues of policy may be settled outside the Cabinet by a few ministers in consultation with the Prime Minister. The best-known examples of this include the decisions to manufacture the British atomic bomb,³⁷ to mount the Suez operation in 1956, and to devalue the pound in 1967.³⁸ Made in a similar fashion were the decisions to ban trade union membership

²⁷ *Ministerial Code*, para 2.3.

²⁸ Wilson, *The Governance of Britain*, pp 74–5, 191–3; and see D L Ellis [1980] PL 367, 379–83.

²⁹ *Guide to Cabinet and Cabinet Committee Business* (2010, Cabinet Office), p 23.

³⁰ See R Brazier [1990] PL 300.

³¹ *Ministerial Code*, para 2.3.

³² See in particular the vote by 285 to 272 in the Commons on 29 August 2013, rejecting a government motion that contemplated limited military intervention in Syria.

³³ See ch 11 A.

³⁴ Ch 23 B.

³⁵ *Ministerial Code*, para 2.2.

³⁶ *Ministerial Code*, para 2.4.

³⁷ See Hennessy, *Cabinet*, ch 4.

³⁸ Wilson, *The Labour Government 1964–70*, ch 23.

for staff at Government Communications Headquarters,³⁹ and to give the Bank of England responsibility for setting interest rates in 1997. When Mr Blair was Prime Minister, he appears to have made little use of the Cabinet for collective decision-making. The late Robin Cook, a former senior Cabinet minister before he resigned over Iraq in 2003, wrote, ‘Tony does not regard the Cabinet as a place for decisions. Normally he avoids discussions in Cabinet until decisions are taken and announced to it.’⁴⁰ Although Cook said that policy in relation to Iraq was often discussed in Cabinet during 2002,⁴¹ the Butler review of intelligence on weapons of mass destruction in Iraq criticised the informality with which Cabinet discussion took place, difficult questions of policy being aired without circulation of relevant papers.⁴²

Whether decisions are taken by the Cabinet or are merely reported to it, a minister may at any time resign in protest against decisions with which he or she disagrees. Such resignations may indicate a deep disagreement over the way in which the Prime Minister is conducting government.

Agreements to differ

In some circumstances, it may be politically impossible for the Cabinet to maintain a united front on all issues. In 1932, the coalition or ‘National’ government, formed in 1931 to deal with the economic crisis, adopted an ‘agreement to differ’. The majority of the Cabinet favoured the adoption of a general tariff of 10 per cent, against the strong opposition of three Liberal ministers and one National Labour minister. It was announced that the dissenting ministers would be free to oppose the majority’s proposals by speech and vote, both in Parliament and outside. When the Labour opposition criticised the government for violating ‘the long-established constitutional principle of Cabinet responsibility’, the motion of censure was defeated by an overwhelming majority.⁴³ Eight months later, the dissenting ministers resigned on the related issue of imperial preference. This short-lived departure from the principle of unanimity took place in the circumstances of a coalition government formed to deal with a serious national crisis.

In 1975, for different political reasons, the Labour Cabinet agreed to differ over Britain’s continued membership of the European Communities, an issue on which the Labour party was divided. Party unity had been maintained in two general elections in 1974 by an undertaking from Prime Minister Wilson to renegotiate the terms of British membership and to submit the outcome to the people for decision, either at a general election or by referendum. When in April 1975 the renegotiation of terms was completed and a referendum was held, the Cabinet by 16–7 decided to recommend continued membership to the electorate. It was agreed that ministers who opposed this policy should be free to speak and campaign against it, but only outside Parliament.⁴⁴ When a junior minister, Eric Heffer, insisted on opposing Britain’s membership in the Commons,⁴⁵ he had to resign from office.

In 2010, the coalition agreement between the Conservative and Liberal Democrat parties included various issues on which the parties agreed to differ. A procedural agreement

³⁹ See *CCSU v Minister for the Civil Service* [1985] AC 374.

⁴⁰ Cook, *The Point of Departure*, p 115. And see Foster, *British Government in Crisis*, p 291: ‘Power has drained from Parliament, Cabinet and civil service into the PM and those around him.’

⁴¹ *The Point of Departure*, p 116.

⁴² HC 898 (2003–04), paras 610–611. And see ch 11 B.

⁴³ Jennings, *Cabinet Government*, pp 279–81.

⁴⁴ See Cmnd 6003, 1975; HC Deb, 23 January 1975, col 1745; HC Deb, 7 April 1975, col 351 (WA). And Wilson, *The Governance of Britain*, pp 194–7.

⁴⁵ HC Deb, 9 April 1975, cols 1325–32.

entitled *Coalition Agreement for Stability and Reform*⁴⁶ set out the agreed methods in Whitehall and at Westminster for ensuring that the government retained the support of a majority in the Commons. This is a good example of customary practices in government (conventions) being adjusted to take account of a changed political situation. If conventions are observed because of the political difficulties which follow if they are not,⁴⁷ then in situations where no single party has a majority in the Commons, it may be less difficult to depart from Cabinet unanimity than to seek to enforce it.⁴⁸

Other aspects of collective responsibility

In any government there are more ministers outside the Cabinet than within it. Some have heavy departmental duties; others are concerned only with a narrow range of subjects.⁴⁹ These ministers are bound by Cabinet decisions and must refrain from criticising them in public. On some constituency matters a minister may make his or her views clearly known to the responsible minister,⁵⁰ but on all other matters the principle of collective responsibility requires ministers to ensure that their public statements are consistent with government policy.⁵¹ The policy content and timing of all major speeches by ministers ‘should, where possible’ be cleared 24 hours in advance with the No 10 Press Office.⁵²

Another restraint is that ministers ‘may not, while in office, write and publish a book on their ministerial experience’.⁵³ In 1969, a parliamentary secretary resigned to publish a book on the economy and the machinery of government. Refusing him permission to publish the book and remain a minister, Harold Wilson stated that he had no alternative ‘but to uphold the principles which every Prime Minister must maintain in relation to the collective responsibility of the Administration’.⁵⁴ Collective responsibility can thus be invoked by the Prime Minister to control the behaviour of ministers. The obligation to support government policy extends to those backbench MPs who act as unpaid parliamentary secretaries to ministers, and may be dismissed for stepping out of line.⁵⁵

C. Individual responsibility of ministers

Operation of individual responsibility today⁵⁶

Ministerial responsibility remains important, but structural changes in government have affected its application. During the 20th century, as the tasks of the state expanded and vast

⁴⁶ Cabinet Office, 2010.

⁴⁷ Page 22 above.

⁴⁸ Cf the free vote allowed to Labour MPs on the European Assembly Elections Bill during a minority government: HC Deb, 23 March 1977, col 1307; and D L Ellis [1980] PL 367, 388. A free vote is allowed on some social or ethical issues, when MPs including ministers may vote in accordance with their conscience (as eg with capital punishment, see HC Deb, 13 July 1983, col 972).

⁴⁹ *Ministerial Code*, paras 4.6, 4.7.

⁵⁰ *Ministerial Code*, paras 6.5, 6.6.

⁵¹ *Ministerial Code*, para 8.3.

⁵² *Ministerial Code*, para 8.2.

⁵³ *Ministerial Code*, para 8.9.

⁵⁴ *The Times*, 26 and 29 September 1969.

⁵⁵ *Ministerial Code*, paras 3.6–3.10.

⁵⁶ Marshall, *Constitutional Conventions*, ch 4; Brazier, *Ministers of the Crown*, ch 15; Woodhouse, *Ministers and Parliament*; and (the same) in Bogdanor (ed) *The British Constitution in the 20th Century*, ch 8.

Whitehall departments were created, officials continued to act in their minister's name, but the ability of ministers to oversee their work declined. The state's economic and social functions led to the creation of non-departmental bodies, public corporations and other agencies. Many of these (especially the boards of the nationalised industries after 1945) were intended to operate beyond the reach of ministerial responsibility, at least for day-to-day decisions. By contrast, the executive agencies created since 1988 under the 'Next Steps' initiative were intended to achieve effective delegation of managerial power, without necessarily reducing overall ministerial control.⁵⁷

In the tradition of parliamentary government, a minister answers to Parliament for his or her department. Praise and blame are addressed to the minister, not to civil servants; and as a general rule ministers may not excuse the failure of policies by turning on their advisers and officials. Attempts to do so may damage the minister's reputation, as the Home Secretary (Michael Howard) discovered in 1995: after intervening repeatedly in the operation of the Prison Service, Howard denied responsibility for defects in prison security and dismissed the Service's director, saying that the defects had been an operational matter entrusted to the director.⁵⁸ More recently, ministers whose departments are faring badly have been willing to identify the key administrators who may be to blame.⁵⁹ Apart from these instances, the corollary of the minister's responsibility is that civil servants are not directly responsible to Parliament for government decisions, although they are responsible *to ministers* for their own actions and conduct. In 1996 the government defended 'the fundamental principle that civil servants are servants of the Crown, accountable to the duly constituted government of the day, and not servants of the House'.⁶⁰

Much of the work of Parliament rests on this basis. Government Bills are drafted on the instructions of ministers. Question time emphasises the responsibility of ministers.⁶¹ Although civil servants have no voice in most parliamentary proceedings, they appear before select committees to give evidence on departmental policies and decisions. In giving such evidence, they 'do so on behalf of their Ministers and under their directions' and their purpose 'is to contribute to the central process of Ministerial accountability, not to offer personal views or judgments on matters of political controversy, . . . or to become involved in what would amount to disciplinary investigations . . .'.⁶²

The sanctions for individual responsibility

What are the sanctions which underlie this general practice of Parliament? The system assumes that ministers fulfil their parliamentary duties, such as introducing legislation and answering questions. By a rota system, departments are assigned days for answering questions and a minister could not refuse to appear on the assigned day. Ministers may refuse to answer a question if they consider that it does not fall within their responsibility, that it would

⁵⁷ See chs 11 D and 12 E.

⁵⁸ See HC Deb, 16 October 1995, col 30 and 19 October 1995, col 502, and ch 13 D. Also A Barker (1998) 76 *Public Administration* 21 and C Polidano (2000) 71 *Political Quarterly* 177.

⁵⁹ See the troubled history of the UK Borders Agency, disbanded in 2013 when ministers resumed direct control of the immigration and visa service, as described by the Home Affairs Committee: HC 587 (4th report), HC 907 (9th report), HC 1497 (15th report) and HC 1722 (21st report).

⁶⁰ HC 67 (1996–7), app, para 10. See also *Cabinet Manual*, para 7.1 and ch 11 D.

⁶¹ Ch 8 E. Chester and Bowring, pp 251–68, and app II; Franklin and Norton (eds), *Parliamentary Questions*.

⁶² *Departmental Evidence and Response to Select Committees (the 'Osmotherly Rules')* (Cabinet Office, 2005), paras 40, 41; and *Cabinet Manual*, paras 7.14–16. The rules do not apply to non-departmental public bodies (paras 1, 2). See *Guidance on Code of Practice for Board Members of Public Bodies* (2004), app 2; and HC 447 and 1055 (2003–4).

be contrary to the public interest to answer the question or that the expense of obtaining the information requested would be excessive.⁶³ These grounds are similar to the grounds that exempt from disclosure under the Freedom of Information Act 2000.⁶⁴ If a minister persistently refused to answer questions that were properly asked and antagonised many MPs in so doing, he or she would risk losing the support of the Prime Minister. Situations may occur in which a Prime Minister is unable to protect a minister from pressure to resign. In 1986, the Westland affair caused the Trade and Industry Secretary (Mr Brittan) to resign for having released to the press a confidential letter from the Solicitor General. Mr Brittan refused to answer questions from the Commons Defence Committee about the matter.⁶⁵ However, as a matter of general practice today, select committees in the Commons may inquire into the conduct of ministers and their questions may relate directly to the duties of ministers under the Ministerial Code.⁶⁶

Ministerial responsibility for departmental maladministration

Ministers are, or ought to be, responsible to Parliament for their own decisions and policies and for the work of their departments. The position in respect of the errors of civil servants is less clear. Two questions arise: (a) to what extent is a minister responsible for acts of maladministration in the department? (b) if serious maladministration occurs, does such responsibility involve a duty to resign? The Crichton Down affair has long been a starting point for discussion of these questions.

Farmland in Dorset known as Crichton Down had been acquired under compulsory powers from several owners by the Air Ministry in 1937. After the war, the land was transferred to the Ministry of Agriculture, for whom it was administered by a commission set up under the Agriculture Act 1947. While the future of the land was being considered, Marten, whose wife's family had previously owned much of the land, asked that it be sold back to the family. Misleading replies and false assurances were given when this and similar requests were refused, and an inaccurate report was prepared by a civil servant which led the ministry to stick to a scheme which it had prepared for letting all the land to a single tenant. When Conservative MPs took up Marten's case with the Minister of Agriculture, Sir Andrew Clark QC was appointed to hold an inquiry. His report established that there had been muddle, inefficiency, bias and bad faith on the part of some officials named in the report.⁶⁷ A subsequent inquiry to consider disciplinary action against the civil servants reported that some of the deficiencies were due as much to weak organisation within the ministry as to the faults of individuals.⁶⁸

⁶³ And see Erskine May, pp 360–70. Since 1993, the House of Commons Table Office has rejected questions only when a minister has refused to answer them in the same session: Erskine May, pp 363–4; HC 313–I (1995–6), para 39; and R Scott [1996] PL 410, 416–17. On ministerial accountability and parliamentary questions, see HC 820 (1997–8), HC 821 (1998–9), HC 61 (2000–1), HC 1086 (2001–2), HC 355 (2003–4), HC 449 (2004–5) and HC 853 (2005–06) (reports by Public Administration Committee).

⁶⁴ See ch 11 F; and HC 449 (2004–5). In HC 853 (2005–06), the government explained why Freedom of Information Act grounds for refusing disclosure in the public interest could not be applied to parliamentary questions.

⁶⁵ HC (1985–6) 519; HC Deb, 29 October 1986, col 339; also A Tomkins (1996) 16 LS 63, 76–7.

⁶⁶ Ch 8 E.

⁶⁷ Cmd 9176, 1954.

⁶⁸ Cmd 9220, 1954.

During a Commons debate on these reports, the Minister of Agriculture, Sir Thomas Dugdale, resigned. Speaking in the debate, the Home Secretary, Sir David Maxwell Fyfe, reaffirmed that a civil servant is wholly and directly responsible to his minister and can be dismissed at any time by the minister – a ‘power none the less real because it is seldom used’. He outlined several categories where differing considerations apply.

- (1) A minister must protect a civil servant who has carried out his explicit order.
- (2) Equally a minister must defend a civil servant who acts properly in accordance with the policy laid down by the minister.
- (3) Where an official makes a mistake or causes some delay, but not on an important issue of policy and not where a claim to individual rights is seriously involved, the Minister acknowledges the mistake and he accepts the responsibility although he is not personally involved. He states that he will take corrective action in the Department.
- (4) Where action has been taken by a civil servant of which the minister disapproves and has no previous knowledge, and the conduct of the official is reprehensible, there is no obligation on a minister to endorse what he believes to be wrong or to defend what are clearly shown to be errors of his officers. He remains however, ‘constitutionally responsible to Parliament for the fact that something has gone wrong’, but this does not affect his power to control and discipline his staff.⁶⁹

This statement and the implications of the Crichton Down affair have been much discussed.⁷⁰ Was the resignation due to the part which the minister had played, or to the unpopularity of the department’s policy among Conservative MPs, or was he accepting vicarious responsibility for the civil servants? Maxwell Fyfe’s analysis sought to identify situations in which a minister must ‘accept responsibility’ for the acts of civil servants. The analysis did not state that a minister’s duty to accept responsibility carried with it a duty to resign.⁷¹

Subsequent events confirmed that there is no ‘duty’ on a minister to resign because of misconduct by officials within his or her department,⁷² and today there is no expectation that this will occur. Different considerations apply where the personal conduct of a minister is an issue: the Chancellor of the Exchequer’s inadvertent disclosure of a Budget secret caused him to resign in 1947;⁷³ and in 1963 the Secretary of State for War resigned for having lied to the Commons in a personal statement.⁷⁴ Other resignations because of personal misconduct have occurred from time to time.⁷⁵ Resignations are unavoidable if a minister’s own conduct makes it too difficult for the individual to perform his or her duties faced with continuing criticism in the media⁷⁶ (a convenient formula that is often used to explain a forced resignation). In some situations, it may be that events in a department call into question the manner in which a minister has been heading the department. Publicity given to serious departmental errors (such as the discovery in April 2006 that the Home Office had released over 1000 foreign prisoners at the end of their prison sentences rather than considering them

⁶⁹ HC Deb, 20 July 1954, cols 1286–7.

⁷⁰ See e.g. J A G Griffith (1955) 8 MLR 557; (1954) 32 *Public Administration* 385 (C J Hamson) and 389 (D N Chester). For a reinterpretation, see Nicolson, *The Mystery of Crichton Down*.

⁷¹ And see Sir R Scott [1996] PL 410 at 412–13.

⁷² S E Finer (1956) 34 *Public Administration* 377, analysed the political factors that may be in play.

⁷³ HC 20 (1947–8).

⁷⁴ HC Deb, 22 March 1963, col 809; 17 June 1963, cols 34–170; and Cmnd 2152, 1963.

⁷⁵ In June 2009, several ministers left office in a Cabinet reshuffle caused in part by concern about their claims for parliamentary expenses. Ministers who have resigned because of questions about their conduct include David Laws (Chief Secretary to the Treasury) in 2010 and Liam Fox (Defence Secretary) in 2011.

⁷⁶ See D Woodhouse, *Ministers and Parliament*; (1993) 46 *Parliamentary Affairs* 277, and (2004) 82 *Public Administration* 1.

for deportation)⁷⁷ may force the Prime Minister to make an immediate Cabinet reshuffle in which the minister leaves the government.

In considering some past instances of practice in this area, we must remember that, 40 years ago, British government was marked by a degree of secrecy that would not be accepted today. The only information known about decision-making in Whitehall was that given by ministers; unauthorised disclosures ran the risk of prosecution under the draconian Official Secrets Act 1911. Crichton Down was unusual in that a public inquiry exposed the acts of officials to the light of day. In 1968, the first major investigation by the newly created Parliamentary Ombudsman found that there had been maladministration by the Foreign Office in the Sachsenhausen affair.⁷⁸ The Foreign Secretary (George Brown) ‘assumed personal responsibility’ for decisions made in the Foreign Office, while reluctantly agreeing to provide compensation for the claimants. But he also said: ‘We will breach a very serious constitutional position if we start holding officials responsible for things that are done wrong . . . If things are wrongly done, then they are wrongly done by ministers.’⁷⁹ This statement failed to recognise that an investigation by the Ombudsman into a complaint of maladministration must inevitably probe behind statements by the minister. However, creation of the Ombudsman did not mean an overnight change in the relationship between ministers and the civil service; ministers continued to insist that it followed ‘from the principle that the minister alone has responsibility for the actions of his department’ that individual civil servants should remain anonymous.⁸⁰

In fact, the Ombudsman’s method of reporting has never included the ‘naming and shaming’ of individual civil servants. By contrast, a senior civil servant was exposed to public criticism when a tribunal of inquiry investigated the collapse of the Vehicle and General Insurance company in 1971, leaving a million policyholders uninsured. It was alleged that the Department of Trade and Industry had failed to use its regulatory powers over the company in time to minimise the losses of the policyholders. The inquiry found that the department’s regulatory functions had been left entirely in the hands of an under-secretary (Mr Jardine), whose conduct had fallen below a proper standard.⁸¹ The findings in the report, made after a public inquiry, appeared to leave no scope for the principle that a minister takes the praise for a department’s successes and the blame for its failures.⁸² Possibly that principle may still apply if the only information about a matter comes from what the minister tells Parliament, but today a minister’s statement on a disputed matter is seldom conclusive, and often may lead to demands for a means of verifying what has been said. In general, we have moved towards a more open system of government, to which the Parliamentary Ombudsman, public inquiries, select committees of the Commons and the Freedom of Information Act have all contributed. By one or more of these means, it is often possible to form a judgement about disputed events that is far more objective than the minister’s explanation.

In April 1982, the Argentine invasion of the Falkland Islands caused the Foreign Secretary, Lord Carrington, and two Foreign Office ministers to resign. They ‘accepted responsibility’ for the conduct of policy on the Falkland Islands, and insisted on resigning, against the express wishes of the Prime Minister. A committee of privy counsellors later

⁷⁷ See HC Deb, 26 April 2006, col 573 and 3 May 2006, col 969 (statements by Charles Clarke MP).

⁷⁸ Ch 23 D, and see G K Fry [1970] PL 336.

⁷⁹ HC Deb, 5 February 1968, col 112.

⁸⁰ HC 350 (1967–8), para 24 (the Attorney General, Sir Elwyn Jones).

⁸¹ HL 80, HC 133 (1971–2), para 344.

⁸² See HC Deb, 1 May 1972, col 34; and R J S Baker (1972) 43 *Political Quarterly* 340. After the collapse of the Barlow Clowes investment business in 1988, a detailed investigation by the Ombudsman found that no ministers were implicated; although serious faults were found to have occurred, no civil servants were named: R Gregory and G Drewry [1991] PL 192, 408; ch 23 D.

reviewed government actions occurring before the invasion, found that the Foreign Office had misjudged the situation, and recommended changes in the intelligence organisation. But no blame was attached to individuals, nor did the committee consider that criticism for the events leading to the invasion could be attached to the government.⁸³

In 1996, the report by the judge, Sir Richard Scott, on the ‘arms for Iraq’ affair found that on numerous occasions ministers failed to inform Parliament adequately about their policy on exporting arms and machine tools to Iraq and did not reveal changes they had made in the policy. The answers by ministers to repeated questions had been misleading,⁸⁴ but ministers persuaded the inquiry that they had not intentionally misled Parliament. However, as Scott observed, without the provision of full information Parliament cannot

assess what consequences, in the form of attribution or blame, ought to follow . . . A failure by Ministers to meet the obligations of Ministerial accountability by providing information about the activities of their departments undermines . . . the democratic process.⁸⁵

When the report was debated in the Commons, the government survived by one vote. No ministers resigned.⁸⁶

Failings in a different context were revealed by the massive inquiry conducted by another judge (Lord Phillips) and two scientists into the response of five government departments to the problems for health and agriculture posed by BSE and variant CJD.⁸⁷ The Phillips report examined in detail the actions of ministers, civil servants and scientific advisers from 1986 to 1996. It was much less critical in tone than the Scott report, and no question of resignations had arisen. What is certain is that a fact-finding judicial inquiry, with access to relevant material in Whitehall, enables informed conclusions to be drawn that will not easily emerge from the political process in Parliament. When an inquiry into a departmental affair is made by a Commons committee, this is likely to be less effective than an independent inquiry.⁸⁸ But even a judicial inquiry will not settle the political verdict on a controversial affair.

In 2003, a senior judge, Lord Hutton, conducted an inquiry into the tragic suicide of the scientist, Dr David Kelly, under the pressure of events relating to the government’s ‘dodgy dossier’ on Iraq. The inquiry itself was notable for the mass of evidence that came from Whitehall and was placed on the internet. The Hutton report did not convince informed opinion that its conclusions in the dispute between the BBC and the government were well-founded.⁸⁹ But the report of the Butler inquiry in 2004 by a committee of privy counsellors into what was known about weapons of mass destruction before Britain went to war in Iraq was widely accepted in its serious criticism of the style of decision-making in Mr Blair’s government.⁹⁰

Responsibility and accountability restated

A central theme in this area is the tension between government power and democratic accountability. In 1986, responding to a parliamentary inquiry into the Westland affair, the

⁸³ Cmnd 8787, 1983.

⁸⁴ See e.g. the summary at HC 115 (1995–6), vol IV, pp 1799–1800.

⁸⁵ HC 115 (1995–6), vol IV, p 1801.

⁸⁶ HC Deb, 26 February 1996, col 589. On the Scott report, see articles at [1996] PL 357–507; Thompson and Ridley (eds), *Under the Scott-light*; Tomkins, *The Constitution after Scott*.

⁸⁷ HC 887–1 (1999–2000).

⁸⁸ See C Polidano (2001) 79 *Public Administration* 249, discussing inquiries into the Sandline affair: HC 1016 (1997–8), HC 116–1 (1998–9).

⁸⁹ See HC 247 (2003–4). See R P Kaye (2005) *Parliamentary Affairs* 171, 172–6; Rogers (ed.), *The Hutton Inquiry and its Impact*. In defence of his report, see Lord Hutton [2006] PL 807.

⁹⁰ See HC 898 (2003–4). Also Runciman (ed.), *Hutton and Butler: lifting the lid on the workings of power*.

head of the civil service restated the duties of ministers towards Parliament;⁹¹ in a revised form, the statement was later given to other Commons committees and the Scott inquiry.⁹² The statement contrasted ‘accountability’ (in its non-financial sense) with ‘responsibility’. A minister is ‘*accountable*’ to Parliament for everything which occurs in a department: the duty, which may not be delegated, is to *inform* Parliament about policies and decisions of the department, except in rare cases where secrecy is an overriding necessity (as with sensitive questions of defence secrets). If something goes wrong, the minister owes it to Parliament to find out what has happened, ensure necessary disciplinary action and take steps to avoid a recurrence.

By contrast, a minister is said to be ‘*responsible*’ only for broad policies, the framework of administration and issues in which he or she has been involved, not for all departmental affairs. The emphasis is on matters for which the minister may be personally praised or blamed. Since decision-making may be delegated, the minister is *not* responsible for what is done or decided by civil servants (for example, by the chief officer of an executive agency) within the authority assigned to them.⁹³

This distinction between accountability and responsibility requires close scrutiny, since it provides a means by which a minister may avoid liability for unpopular or mistaken decisions; and it opens up potential areas of government for which no one is ‘responsible’ to Parliament, even though a minister remains ‘accountable’. In 1996, the Public Service Committee of the Commons insisted that no clear dividing line can be drawn between accountability and responsibility, and that the two main aspects of ministerial responsibility are (i) the duty to give an account and (ii) the liability to be held to account.⁹⁴ In 2012, the Constitution Committee of the Lords concluded: ‘In our view there is no constitutional difference between the terms responsibility and accountability’.⁹⁵

One outcome of the Scott inquiry was that in 1997 both Houses adopted a resolution stating the principles that must govern the conduct of ministers in relation to Parliament. These principles are now included in the *Ministerial Code* issued by the Prime Minister:

- (a) The principle of collective responsibility, save where it is explicitly set aside, applies to all Government Ministers;
- (b) Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies;
- (c) it is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister;
- (d) Ministers should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000;

⁹¹ HC 92-II (1985–6). And Cmnd 9916, 1986, para 40.

⁹² E.g. HC 390 (1992–3), para 25; HC 27 (1993–4), paras 118–20; Cm 2748, 1995, para 16; HC 313–I (1995–6), paras 15–18. See also the Scott report, HC 115 (1995–6), vol IV, pp 1805–6.

⁹³ On executive agencies, see ch 11 D.

⁹⁴ HC 313 (1995–6), paras 21 and 32. For the BSE inquiry’s views on ministerial accountability, see HC 887 (1999–2000), vol 15, paras 8.7, 8.8.

⁹⁵ HL Paper 61 (2012–13), para 17. This report provides an excellent survey of the accountability of civil servants.

- (e) Ministers should similarly require civil servants who give evidence before Parliamentary Committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code.⁹⁶

These principles are not enacted as legislation but, having been endorsed by both Houses and by successive Prime Ministers, they have great weight as rules that are fundamental to the relationship between executive and Parliament.⁹⁷ Moreover, for a minister or civil servant knowingly to mislead Parliament is a contempt of Parliament.⁹⁸

Inevitably, difficulties remain in the way of achieving a more open system of governance. One is the government's restrictive approach to the giving of evidence by civil servants to select committees:⁹⁹ should ministers be able to censor evidence as to matters of fact which civil servants give at Westminster? Another is the government's power to control the timing and manner in which reports on inquiries that are critical of government policies and decisions are published.¹⁰⁰

In 2007, the Public Administration committee of the Commons urged that the discharge of responsibilities by ministers and civil servants should reflect the way in which decisions are in fact taken, and that the civil service's responsibilities should include 'responsibility to Parliament and the constitution'. In the committee's view, greater transparency in government need not prejudice the political accountability of ministers to Parliament.¹⁰¹ In its reply, the government argued for a more traditional framework:

Civil servants are accountable to Ministers, who in turn are accountable to Parliament. It is this line of accountability which makes clear that ultimately Ministers are accountable to the electorate.¹⁰²

One parliamentary body that especially since 2010 has enabled there to be informed criticism of government failings is the Public Accounts Committee of the House of Commons: its reports are based both on the work of the National Audit Office and on the evidence given to the committee.¹⁰³ The committee's forthright interrogation of officials is one indication of the tension that often arises between the actual operations of government and the emphasis on retaining ministers as the link between executive and Parliament. It now seems remarkable that the doctrine of ministerial responsibility was used as an argument *against* creating the Parliamentary Ombudsman in 1967,¹⁰⁴ and *against* adoption of the present select committees of the Commons in 1979 – fortunately on each occasion without success. The principle of accountable government is ultimately more important than ministerial responsibility. If there is any conflict between the two, the former principle ought to apply.

⁹⁶ *Ministerial Code* (2010), para 1.2. For the original Commons resolution, see HC Deb, 19 March 1997, col 1046.

⁹⁷ On their status and enforceability, see ch 1 C.

⁹⁸ Ch 9 A. In 2013, the Commons Home Affairs Committee found that it had repeatedly been supplied with incorrect immigration statistics by the UK Borders Agency: HC 792 (2012–13), ch 2.

⁹⁹ See the Osmotherly Rules, note 62 above; and HL Paper 61, note 95 above, ch 4.

¹⁰⁰ For a clear abuse of this power, see the manner in which the Scott report was published in 1996.

¹⁰¹ See *Politics and Administration: Ministers and Civil Servants*, HC 122, 2006–07. Annexed to the report is a 'Compact between Ministers and the Home Office Board' (January 2007) which states that officials who head Home Office services (i.e. the executive agencies) have the function of 'increasingly answering externally for operational matters for which they are responsible' (emphasis supplied).

¹⁰² Government Response, HC 1057, 2007–08.

¹⁰³ See ch 8 E.

¹⁰⁴ Ch 23 D.

Ministerial responsibility and the courts

In a system of parliamentary government, the procedures for securing the accountability of ministers to Parliament and the extent of that accountability are essentially matters for the two Houses. Neither they nor the courts wish to see judicial processes used to review procedures at Westminster. The desire to keep courts well away from the internal affairs of the two Houses is seen as a reason why parliamentary practice should not be embodied in legislation.¹⁰⁵ In part 4 of this book, we examine the manner in which the courts by judicial review exercise control over many acts and decisions of the executive. Where statutory powers are in issue, a central justification for judicial review of executive decisions is that this is an important means of ensuring that in law the government makes proper use of powers conferred by Parliament.

When executive decisions are challenged by judicial review, the courts must decide whether any legal grounds have been shown which make the decision vulnerable to judicial review.¹⁰⁶ For much of the 20th century, before judicial review took its present form, the evolution of administrative law was impeded by the fact that some courts relied on ministerial responsibility to Parliament as a reason for not reviewing the legality of ministers' decisions.¹⁰⁷ It is arguable that the rapid evolution of administrative law after 1980 was influenced by the failure of Parliament to take adequate steps to enforce the accountability of ministers.¹⁰⁸ Today, it is generally accepted that judicial review and ministerial responsibility serve different purposes and are not mutually exclusive.¹⁰⁹ Moreover, the scope and intensity of judicial review were extended by the Human Rights Act 1998: the courts must now form judgments about executive decisions on grounds that in the past would have been regarded as falling within the area of ministerial responsibility to Parliament.¹¹⁰

Two other instances of the impact on ministerial responsibility of judicial review may be given: (a) in the case of a large and unwieldy bureaucracy (such as the Home Office) with powers that affect countless individuals, the ministers themselves may be unable to ensure that the policies they have publicly adopted are known to and observed by all the officials in the department;¹¹¹ and (b) in the highly complex schemes for public services today (for instance, regarding social security and welfare), Whitehall departments sometimes adopt rules by executive decision that should properly be made by procedures subject to parliamentary approval.¹¹² These instances suggest that judicial review helps to promote and not to restrict the accountability of ministers to Parliament.

Acts of Parliament typically vest new executive powers in 'the Secretary of State'. This means that the power may if necessary be exercised by any one of the many Cabinet ministers who, by a constitutional fiction, are regarded as joint holders of a single office. In the past, powers were sometimes conferred on a named ministerial post. Whether a power is conferred on the Secretary of State or another minister, the courts under what became known as 'the *Carltona* principle' have long held that civil servants in the minister's department may take

¹⁰⁵ See *Conventions of the UK Parliament*, HL Paper 265, HC 1212 (2004–05), paras 279, 285.

¹⁰⁶ See ch 24.

¹⁰⁷ See J D B Mitchell [1965] PL 95; and Dicey, *Law of the Constitution*, app 2.

¹⁰⁸ See *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513, 572–3, 575 (Lord Mustill).

¹⁰⁹ See e.g. *R v IRC, ex p National Federation of Self-Employed* [1982] AC 617, 644.

¹¹⁰ Ch 14 C. And see e.g. *A v SSHD* [2004] UKHL 56, [2005] 2 AC 68 and *R (Quila) v SSHD* [2011] UKSC 45, [2012] 1 AC 621.

¹¹¹ See e.g. *R (Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245; *R (Kambadzi) v SSHD* [2011] UKSC 23, [2011] 4 All ER 975. And see ch 24 B.

¹¹² See *R (Reilly) v Work and Pensions Secretary* [2013] UKSC 68, [2014] 1 All ER 505. Cf the contrasting outcomes in *R (Munir) v Home Secretary* [2012] UKSC 32, [2012] 4 All ER 1025 and *R (Alvi) v Home Secretary* [2012] UKSC 33, [2012] 4 All ER 1041.

the decision on behalf of the minister. One reason given for this in the *Carltona* case was that the minister ‘must answer before Parliament for anything that his officials have done under his authority’.¹¹³ Accordingly, the powers of ministers may in law be exercised by civil servants, and it is not necessary to establish a formal delegation of authority to them (except where a statutory provision requires such delegation).¹¹⁴ However, there are cases where, from the nature of the power or because of express statutory provision, the general principle does not apply and powers must be exercised personally by the minister.¹¹⁵ Where a statutory function is vested in one minister, he or she may not adopt a policy whereby decisions are made by another minister.¹¹⁶

Devolution and ministerial responsibility

This chapter has dealt with current practice relating to the responsibility of UK ministers at Westminster. What has been described here does not necessarily apply to the Scottish Parliament or the Assemblies in Wales and Northern Ireland. As we have seen, the three forms of devolution differ both from each other and from the Westminster model.¹¹⁷ In Scotland, where the structure is closest to that at Westminster, the Scottish ministers may not continue in office if the Parliament resolves that it has lost confidence in the Executive;¹¹⁸ and Parliament has its own procedures for calling the ministers to account for their departmental functions. The original position in Wales was very different, when executive powers were vested in the Assembly itself, but the Government of Wales Act 2006 created a ministerial structure that comes closer to that in Scotland. In Northern Ireland, government is based on an elaborate scheme of power-sharing and this necessarily affects the accountability of the ministers to the Assembly.

¹¹³ *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, 563. See also *Lewisham MB v Roberts* [1949] 2 KB 608; *R v Skinner* [1968] 2 QB 700; and *Re Golden Chemical Products Ltd* [1976] Ch 300.

¹¹⁴ *Commissioners of Customs and Excise v Cure & Deeley Ltd* [1962] 1 QB 340.

¹¹⁵ See *R v Home Secretary, ex p Oladehinde* [1991] 1 AC 254.

¹¹⁶ *Lavender and Son Ltd v Minister of Housing* [1970] 3 All ER 871. In practice, much consultation between ministers and departments takes place before decisions are announced, and this ‘internal process’ is not disclosed: *Ministerial Code*, para 2.3.

¹¹⁷ Ch 2 B.

¹¹⁸ Scotland Act 1998, s 45(2). See the *Scottish Ministerial Code* (2011) and *Guide to Collective Decision Making* (2008); Himsworth and O’Neill, *Scotland’s Constitution: Law and Practice*, pp 167–76 and ch 9.

CHAPTER 6

United Kingdom and the European Union

The European Economic Community was created in 1957, the original six member states being West Germany, France, Italy, Belgium, the Netherlands and Luxembourg. It was not until 1973 that Britain became a member, following the enactment of the European Communities Act 1972. There are now 28 member states of the EU, the number likely to be increased still further as several other candidate countries complete the process of entry.¹ From the earliest days membership has caused great constitutional anxiety for some in Britain, despite the fact that the United Kingdom is claimed to have the most flexible and the only unwritten constitution among the member states.

Nevertheless, attempts to challenge entry were made on the ground that it constituted an abuse of the prerogative treaty-making power to the extent that it would undermine the sovereignty of Parliament,² and on the ground also that the Treaty would breach art 18 of the Treaty of Union of 1707.³ More recently the renegotiation of the EC Treaty at Maastricht in 1992 led to further challenges in the British courts, an unsuccessful attempt being made to prevent the government from ratifying it.⁴ But if British membership has caused constitutional concerns, these are overshadowed by the political controversies it has generated. Political parties have been divided, constitutional conventions have been formally and informally suspended, and the only national referendum in the 20th century was held in 1975 on continued membership of what was then the EEC.⁵

There is no sign of the controversy abating, with contemporary politics having been dominated by the question whether another referendum should have been held before the United Kingdom ratified the Treaty of Lisbon in 2007.⁶ The latter is the latest stage in the evolution of the European Union,⁷ with a number of treaty amendments along the way (for example the Single European Act of 1986, the Maastricht Treaty in 1992, and the Nice Treaty in 2001) having expanded the powers of what were then the ‘Community’ institutions, and enabling an expanding volume of what was then ‘Community’ law to be made on the basis of qualified majority voting rather than the agreement of all member states. The Lisbon Treaty arose from the ashes of ambitious plans for a European Constitution, as designed by the Convention on the Future of Europe in 2003, under the chairmanship of a former French President.⁸

Although signed by all the member states,⁹ the Constitution could only be introduced once formally ratified by each of them. In some cases ratification would require a referendum,

¹ On legal issues arising from the 2005 accessions, see *Case C-273/04, Poland v Council* [2007] ECR I-8925; *Case 413/04, Parliament v Council* [2006] ECR I-11221.

² *Blackburn v A-G* [1971] 1 WLR 1037. See ch 10.

³ *Gibson v Lord Advocate* 1975 SLT 134. See ch 3.

⁴ *R v Foreign Secretary, ex p Rees-Mogg* [1994] QB 552. See G Marshall [1993] PL 402, and also R Rawlings [1994] PL 254, 367.

⁵ Referendum Act 1975. See also Cmnd 5925, 1975 and 6251, 1975.

⁶ See *R (Wheeler) v Office of Prime Minister* [2008] EWHC 1409 (Admin) – no legal obligation to hold a referendum on the treaty.

⁷ For a full analysis of the Lisbon Treaty, see HL Paper 62-I (2007–08).

⁸ For commentary, see (2005) 11 *European Public Law* 1–164; (2005) 1 *European Constitutional Law Review* 1–147; and (2005) 3 *International Journal of Constitutional Law* 173–515.

⁹ A legal challenge to the British government signing the draft Constitution was predictably unsuccessful: *R v Foreign Secretary, ex p Southall* [2003] 3 CMLR 562.

and in June 2005 the peoples of France and the Netherlands voted to reject the proposals.¹⁰ In rescuing much (though not all) of the substance of the draft Constitution, the Lisbon Treaty significantly amended and substantially re-wrote (and re-numbered) the two treaties which provide the legal base on which the EU now stands.¹¹ One (created at Maastricht in 1992) is the Treaty on European Union (TEU), and the other (created originally in Rome in 1957) is the Treaty on the Functioning of the European Union (TFEU), as the EC Treaty (TEC) was renamed at Lisbon. The European Community and EC law thus no longer exist. These changes were duly ratified by the British government,¹² and it is with the domestic implications of EU membership that we are principally concerned in this chapter.

A. European Union institutions

The TEU now makes provision for seven different EU institutions: the European Council, the Commission, the Council, the European Parliament, the Court of Justice, the European Central Bank, and the Court of Auditors (though not presented in that order by the Treaty).¹³

The difference between the European Council and the Council calls for an explanation. Thus, the European Council consists of heads of state or government and meets at least twice a year to ‘provide the Union with the necessary impetus for its development’, and define the general political directions and priorities of the Union.¹⁴ The Council in contrast consists of ministerial representatives from each member state and has policy-making, legislative and budgetary functions, which in the latter cases are exercised jointly with the European Parliament. An important feature of the Lisbon reforms has been the creation of the office of President of the European Council, elected by the European Council for a renewable term of two-and-a-half years.¹⁵

The Commission

The Commission consists of one member for each member state, though its numbers are to be reduced in November 2014.¹⁶ Before the recent enlargements in 2005, 2007 and 2013 the Commission had a membership of 20, the largest of the member states having two Commissioners each. The practice in the United Kingdom (where nominations are made by the Prime Minister) has been for Commissioners to be senior political figures, and the convention was that one should have a record of service in the Labour party and the other in the Conservative party. Now that Britain has only one Commissioner, new practices have been established to determine who should be nominated when vacancies arise: recent Labour governments have nominated members of the Labour party based in the House of Lords for this role. Each Commissioner has responsibility for a specific area of the Commission’s activity, with the British-nominated Commissioner at the time of writing (Baroness Ashton) previously

¹⁰ The British government gave an undertaking that the Constitution would not be ratified without there first being a referendum. The results in the Netherlands and France relieved the government of the need to hold such a referendum, which some commentators believed would not provide sufficient support for the Constitution.

¹¹ P P Craig (2008) 33 EL Rev 137.

¹² Implemented by the European Union (Amendment) Act 2008.

¹³ TEU, art 13.

¹⁴ Ibid, art 15.

¹⁵ Ibid, art 15(5).

¹⁶ Ibid, art 17(5).

having responsibility for trade, before being appointed as the inaugural High Representative for Foreign Affairs and Security Policy (which also has a seat on the Commission).

The President of the Commission (not to be confused with the President of the European Council referred to above) is nominated by the European Council, acting by qualified majority with the approval of the European Parliament.¹⁷ Once nominated, both the President and the other members of the Commission are then ‘subject as a body to a vote of consent by the European Parliament’, following which they are appointed by the European Council acting by a qualified majority.¹⁸ Although the Commission ‘shall be responsible to the Parliament’, the latter has no power to veto an individual nomination, and no power to remove an individual Commissioner.¹⁹ Where there are complaints about a breach of duty by a Commissioner, these may be made by the Council (acting by a majority) or the Commission to the CJEU, which may require the Commissioner to be compulsorily retired or to be deprived of his or her pension or other benefits.²⁰ They may also be compulsorily retired by the CJEU on a reference by the Council (again acting by a majority) or the Commission if they no longer fulfil the conditions required for the performance of their duties, or if guilty of serious misconduct.²¹

The Commission – which works under the political guidance of its President – has two principal functions.²² The first is to initiate proposals for legislation, to be considered by the Council and the Parliament. In this way the Commission plays a central role in EU policy development in the different areas of its competence and in initiating legislative proposals to give effect to that policy. However, Commission initiatives are not always endorsed by the Council, particularly where the unanimity of the Council is required.²³ The Commission’s second main function is to ensure that the provisions of the Treaties, as well as EU law generally, are implemented and applied. This may mean initiating enforcement proceedings in the Court of Justice against another EU institution that is in breach of treaty obligations,²⁴ though such cases are unusual. It is more likely that the Commission will bring proceedings against a member state which is in breach of the treaties or which has failed to implement directives or regulations.²⁵ The Commission must be ‘completely independent’,²⁶ which means that commissioners must ‘neither seek nor take instructions from any government or other institution, body, office or entity’.²⁷

Enforcement proceedings have been taken in a number of notable cases involving the United Kingdom. These include case *C-382/92, Re Business Transfers: EC Commission v UK*,²⁸ where enforcement proceedings were initiated in respect of a failure to implement directives protecting workers in the event of business restructuring; and *Case C-222/94, EC Commission v UK*,²⁹ where proceedings were initiated in respect of a failure to implement correctly a directive on television broadcasting.³⁰ More recent cases include *Case C-98/01*,

¹⁷ Ibid, art 17(7).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ TFEU, art 245. See *Case C-432-4, Commission v Edith Cresson* [2006] ECR I-6387.

²¹ TFEU, art 247.

²² For the main functions of the Commission, see TEU, art 17(1); other powers are found elsewhere in the Treaty, e.g. TFEU, art 45.

²³ On voting procedures in the Council, see pp 114–115 in this chapter.

²⁴ As in *Case C-110/02, European Commission v Council* [2004] ECR I-6333.

²⁵ TFEU, art 258. See pp 117–118 below.

²⁶ TEU, art 17.

²⁷ Ibid.

²⁸ [1994] ECR I-2435. For the sequel, see SI 1995 No 2587. See also *R v Trade and Industry Secretary, ex p UNISON* [1997] 1 CMLR 459. See further M Radford and A Kerr (1997) 60 MLR 23.

²⁹ [1996] ECR I-4025.

³⁰ See also *Case C-246/89, Commission v UK* [1991] ECR I-4585.

Commission v United Kingdom,³¹ where government control of British Airports Authority plc in the aftermath of its privatisation was found to be in breach of what is now TEU, art 63 (relating to the free movement of capital). Illustrating the wide diversity of issues raised by proceedings of this kind, *Case C-6/04, Commission v United Kingdom*³² was concerned with the failure of the government to take all the measures necessary to implement ‘completely and correctly the requirements of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora’.

The Council

The Council consists of political representatives of the member states, each being represented by a minister who is ‘authorised to commit the government of [that] member state’ and ‘cast its vote’.³³ The Council meets in **ten** different ‘configurations’, based on a decision as to the nature of these configurations taken by a qualified majority of Council members.³⁴ At the time of writing (December 2013) the configurations were as follows: **general affairs; foreign affairs; economic and financial affairs; justice and home affairs; employment, social policy, health and consumer affairs; competitiveness; transport, telecommunications and energy; agriculture and fisheries; environment; and education, youth, culture and sport**.³⁵ The representative at any particular session will depend on the subject of the meeting, so that, for example, on transport matters the United Kingdom representative will be a minister with responsibility for transport. The presidency of the Council configurations rotates between member states,³⁶ in accordance with a Council decision adopted by qualified majority.³⁷

Under the treaties, the Council has policy-making and ‘coordinating’ functions,³⁸ as well as a pivotal role in the legislative process, in the sense that it must approve Commission initiatives. Indeed, the Council is in a real sense the principal legislative authority within the Union,³⁹ albeit that this legislative authority must now be shared with the Parliament, the powers of which have gradually expanded since it was first established as a supervisory and consultative body. These changes reflect concerns about the ‘democratic deficit’ in the law-making process of an institution (the EU) that has the capacity to make major changes to the lives of millions of people and thousands of businesses by a single legislative act. Unusually for a ‘legislative’ body, however, the Council’s deliberations were not conducted in public, until changes made recently by the Lisbon Treaty. Council business is now divided into two parts, the first dealing with legislative business to which the public have access, and the second dealing with non-legislative business which continues to be conducted in private.⁴⁰

In performing its functions, the Council is required to act by what is called qualified majority vote unless the treaties provide otherwise.⁴¹ There are as we have seen circumstances where the Council may act by simple majority, and as we shall see circumstances where unanimity is still required.⁴² The formula for determining the votes to be secured for

³¹ [2003] ECR I-04641.

³² [2005] ECR I-9017.

³³ TEU, art 16.

³⁴ *Ibid*, art 16(6); TFEU, art 236.

³⁵ See <http://ue.eu.int/council/council-configurations?lang=en>.

³⁶ TEU, art 16(6), TFEU, art 236.

³⁷ TFEU, art 236.

³⁸ TEU, art 16.

³⁹ D Curtin (1993) 30 CML Rev 17.

⁴⁰ TEU, art 16(8).

⁴¹ *Ibid*, art 16(3).

⁴² See p 113 above.

the purposes of QMV will change in 2014.⁴³ In the meantime, the votes of each country are weighted broadly by population, with France, Germany, Italy and the United Kingdom each having 29 out of a total of 352 votes, Germany thus being under-represented in relation to the others. The weightings having changed since the enlargement of the EC in 2005, and again in 2007 (Bulgaria and Romania) and 2013 (Croatia). Where QMV is required, acts of the Council need the support of at least 15 member states and a minimum of 260 votes, which represents just under three-quarters of the whole. In addition, ‘a member of the Council may request verification that the member states constituting the qualified majority represent at least 62 per cent of the total population of the Union’. A decision may not be adopted if this condition is not met.

The streamlined procedures – which gradually come into force in 2014 – do away with the voting weights, with the focus now being on the number of countries and their combined population. Although there has been an extension of the areas in which the Council can act by QMV (thereby removing the British veto where special provision for the United Kingdom has not otherwise been made), as already suggested there remain important areas where unanimity is still required and where one country does have a power of veto; this problem has arisen in the approximation of laws affecting social policy, where the unanimity of the Council continues to be required for measures on matters such as the social protection of workers and the protection of workers where their contracts of employment are terminated, as well as arrangements relating to the representation and the collective defence of the interests of workers.⁴⁴ As the EU continues to grow, the likelihood of unanimity being secured for such controversial issues seems remote, particularly in a climate of austerity in which steps are being taken actively to diminish rather than expand social protection in member states.⁴⁵

European Parliament

The status and powers of the European Parliament have greatly increased since its inception. Now it is elected for periods of five years by direct universal suffrage,⁴⁶ with the number of representatives elected in each state varying according to the population of the state in question. Under EU law applicable in the United Kingdom, the franchise must include EU nationals resident in the United Kingdom, and it is open to member states to extend the franchise to other non-nationals who have a close connection with the country in question.⁴⁷ Beyond that, however, EU law confers no right to vote, it being a matter for each member state to determine the franchise in the territory in question, consistently with the requirement that there should be no discrimination against EU nationals. So in *R (Chester) v Secretary of State for Justice*,⁴⁸ it was held that there was no right under EU law that displaced the provisions of the Representation of the People Act 1983 denying prisoners the right to vote. Nor does the ECHR confer rights on prisoners to vote in European parliamentary elections.

There are 766 seats in the unicameral Parliament (which was expanded in 2013 following the accession of Croatia), with the larger member states predictably having more seats than the smaller member states. Thus Germany has 99 seats and France has 74, with Italy and the United Kingdom each having 73. Elections in Great Britain are conducted on the basis of a regional list system, by means of which the country is divided into 11 electoral regions (the

⁴³ TEU, art 16(5).

⁴⁴ TFEU, art 153.

⁴⁵ On the legality of which see *Case C-370/12, Pringle v Ireland*, 27 November 2012. See P P Craig (2013) 20 *Maastricht Journal* 1.

⁴⁶ See European Parliamentary Elections Act 2002, amended by the European Parliament (Representation) Act 2003, and European Union Act 2011.

⁴⁷ *Case C-145/04, Spain v United Kingdom* [2006] ECR I-7917.

⁴⁸ [2013] UKSC 63. For further discussion, see ch 7 below.

number of members returned varying according to the size of the region), with votes being cast for registered parties rather than candidates. Seats are then allocated to individuals on the party lists (in the order in which they appear on the list) to reflect the votes cast in favour of each party in the region in question. So the more votes cast for a party, the larger the number of seats it will be allocated.⁴⁹ Although the TEU declares that ‘political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union’,⁵⁰ there are no European political parties as such. After each election, however, MEPs participate in different political rather than national groupings.⁵¹

The European Parliament has been said to represent ‘the principal form of democratic, political accountability in the Community system’.⁵² Its most important functions relate to its role in the legislative process on the one hand, and its powers in relation to the Union’s budget on the other. So far as the former is concerned, the Council has been the principal legislative body of the Union, though the focus in recent years has been not to substitute the Parliament for the Council but to develop a system that would enable the Parliament to play a fuller part in the law-making process.⁵³ Initially the Parliament enjoyed only a consultative status, but the TEU now provides that legislative functions are to be exercised by the Council and the Parliament jointly.⁵⁴ Under the ‘ordinary’ legislative procedure in the TFEU (which does not apply in all cases), legislative instruments (regulations, directives and decisions) require the approval of both the Council and the Parliament,⁵⁵ and provision is made in the TFEU for resolving disputes between the two by conciliation.⁵⁶ If conciliation fails, so does the instrument concerned.⁵⁷

So far as the budget is concerned, the raising of money is required to meet the spending commitments of the EU as approved by the European Council with the consent of the Parliament. A draft budget is prepared annually by the Commission on the basis of estimates submitted by each of the EU’s institutions, and is then presented for approval to the Council and the Parliament, with the Council submitting its position on the budget to the Parliament, which then has 42 days to approve or propose amendments to the Council’s position. If the latter, a Conciliation Committee must be convened to resolve the differences between the Council and the Parliament (with equal representation of each), in which the Commission also participates. If this process is unable to secure an agreed outcome, a new draft budget must be submitted by the Commission, and the process will begin again. The budget for 2013 was just over 150 billion euro, making the challenge of effective parliamentary scrutiny a formidable one. In the current political climate the Commission is understandably defensive about this level of expenditure, and responds by claiming that the budget represents less than 2 per cent of the national budgets of the 28 member states combined.

⁴⁹ Three members are elected from Northern Ireland by single transferable vote. One of the English regions now includes Gibraltar (European Parliament (Representation) Act 2003, Pt 2), following a decision of the European Court of Human Rights that the lack of representation of Gibraltar in the European Parliament was a breach of the ECHR (First Protocol, art 3) (*Mathews v UK* (1998) 28 EHRR 361).

⁵⁰ TEU, art 10(4).

⁵¹ Labour party members belong to the Party of European Socialists (PES) along with other socialist and social democratic parties; the Liberal Democrats are part of the Alliance of Liberals and Democrats for Europe; and the Conservative party is now associated with the European Conservatives and Reformists, having been previously aligned with the more mainstream European People’s Party.

⁵² *Mathews v UK*, above.

⁵³ D Curtin (1993) 30 CML Rev 17.

⁵⁴ TEU, arts 14 and 16.

⁵⁵ TFEU, art 289.

⁵⁶ *Ibid*, art 294.

⁵⁷ *Ibid*, art 294(12).

Court of Justice of the European Union⁵⁸

The function of the Court (CJEU) is to ‘ensure that in the interpretation and application of the Treaties the law is observed’.⁵⁹ It consists of one judge for each member state and may sit in chambers (normally of 5 judges) or in a Grand Chamber (of 13 judges),⁶⁰ as provided by its own statute, which is annexed as a protocol to the treaties. The Court is assisted by eight Advocates General, an office without parallel in the United Kingdom.⁶¹ Under TFEU, art 252 the duty of the Advocates General is to make reasoned submissions on cases brought before the Court in order to assist the Court in the performance of its tasks. These submissions will include an assessment of the legal position in the matter referred for determination, an assessment that will often be endorsed by the Court. The submissions of the Advocates General are reported in advance of the judgment of the Court. Both judges and Advocates General are appointed from among people who are eligible for the highest judicial offices in their respective countries and appointments are made ‘by common accord of the Governments of the member states for a term of six years’.⁶²

Every three years there is a partial replacement of both the judges and the Advocates General, although retiring judges and Advocates General are eligible for reappointment. The judges elect the President of the Court from among their number for a period of three years, a retiring President being eligible for re-election.⁶³ In addition to the Court of Justice, there is a General Court (known previously as the Court of First Instance) which hears and determines a defined class of cases, the aim being to reduce the pressure of work on the CJEU itself, but to which there is a right of appeal on a point of law.⁶⁴ Under TFEU, art 263 (ex TEC, art 230), cases may be brought before the CJEU in a number of ways:⁶⁵

- First, as already suggested the Commission may bring proceedings against a member state, where it considers that the state has failed to comply with a Treaty obligation.⁶⁶ If the Commission considers that a member state has failed to fulfil a Treaty obligation, it must first deliver a reasoned opinion on the matter after giving the state concerned an opportunity to submit its observations. It is only if the state does not comply with the opinion that the Commission may bring the matter before the Court.⁶⁷
- Second, one state may initiate proceedings against another where the former considers that the latter has failed to comply with a Treaty obligation.⁶⁸ Before this is done the matter must first be referred to the Commission, which will deliver a reasoned opinion in this situation as well. Where the CJEU finds that a state has failed to comply with a Treaty

⁵⁸ For the work of the ECJ/CJEU, see D Edward (1995) 20 EL Rev 539. And see generally, Arnall, *The European Union and its Court of Justice*, and Brown and Kennedy, *The Court of Justice of the European Communities*.

⁵⁹ TEU, art 19.

⁶⁰ TFEU, art 251.

⁶¹ See A Dashwood (1982) 2 LS 202.

⁶² TFEU, art 253.

⁶³ *Ibid.* A post of Vice-President was created in 2012.

⁶⁴ *Ibid.*, art 256.

⁶⁵ TEU, art 19(3).

⁶⁶ TFEU, art 258. Liability under TFEU, art 258 arises whatever the agency of the state whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution: *Case 77/69, EC Commission v Belgium* [1970] ECR 237 (difficulty in securing parliamentary approval because Parliament had been dissolved).

⁶⁷ TFEU, art 258. See *Case 293/85, EC Commission v Belgium* [1988] ECR 305, and *Case 74/82, EC Commission v Ireland* [1984] ECR 317.

⁶⁸ TFEU, art 259. See *Case 141/78, France v UK* [1979] ECR 2923, *Case C-364/10, Hungary v Slovakia*, 16 October 2012.

obligation, ‘the state shall be required to take the necessary measures to comply with the judgment of the Court’,⁶⁹ and failure to do so could lead to subsequent proceedings before the Court initiated by the Commission with a view to imposing a financial penalty on the state.⁷⁰

- Third, it may also be possible for one member state to challenge the legality of a legal instrument in proceedings against an EU institution, as in *Case C-84/94, UK v EU Council*,⁷¹ where the British government unsuccessfully contested the legal basis of the Working Time Directive (93/104/EC), as exceeding powers under what was then TEC, art 118a.⁷² In addition to proceedings against states and against EU institutions, a natural or legal person in some circumstances may also challenge decisions which are either addressed to them personally or are of ‘direct and individual concern’ to him or her where addressed to another.⁷³ If such an action is well-founded, the Court shall declare the act concerned to be void.⁷⁴

Apart from the foregoing, the Court also has jurisdiction under art 267 (previously TEC, art 234 and before that EC Treaty, art 177) to give preliminary rulings concerning the interpretation of the Treaties, as well as the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.⁷⁵ A national court or tribunal may seek a preliminary ruling where it ‘considers that a decision on the question is necessary to enable it to give judgment’.⁷⁶ In the case of a court or tribunal ‘against whose decisions there is no judicial remedy under national law’, the court or tribunal must bring before the CJEU for a ruling any question on a matter which is necessary for it to give judgment.⁷⁷ According to the CJEU, a reference is not required where the question of EU law is irrelevant, or the matter has already been decided by the CJEU, or the position is ‘so obvious as to leave no scope for any reasonable doubt’.⁷⁸ Where a reference is made, the court will request an answer to specific questions by the CJEU;⁷⁹ the latter is not empowered to resolve the dispute

⁶⁹ Ibid, art 260(1). In the *Factortame* affair (pp 135–6 below), secondary legislation was introduced to remove the discriminatory effect of the vessel registration scheme set out in the Merchant Shipping Act 1988.

⁷⁰ TFEU, art 260(2).

⁷¹ [1996] 3 CMLR 671.

⁷² It was subsequently held that key provisions of the directive were insufficiently precise for the directive to have direct effect, thereby preventing workers from recovering holiday pay for the period in which the United Kingdom failed to implement the directive: *Gibson v East Riding Council* [2000] ICR 890.

⁷³ TFEU, art 263. In some cases the requirement for individual concern may be dispensed with where the challenge is to a regulatory act (not defined) which is of ‘direct concern’ and does not entail ‘implementing measures’ (not defined) (TFEU, art 263(4)). For significant recent challenges by individuals or organisations (not all of which succeeded), see *Joined Cases C-402/05P and 415/05P, Kadi v Council and Commission*, 3 September 2008 (below, p 121); *Case T-345/05, Mote v European Parliament* [2008] ECR II-2849; *Case C-345/06, Heinrich* [2009] 3 CMLR 7; *Case T-284/08, People’s Mojahedin Organization of Iran v Council of the European Union* [2009] 1 CMLR 44; and *Case C-355/08 P, WWF-UK v Council and Commission* [2009] ECR I-00073.

⁷⁴ TFEU, art 264. See *Case C-345/06, Heinrich*, above.

⁷⁵ TFEU, art 267. This has been said to be ‘an instrument of cooperation between the Court of Justice and national courts’ (*Case C-313/07, Kirtuna SL v Red Elite de Electrodomesticos SA* [2009] 1 CMLR 14, at para 25).

⁷⁶ TFEU, art 267. On the meaning of a court or tribunal for this purpose, see *Case C-416/96, El-Yassini v Home Secretary* [1999] ECR I-1209 (immigration adjudicator a court or tribunal).

⁷⁷ TFEU, art 267. This would apply to the House of Lords and now the Supreme Court of the United Kingdom (but see *R v Employment Secretary, ex p EOC* [1995] 1 AC 1), and possibly also to bodies whose decisions are protected by a privative clause.

⁷⁸ *Case 283/81, CILFIT v Ministry of Health* [1982] ECR 3415.

⁷⁹ The questions will normally be agreed with the parties in advance: see *Marks and Spencer plc v Customs and Excise Commissioners* [2005] UKHL 53, [2005] STC 1254.

between the parties, it being for the national court to apply the ruling to the facts of the case before it.⁸⁰

There is now a significant body of case law addressing the circumstances in which a reference should be made. Earlier guidelines in *Bulmer Ltd v Bollinger SA*,⁸¹ have been displaced by a formulation developed by Lord Bingham, who before referring to *Bulmer* said:

... if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer.⁸²

More recent cases have emphasised that TFEU, art 267 does not only entitle the national court to refer to the CJEU a question 'concerning the interpretation of directives of the Community where the national court consider[s] that a decision on the question was necessary for it to give judgment and the question was not *acte clair*', but it actually 'impose[s] an obligation on a court of final appeal to request a preliminary ruling in those circumstances'.⁸³ Notable recent cases include:

- *McCall v Poulton*,⁸⁴ where the Court of Appeal upheld a reference made by a county court (despite an earlier decision of the House of Lords on the same issue), on the ground that the position had been rendered unclear by an intervening decision of the ECJ in a TEC, art 234 (now TFEU, art 267) reference from another country;⁸⁵
- *OFT v Abbey National plc*,⁸⁶ where the Supreme Court of the United Kingdom declined to make a reference in a controversial case where neither party 'showed any enthusiasm' for it, and where there was 'a strong public interest in resolving the matter without further delay';
- *O'Brien v Department of Constitutional Affairs*,⁸⁷ where the Supreme Court sought guidance on whether judges were workers for the purposes of a directive dealing with the right of part-time workers to equal treatment with full-time workers, in a dispute about the pension entitlement of recorders.

B. European Union law

As we shall see, there is a distinctive EU constitutional law, the fundamentals of which were in place before Britain's accession in 1973, and the bold claims of which are not easy for the

⁸⁰ The ECJ/CJEU 'has consistently held that under [TFEU, art 267] it has no jurisdiction to rule on the compatibility of national measures with Community law': *Case C-458/93, Saddik* [1995] ECR I-511.

⁸¹ [1974] 1 Ch 401. See J D B Mitchell (1974) 11 CMLR 351.

⁸² *R v International Stock Exchange, ex p Else* [1993] QB 534, at p 545.

⁸³ *JBW Group Ltd*, above, citing *Cooper v Attorney General* [2010] EWCA Civ 464, [2011] 2 WLR 448. See also *Alemo Herron v Parkwood Leisure Ltd* [2009] UKSC 6, paras 48 and 50 (Lord Walker).

⁸⁴ [2008] EWCA Civ 1313, [2009] 1 CMLR 1239.

⁸⁵ See below, p 126. On the right of appeal against TFEU, art 267 references, see *Grattan plc v Revenue and Customs* [2011] UKUT 399 (TCC), [2012] 1 CMLR 869.

⁸⁶ [2009] UKSC 6, [2010] 1 AC 696.

⁸⁷ [2010] UKSC 34, [2011] 1 CMLR 36, and subsequently *O'Brien v Ministry of Justice* [2013] UKSC 6, [2013] 1 WLR 522.

British public lawyer, schooled in the traditions of Dicey and others, to embrace. These claims relate particularly to claims about the supremacy of EU law in its expanding field of competence, as established by the CJEU in several ground-breaking early decisions. While as a practical matter any potential conflict between national constitutional law and the constitutional law of the EU is unlikely to be an issue of day-to-day concern, the possibility of serious disagreement between the British government and the EU institutions at some time in the future ought not to be discounted.

It is at this point that unresolved issues of principle may become important, and it is at this point a national government will be faced with the strong claims of the ECJ in *Case 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen*.⁸⁸ There it was noted that what was then the EEC Treaty ‘is more than an agreement which merely creates mutual obligations between the contracting states’, and in which the Court asserted:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The point was reinforced forcefully in *Case 6/64, Costa v ENEL* (considered below),⁸⁹ and reflected in the Declaration concerning primacy annexed to the Lisbon Treaty (Declaration 17).⁹⁰

The supremacy of EU law: the general principle

Within the Community legal order, the CJEU thus claims that EU law takes priority over national law. In the landmark *Costa* case referred to above, Mr Costa claimed that he was not obliged to pay for electricity supplied to him by ENEL on the ground that the supplier was an entity which had been nationalised in 1962 in breach of provisions of what was then the EEC Treaty. The Italian court (the Giudice Conciliatore of Milan) referred to the ECJ (as it was then) for consideration whether Italian law violated the Treaty in the manner suggested, only to be faced with the argument by the Italian government that the reference was ‘absolutely inadmissible’ inasmuch as ‘a national court which is obliged to apply a national law cannot avail itself of art 177 [now TFEU, art 267]’.

In rejecting this argument, the ECJ held:

The integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a

⁸⁸ [1963] ECR 1.

⁸⁹ [1964] ECR 585.

⁹⁰ *Ibid*, p 593. Declaration 17 provides that ‘In accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of member states, under the conditions laid down by the said case law’. Attached to the Declaration is an Opinion of the Council Legal Service of 22 June 2007 pointing out that this principle of ‘primacy’ is a result of the case law of the Court of Justice (referring specifically to the *Costa* case), and is not mentioned in the Treaty.

legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty.⁹¹

The ECJ further asserted that ‘the laws stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law, and without the legal basis of the Community itself being called into question’.⁹²

This case thus unequivocally declared the supremacy of Community – and now EU – law over inconsistent domestic law, including in particular domestic law introduced after accession.⁹³ EU law also takes priority over inconsistent provisions of national constitutional law. The leading case, *Case 11/70, Internationale Handelsgesellschaft v Einfuhrund Vorratsstelle für Getreide und Futtermittel*,⁹⁴ was concerned with regulations which required applicants for export and import licences to pay a deposit which was forfeited if terms of the licence were violated. The German authorities were of the view that the system of licences violated certain principles of German constitutional law ‘which must be protected within the framework of the German Basic Law’. But the ECJ disagreed and held:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.⁹⁵

Further, ‘the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure’.⁹⁶ Although Community law thus prevails over even fundamental rights guaranteed by national constitutions, the ECJ did, nevertheless, hold that ‘respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice’, and that ‘protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community’.⁹⁷ On the facts it was held that the system of licences in question did not violate any such rights.

The respect for fundamental rights has meant that the ECHR has a special status in EU law. Otherwise, however, EU law takes priority over the international law obligations of the EU and its member states, as in *Joined Cases C-402/05P and 415/05P, Kadi v Council and*

⁹¹ [1964] ECR 585, pp 593–4.

⁹² *Ibid*, p 594.

⁹³ See also *Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

⁹⁴ [1970] ECR 1125.

⁹⁵ *Ibid*, p 1134.

⁹⁶ See also *Case 44/79, Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, and more recently *Case C-438/05, International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP* [2007] ECR I-10779.

⁹⁷ [1970] ECR 1125, 1134. See now TEU, art 6(3). See below, pp 126–8.

Commission,⁹⁸ which concerned a regulation authorising the freezing of the assets of the applicant to comply with UN resolutions.

It was held by the ECJ that the regulation in question was ultra vires and it was annulled. This was partly because there was no power in the EC Treaty to make a regulation of this kind, and partly because it was not consistent with respect for fundamental rights drawn 'from the constitutional traditions common to the member states and from the guidelines supplied by international instruments for the protection of human rights on which the member states have collaborated or to which they are signatories'.

Here the rights in question related to respect for private property and the right to effective judicial protection (the right to be heard). In the view of the ECJ, 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system'. Although a welcome decision, the subordination of international law to EU law may be less attractive where economic freedoms in the TFEU are accorded priority over fundamental social rights in international and regional treaties to which member states are party.⁹⁹

EU law and the United Kingdom

The implications of the supremacy of EU law for the United Kingdom were revealed by the *Factortame* series of cases in which the company challenged the Merchant Shipping Act 1988 and regulations made thereunder, on the ground that they violated provisions of the EEC Treaty, including arts 7 and 52 (now TFEU, arts 26 and 46 respectively).¹⁰⁰ The Act had been introduced to prevent what was called 'quota hopping', and amended the rules relating to the licensing of fishing vessels by providing that only British-owned vessels could be registered, a requirement which excluded the Spanish-owned vessels of the applicants. In judicial review proceedings in *Factortame (No 1)* the Divisional Court made a reference under EEC Treaty, art 177 (now TFEU, art 267) for a preliminary ruling on the issues of Community law raised by the proceedings, and ordered by way of interim relief that the application of the 1988 Act should be suspended as regards the applicants.

This latter order was set aside by the Court of Appeal on the ground that the court had no power to suspend the application of an Act, since 'it is fundamental to our (unwritten) constitution that it is for Parliament to legislate and for the judiciary to interpret and apply the fruits of Parliament's labours'.¹⁰¹ By the time the case reached the House of Lords, however, the question of parliamentary sovereignty had been diluted, although not completely displaced. Lord Bridge said:

⁹⁸ [2008] ECR I-06351. On the supremacy of EU law over international law, see also *Case C-308/06, R (International Association of Independent Tanker Owners) v Transport Secretary* [2008] I-04057, and *Case C-122/95, Germany v Council* [1998] ECR I-973.

⁹⁹ *Case 438-05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP*, above; *Case 341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767.

¹⁰⁰ For the *Factortame* litigation, see *R v Transport Secretary, ex p Factortame Ltd (No 1)* [1989] 2 CMLR 353 (CA), [1990] 2 AC 85 (HL); *Case C-213/89, R v Transport Secretary, ex p Factortame Ltd (No 2)* [1991] AC 603 (ECJ and HL); *Case C-221/89, R v Transport Secretary, ex p Factortame Ltd (No 3)* [1992] QB 680 (ECJ); *Case C-48/93, R v Transport Secretary, ex p Factortame Ltd (No 4)* [1996] QB 404 (ECJ); *R v Secretary of State for Transport, ex p Factortame (No 5)* [2000] 1 AC 524. For proceedings by the Commission under art 169 (now TFEU, art 226) see *Case C-246/89, Commission v UK* [1991] ECR I-4585. For the sequel, see Merchant Shipping Act 1988 (Amendment) Order 1989, SI 1989 No 2006. For an account of the costs of the *Factortame* case, see HL Deb, 4 July 2000, WA 132.

¹⁰¹ [1989] 2 CMLR 353, 397 (Lord Donaldson MR).

If the applicants fail to establish the rights they claim before the ECJ, the effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament's sovereign will and correspondingly to have deprived British fishing vessels, as defined by Parliament, of the enjoyment of a substantial proportion of the United Kingdom quota of stocks of fish protected by the common fisheries policy. I am clearly of the opinion that, as a matter of English law, the court has no power to make an order which has these consequences.¹⁰²

It was also held that under English law it was not possible (at that time) to grant an interlocutory injunction against the Crown.

In the view of the ECJ, in contrast, 'the full effectiveness' of Community law (as it then was) would be impaired 'if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under community law'. It therefore followed that 'a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule'. As a result EC law (now EU law) must take priority over domestic legislation, even if this means that the British courts are required to set aside a fundamental constitutional principle. However, there is nothing novel about such a conclusion, the ECJ holding on a number of occasions that the supremacy of Community law (now EU law) applies even in respect of provisions of national constitutional law.

The position was reinforced by *Factortame (No 4)* which was concerned with whether the government was liable to the plaintiffs in damages for loss suffered as a result of the legislation.¹⁰³ It had already been held that failure to implement a directive could in some circumstances give rise to liability in damages on the part of a state to a citizen who suffered loss as a result.¹⁰⁴ In *Factortame (No 4)*, the ECJ held:

The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by the breach.¹⁰⁵

So not only may an Act of Parliament be 'disapplied'; the courts may also be called on to make an award of damages for losses suffered as a result of its terms where the conditions for state liability are met. In *Factortame (No 5)*, the House of Lords held that the 'deliberate adoption of legislation which was clearly discriminatory on the ground of nationality and which inevitably violated [what was then] article 52 of the Treaty' was a sufficiently serious breach to give rise under Community law to a right to compensatory damages.¹⁰⁶

Sources of EU law

1. EU treaties

EU law takes a number of different forms. The highest form of law are the Treaties (TEU, TFEU) themselves, which not only set out the constitution of the EU, but also deal with

¹⁰² [1990] 2 AC 85, 143.

¹⁰³ [1996] QB 404. Although the government moved quickly to repair the legislation, losses were sustained from the time the 1988 Act came into force (31 March 1989) until the offending discrimination was removed (2 November 1989).

¹⁰⁴ See below, p 138.

¹⁰⁵ [1996] QB 404, at p 497.

¹⁰⁶ *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)* [2000] 1 AC 524, at p 545 (Lord Slynn). See A Cygan (2000) 25 EL Rev 452. Article 52 is now TFEU, art 43.

substantive matters, some of which give rise to rights which are directly effective in national courts. *Case 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen*¹⁰⁷ was concerned with the interpretation of what was then art 12 of the EEC Treaty, this requiring member states to refrain from introducing between themselves new customs duties, or increasing those already in force, in trade with each other. The question referred by the Dutch tribunal to the ECJ was whether the then art 12 of the EEC Treaty had direct effect in the domestic courts ‘in the sense that nationals of member states may on the basis of [the] article lay claim to rights which the national court must protect’.

In a seminal decision, the ECJ held that:

Independently of the legislation of member states, Community law . . . not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community.¹⁰⁸

But not all terms of the Treaties have direct effect in the sense that they will be enforceable by individuals in their own national courts.¹⁰⁹ Much will depend on the nature of the treaty provision in question, it being stated in *Van Gend en Loos* that the then art 12 contained ‘a clear and unconditional prohibition’, which was unqualified ‘by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law’.¹¹⁰ This made it ‘ideally adapted to produce direct effects in the legal relationship between member states and their subjects’.

Where a treaty provision does have direct effect, in some cases it may be relied on by one private party against another, in which case it is said to have ‘horizontal’ direct effect. A provision that can be relied upon only against the state is said in contrast to have ‘vertical’ direct effect. Among the cases in which the ECJ has held that treaty provisions have horizontal direct effect, *Case 43/75, Defrenne v Sabena*,¹¹¹ was concerned with the then art 119 (thereafter art 141, now TFEU, art 257), which provides that ‘each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work’. The article was said to promote a double aim, one economic and the other social, the former seeking to eliminate unfair competition and the latter furthering social objectives of the Community, ‘which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of living and working conditions’.¹¹²

The principle of equal pay formed part of ‘the foundations of the Community’, and art 119 was held to have direct effect even though its complete implementation ‘may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level’. The ECJ held that direct effect would apply in particular to ‘those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public’.¹¹³ *Case 43/75, Defrenne v Sabena* was relied upon by the ECJ in

¹⁰⁷ [1963] ECR 1.

¹⁰⁸ *Ibid*, p 12.

¹⁰⁹ See e.g. *R v Home Secretary, ex p Flynn* [1995] 3 CMLR 397 (EC Treaty, art 7a (now TFEU 26) held not to have direct effect).

¹¹⁰ [1963] ECR 1, p 13.

¹¹¹ [1976] ECR 455.

¹¹² *Ibid*, p 472.

¹¹³ See K Apps (2009) 34 E L Rev 141 for some of the important remedial implications of this decision.

the controversial decision in *Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line*,¹¹⁴ in holding that a company can proceed against a trade union where the company's right to freedom of establishment (under what is now TFEU, art 49) was allegedly impeded by the industrial action organised by the defendant organisation based in London (which is why this case was a reference from the Court of Appeal).

2. EU legislation

As we have seen, the Treaties also confer law-making powers on the EU institutions, these taking a number of different forms. By TFEU, art 288 (ex TEC, art 249) the institutions are empowered to 'adopt regulations, directives, decisions, recommendations and opinions'. These different measures have different legal consequences. **Regulations** have 'general application', in the sense that they are binding in their entirety and directly applicable in all member states.¹¹⁵

*Case 93/71, Leonasio v Italian Ministry of Agriculture*¹¹⁶ was concerned with an EEC regulation of 1969 providing a subsidy for those who slaughtered milk cows. The question for the ECJ was whether the regulation conferred on farmers a right to payment of the subsidy enforceable in national courts. In holding that it did, the Court held that, as a general principle, 'because of its nature and its purpose within the system of sources of Community law', a regulation 'has direct effect and is, as such, capable of creating individual rights which national courts must protect'. It was no excuse in this case that the national Parliament had not allocated the necessary funds to meet the costs of the subsidy, for to hold otherwise would have the effect of placing Italian farmers in a less favourable position than their counterparts elsewhere 'in disregard of the fundamental rule requiring the uniform application of regulations throughout the Community'.¹¹⁷

Like some provisions of the Treaty, regulations may have horizontal as well as vertical direct effect.¹¹⁸ It would also be possible in English law for the Attorney General – in his or her capacity as guardian of the public interest – to seek an injunction to restrain a private party from acting in breach of a regulation.¹¹⁹

Directives generally require implementing legislation by a member state before they give rise to enforceable obligations in the member state in question, the TFEU providing that directives are binding 'as to the result to be achieved', the national authorities being left 'the choice of form and methods'.¹²⁰ So 'where different options are available for and effective to achieve the objects of the Directive it is for member states to choose between them'.¹²¹ This gives member states 'considerable flexibility' in implementation.¹²² But directives also may

¹¹⁴ *Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP*, above.

¹¹⁵ TFEU, art 288.

¹¹⁶ [1972] ECR 287.

¹¹⁷ See also *Case 128/78, Re Tachographs: Commission v UK* [1979] ECR 419.

¹¹⁸ *Case C-253/00, Antonio Muñoz y Cia SA v Frumar Ltd* [2003] Ch 328.

¹¹⁹ *DEFRA v ASDA Stores* [2003] UKHL 71, [2004] 4 All ER 268.

¹²⁰ TFEU, art 288. For a full account, see S Prechal, *Directives in EC Law*.

¹²¹ *Wilson v St Helens Borough Council* [1999] 2 AC 52, per Lord Slynn.

¹²² *R (Amicus-MSF) v Secretary of State for Trade and Industry* [2004] IRLR 430, per Richards J. See also *Wilson v St Helens Borough Council* [1999] 2 AC 52, per Lord Slynn.

have vertical direct effect,¹²³ the point having been established in *Case 41/74, Van Duyn v Home Office* where the ECJ said that it would be ‘incompatible with the binding effect attributed to a directive by art 249 [now TFEU, art 288] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned’.¹²⁴ According to one line of authority, ‘wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the state where that state fails to implement the directive in national law by the end of the prescribed period or where it fails to implement the directive correctly’.¹²⁵ As a general rule, however, directives do not have horizontal direct effect (though they may sometimes have what has been termed ‘incidental effect’).¹²⁶

In *Case 152/84, Marshall v Southampton and South West Hampshire AHA*,¹²⁷ it was held that art 5(1) of the Equal Treatment Directive (76/207/EEC) was directly effective, thereby allowing a woman (who had been dismissed at the age of 62 in circumstances where men would not have been dismissed until the age of 65) to bring proceedings in domestic law for sex discrimination on an issue to which domestic legislation did not then apply. It was held that although directives have only ‘vertical’ rather than ‘horizontal’ direct effect, a directive nevertheless may be relied on against the state ‘regardless of the capacity in which the latter is acting, whether employer or public authority’.¹²⁸

Decisions are binding in their entirety on those to whom they are addressed, while **recommendations** and **opinions** have no binding force.¹²⁹

The EU, the ECHR and fundamental rights

An issue of growing interest is the extent to which fundamental rights play a part in the developing law of the EU.¹³⁰ It is, of course, the case that many national constitutions include

¹²³ On which, see P P Craig (2009) 34 EL Rev 349 on the complex position now emerging on the legal status of directives.

¹²⁴ [1974] ECR 1337.

¹²⁵ *Case 8/81, Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

¹²⁶ *Case C-194/94, CIA Security International SA v Signalson SA* [1996] ECR I-2201; *Case C-443/98, Unilever Italia v Central Food* [2000] ECR I-7535; *Case C-201/02, Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723; *Joined Cases C-152/07 to 154/07, Arcor AG* [2008] ECR I-05959.

¹²⁷ [1986] ECR 723. See A Arnulf [1987] PL 383.

¹²⁸ *Marshall*, at p 749. The Area Health Authority was a public authority (or emanation of the state) for this purpose. See further *Case C-222/84, Johnston v Chief Constable of the RUC* [1987] QB 129 (police authority); *Case 188/89, Foster v British Gas* [1991] 2 AC 306 (nationalised industry); and *Griffin v South West Water* [1995] IRLR 15 (privatised water company). It has also been said that a directive may be ‘relied on against organisations or bodies which are subject to the authority or control of the state or have special powers beyond those which result from the normal rules applicable to relations between individuals, such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility by the public authorities and under their supervision, for providing a public service’: *Joined Cases C-253/96 to C-258/96, Kampelmann v Landschaftsverband Westfalen-Lippe* [1997] ECR 6907. However, a private company (the Motor Insurance Bureau) was held not to be an emanation of the state for the purposes of direct effect, even though it was the party to an agreement with the government by which a directive was to be implemented: *Byrne v MIB* [2008] 2 WLR 234. But see now *McCall v Poulton* [2008] EWCA Civ 1313; [2009] 1 CMLR 1239 (above, p 119).

¹²⁹ TFEU, art 288. On decisions, see R Greaves (1996) 21 EL Rev 3.

¹³⁰ See Betten and Grief, *EU Law and Human Rights*.

protection for fundamental rights, the nature of the protection varying from state to state. All member states have ratified the European Convention on Human Rights as well as the Council of Europe's Social Charter of 18 October 1961 or its Revised Social Charter of 3 May 1996. Fundamental rights (as guaranteed by the ECHR) are deemed to 'constitute general principles of the Union's law', the TEU, art 6(3) now giving effect expressly to an initiative to this end by the ECJ.¹³¹ In this way the Court has been willing in a developing line of jurisprudence (i) to construe Community legal instruments in a manner which is consistent with fundamental rights;¹³² and (ii) to set aside or annul decisions by Community institutions which are in breach of fundamental rights.¹³³

National courts have also been called upon to deal with fundamental rights when deciding matters of what is now EU law.¹³⁴ But the EU is not yet a party to the ECHR and so complaints cannot be taken to the Strasbourg court claiming that the Union is in breach of the ECHR,¹³⁵ though it would be possible for a complaint to be made to the Strasbourg court from a member state where it is claimed that the implementation of EU law in the state in question constitutes a breach of Convention rights.¹³⁶ Following the Lisbon amendments, the TEU now requires the EU to accede to the ECHR,¹³⁷ with the caveat that any accession 'shall make provision for preserving the specific characteristics of the Union and Union law'.¹³⁸ But this has yet to take place, and despite the mandatory provisions of TEU, art 6, any decision concluding accession will first need the agreement of the Council (acting unanimously) as well as the consent of the Parliament,¹³⁹ before being approved by all member states 'in accordance with their respective constitutional requirements'.¹⁴⁰

An important initiative in reinforcing the role of fundamental rights in EU law was the EU Charter of Fundamental Rights, adopted at Nice in December 2000.¹⁴¹ This is a wide-ranging document, particularly important for its commitment to 'the indivisible, universal values of human dignity, freedom, equality and solidarity'. A document of 54 articles, it is divided into seven chapters, entitled respectively dignity (articles 1–5); freedoms (articles 6–19); equality (articles 20–26); solidarity (articles 27–38); citizens' rights (articles 39–46); justice (articles 47–50); and general provisions (articles 51–54). The Charter draws freely on

¹³¹ *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹³² See *Case-13/94, P v S and Cornwall County Council* [1996] ECR I-02143; *Case C-60/00, Mary Carpenter* [2002] ECR I-6279; *Case C-112/00, Eugen Schmidberger v Austria* [2003] ECR I-5659 (A Biondi [2004] EHRLR 37); and *Case 438-05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP*, above.

¹³³ *Case C-185/95, Baustahlgewerbe GmbH v Commission* [1998] ECR I-8417.

¹³⁴ See *Booker Aquaculture Ltd v Secretary of State for Scotland* 2000 SC 9.

¹³⁵ Indeed, prior to the Lisbon amendments, the EU had no power under the treaties then in force to accede to the ECHR (*Opinion 2/94, Re the Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759), as some had proposed (House of Lords, Select Committee on European Union, 8th Report (1999–2000), for discussion of this issue).

¹³⁶ See K D Ewing and J Hendy (2010) 39 ILJ 2.

¹³⁷ TEU, art 6(2), where it is stated that the Union 'shall' accede.

¹³⁸ Protocol No 8. It is also provided that the 'accession of the Union shall not affect the competences of the Union or the powers of its institutions', nor is it to affect the right of member states to derogate from the ECHR or to accept certain provisions with reservations.

¹³⁹ TFEU, art 218.

¹⁴⁰ *Ibid*, art 218(8). It is unclear what this now means in the context of the United Kingdom. The European Union Act 2011 has since provided that the government must not agree to EU accession to the ECHR without the prior approval of Parliament (s 8(4)).

¹⁴¹ See A Arnall [2003] PL 774, S Douglas-Scott [2004] EHRLR 37, and Peers and Ward (eds), *The EU Charter of Fundamental Rights*. The Charter had been seen as 'a prelude to a European constitution' (F Jacobs (2001) 26 EL Rev 331).

other texts for its contents, including the ECHR and the Council of Europe's Social Charter, as well as the Community's Charter of the Fundamental Social Rights of Workers of 1989. The Nice Charter is addressed to the institutions and bodies of the Union and to the member states only when they are implementing Union law.¹⁴²

Where the EU Charter includes rights which are also to be found in the ECHR, 'the meaning and scope of those rights shall be the same as those laid down' by the Convention, thereby minimising the possibility of conflicting interpretations of Convention rights by the two highest courts in the European legal order.¹⁴³ The legal status of the EU Charter was transformed by the Lisbon Treaty, with the TEU, art 6 now also providing that the Charter 'shall have the same legal value as the Treaties',¹⁴⁴ albeit not integrated into the treaties. In the case of the United Kingdom (and Poland) however, Protocol No 30 provides that the Charter does not extend the ability of the ECJ (or of any domestic court) to find that any provision of domestic law is inconsistent with its terms; the Protocol also provides 'for the avoidance of doubt' that nothing in title IV of the Charter (dealing with certain trade union freedoms and employment rights) creates justiciable rights applicable to the United Kingdom.¹⁴⁵

From the time it was agreed, doubts have been raised about the effectiveness of Protocol 30. These doubts appear to have been vindicated by a passage from the decision of the CJEU in a reference from the United Kingdom.¹⁴⁶ According to the Court, Protocol 30 'does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those member states from ensuring compliance with those provisions'.¹⁴⁷ It has been said subsequently that the 'constitutional significance of this decision can hardly be overstated'.¹⁴⁸

Thus, 'Notwithstanding the endeavours of our political representatives at Lisbon', according to Mostyn J, 'it would seem that the much wider Charter of Rights is now part of our domestic law', and that it operates as such independently of the ECHR, which it significantly expands upon.¹⁴⁹ Whatever the substance in these claims, it is uncertain whether they take fully on board those provisions of the Charter that make clear that the latter is 'addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the member states only when they are implementing Union law' (art 51).¹⁵⁰

¹⁴² On which, see *Case C-617/10, Aklagaren v Fransson*, 26 February 2013, and *Case C 399/11, Melloni v Ministerio Fiscal*, 26 February 2013. See also *R (Sandiford) v Foreign Secretary* [2013] EWCA Civ 581, [2013] 1 WLR 2938.

¹⁴³ On the relationship between the two courts, see *Bosphorus Hava Yollari Turizm v Ireland* (2005) 42 EHRR 1. See generally, S Douglas-Scott (2006) 43 CML Rev 629; G Harpaz [2009] CMLR 105.

¹⁴⁴ But see also Protocol 7, which is said to make it 'absolutely clear that the contracting parties agreed that the Charter did not create one single further justiciable right in our domestic courts': *R(AB) v Home Secretary* [2013] EWHC 3453 (Admin), para 12.

¹⁴⁵ For a full discussion, see HL Paper 62-I (2007–08), paras 5.84–5.111. But see now *R(AB) v Home Secretary*, above, esp paras 10–16.

¹⁴⁶ *Joined Cases C-411/10 and C-493/10, NS v Home Secretary*, 21 December 2011.

¹⁴⁷ *Ibid*, para 120.

¹⁴⁸ *R(AB) v Home Secretary*, above, para 14.

¹⁴⁹ Moreover, said Mostyn J engaging with another debate (on which see ch 14 below), 'that much wider Charter of Rights would remain part of our domestic law even if the Human Rights Act were repealed' (para 14).

¹⁵⁰ As the court made clear in *Joined Cases C-411/10 and C-493/10, NS v Home Secretary*, above. See also *Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55, [2012] 1 WLR 3333, para 28.

C. EU law and British constitutional law¹⁵¹

We have seen so far that the EU treaties have created a new legal order, that the CJEU has asserted the supremacy of EU law over national law and that EU law may have direct effect in national legal systems. In each of these respects EU law presents a challenge to traditional British constitutional law, in so far as this is deeply rooted in parliamentary supremacy and in the obligation of the courts to give effect to legislation passed by Parliament.¹⁵²

But the question of legislative supremacy is not the only potential flashpoint, with the courts being presented with difficulties of a more practical nature which some see as a challenge to their authority. Apart from the differences of style in the drafting of British and EU law,¹⁵³ there is the more serious point that British judges must determine questions of EU law in accordance with the principles laid down by and in accordance with any relevant decisions of the CJEU.¹⁵⁴ Before considering the response of the courts, it is necessary to consider in some detail the constitutional issues presented by EU membership.

The constitutional implications of UK membership of the EC/EU

The constitutional implications of what was then EC membership were canvassed in a white paper published by the Labour government in 1967, which formed an important basis for the European Communities Act 1972.¹⁵⁵ It was pointed out that complex legislation would need to be introduced to implement measures that did not have direct effect, and that further legislation would be needed to give effect to subsequent Community instruments. Legislation would also be required in the case of those provisions of Community law ‘intended to take direct internal effect within the member states’:

This legislation would be needed, because, under our constitutional law, adherence to a treaty does not of itself have the effect of changing our internal law even where provisions of the treaty are intended to have direct internal effect as law within the participating states.¹⁵⁶

The white paper further pointed out that ‘the legislation would have to cover both provisions in force when we joined and those coming into force subsequently as a result of instruments issued by the Community institutions’. Although ‘no new problem would be created by the provisions which were in force at the time we became a member of the Communities’, a constitutional innovation would lie ‘in the acceptance in advance as part of the law of the United Kingdom of provisions to be made in the future by instruments issued by the Community institutions – a situation for which there is no precedent in this country’. These instruments were said like ordinary delegated legislation to ‘derive their force under the law of the United Kingdom from the original enactment passed by Parliament’.¹⁵⁷

Quite whether this constitutional innovation could be successfully implemented is a question not resolved before the introduction of the 1972 Act. The 1967 white paper noted:

¹⁵¹ See Jowell and Oliver (eds), *The Changing Constitution*, ch 2 (A W Bradley), and ch 4 (P Craig). Also Nicol, *EC Membership and Judicialization of British Politics*.

¹⁵² Britain is not alone in experiencing difficulties in reconciling EU law with the principles of national constitutional law. See Craig and De Burca, ch 9, and A Albi and P van Elsuwege (2004) 19 *EL Rev* 741.

¹⁵³ See *Bulmer v Bollinger SA* [1974] Ch 401, 425.

¹⁵⁴ European Communities Act 1972, s 3.

¹⁵⁵ Cmnd 3301, 1967.

¹⁵⁶ *Ibid*, para 22.

¹⁵⁷ *Ibid*. Today this analogy is seen to be badly misconceived. Delegated legislation (see ch 22) does not give rise to an autonomous body of law claiming supremacy over the source of its legal authority in domestic law.

The Community law having direct internal effect is designed to take precedence over the domestic law of the member states. From this it follows that the legislation of the Parliament of the United Kingdom giving effect to that law would have to do so in such a way as to override existing national law so far as inconsistent with it.¹⁵⁸

But this merely restates rather than resolves the problem: what happens if Parliament should legislate in a manner inconsistent with the directly effective terms of the Treaty?

The answer it seemed was that ‘within the fields occupied by Community law Parliament would have to refrain from passing fresh legislation inconsistent with that law as for the time being in force’, although this ‘would not however involve any constitutional innovation’, for ‘many of our treaty obligations already impose such restraints – for example, the Charter of the United Nations, the European Convention on Human Rights and GATT’.¹⁵⁹ But this did not provide an answer either: what would be the position of a post-accession statute that was incompatible with a subsequently introduced regulation having direct effect or a statute introduced to comply with the Treaty, the terms of which were expanded in a novel and unpredictable way by the ECJ/CJEU? In this context, the examples of the UN Charter or the ECHR are beside the point, for unlike what was then the EC Treaty these provisions do not seek to create directly effective obligations, but rely instead on implementing legislation for any obligations they generate.

European Communities Act 1972

Britain’s application for membership was made in 1967. The Treaty of Accession was signed on 22 January 1972 and was implemented by the European Communities Act 1972.¹⁶⁰ This deals with two central questions which were said to be ‘fundamental to the structure and contents’ of the Act,¹⁶¹ the first being those provisions intended to embody in domestic law the provisions of Community (now EU) law designed to have direct effect and the second being the provisions which did not have direct effect but where action was necessary for their implementation. So far as the former is concerned, s 2(1) of the 1972 Act, said to be ‘at the heart of the Bill’,¹⁶² provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.

What this does is to provide that in so far as EEC/EC/EU law has direct effect, it shall be enforceable in the UK courts. It is also designed to ensure that directly effective EEC/EC/EU obligations take precedence over national law. But it does not address the question of what should happen where there is a statute inconsistent with directly effective EEC/EC/EU obligations. This, however, is addressed by s 2(4) which provides (inter alia):

any enactment passed or to be passed [i.e. by the Westminster Parliament], other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section.

¹⁵⁸ Cmnd 3301, 1967, para 23.

¹⁵⁹ Ibid.

¹⁶⁰ This has been amended on several occasions since. On the interaction of some of these amending measures, see *R v Foreign Secretary, ex p Rees-Mogg* [1994] QB 552.

¹⁶¹ HC Deb, 15 February 1972, col 271.

¹⁶² Ibid, col 650.

Together with s 2(1), this is expressly designed to mean that ‘the directly applicable provisions ought to prevail over future Acts of Parliament in so far as they might be inconsistent with them’.¹⁶³ As such, s 2 is an attempt by one Parliament to fetter the continuing supremacy of another by providing that, while future Parliaments may legislate in breach of Community (now EU) law, the courts must (to the extent of any inconsistency) deny it any effect.¹⁶⁴

The provisions of Community (now EU) law that do not have direct effect were addressed in two ways by the 1972 Act. The first was by making a number of amendments to existing legislation to bring it into line with Community (now EU) law; and the second was by introducing a general power to make subordinate legislation to cover future as well as some existing Community instruments. Although there was concern about the new power to make subordinate legislation, the government did not expect the power to be frequently used,¹⁶⁵ an expectation which was clearly unfulfilled. By s 2(2) of the 1972 Act, regulations may be introduced by a designated minister for the purpose of implementing any EU obligation. This is subject to Sched 2, which provides that regulations may not be used for a number of specified purposes.

These latter purposes are (i) an imposition of or increase in taxation; (ii) a provision having retrospective effect; (iii) a power delegating legislative authority; and (iv) a measure creating a new criminal offence punishable with imprisonment for more than two years, or punishable on summary conviction with imprisonment for more than three months or with a fine of more than level 5 on the standard scale. The power to make regulations under these provisions is otherwise exercisable by statutory instrument, which if not made following a draft being approved by resolution of each House of Parliament, is subject to annulment by either House.¹⁶⁶ Although the power to make subordinate legislation has been widely construed,¹⁶⁷ the government must indicate in clear terms what (if any) primary legislation is being repealed or amended when this procedure is invoked.¹⁶⁸

Parliamentary scrutiny of EU legislation

In addition to the need to give effect to Community (now EU) law, there was also a need for procedures to ensure the accountability of ministers engaged in the making of new Community (now EU) law, in particular where the Community (now EU) instruments would have direct effect. The government expressed the view that ‘Parliament should be informed about and have an opportunity to consider at the formative stage those Community instruments which, when made by the Council, will be binding in this country’.¹⁶⁹ Traditional parliamentary procedures, such as questions, adjournment debates and (the now discontinued) supply days, would apply and an undertaking was given that ‘No Government would proceed on a matter of major policy in the Council unless they knew that they had the approval of the House.’¹⁷⁰ Nevertheless, the government accepted that the traditional means of parliamentary accountability needed to be strengthened and that ‘special arrangements’ should be made under which the House would be ‘apprised of draft regulations and directives before they go to the Council of Ministers for decision’.¹⁷¹

¹⁶³ Ibid, col 278.

¹⁶⁴ See S A de Smith (1971) 34 MLR 597, H W R Wade (1972) 88 LQR 1, J D B Mitchell et al. (1972) 9 CML Rev 134, F A Trindade (1972) 35 MLR 375, G Winterton (1976) 92 LQR 591.

¹⁶⁵ HC Deb, 15 February 1972, col 282.

¹⁶⁶ For parliamentary scrutiny of delegated legislation, see ch 22 C.

¹⁶⁷ See *R v Trade and Industry Secretary, ex p UNISON* [1997] 1 CMLR 459.

¹⁶⁸ *R (Orange Personal Communications Ltd) v Trade and Industry Secretary* [2001] 3 CMLR 36.

¹⁶⁹ HC Deb, 15 February 1972, col 274.

¹⁷⁰ Ibid.

¹⁷¹ Ibid, col 275.

In 1974 special committees were set up by both Houses of Parliament, now the European Scrutiny Committee in the case of the Commons, and the European Union Committee in the case of the Lords. The Commons committee is empowered to examine European Union documents (a term defined to include proposed legislation), to report its opinion on the legal and political importance of each and to consider any issue of principle, policy or law that may be affected.¹⁷² There are now over 1,100 documents considered by the Committee each year. The revised terms of reference of the highly respected Lords committee enable it to ‘consider European Union documents deposited in the House by a minister, and other matters relating to the European Union’.¹⁷³ The Lords committee also has the power to appoint sub-committees, of which there are in fact six, and it is through the medium of these sub-committees that much business is conducted.¹⁷⁴ Debates on matters identified by the Commons Scrutiny Committee now take place in one of three European Standing Committees where ministers may make a statement and be questioned.¹⁷⁵

In recent years steps have been taken at both EU and national level to help overcome some of the formidable political obstacles to effective scrutiny of EU legislation. Attempts to enhance the role of national Parliaments are to be found in the TEU, which provides that national Parliaments should be better informed and be sent draft legislation in good time so that they may consider it properly.¹⁷⁶ By Protocol 1, legislative proposals from the Commission should be sent to national Parliaments at the same time as they are sent to the Council and the European Parliament, while a period of eight weeks must elapse between the sending of a legislative proposal to national Parliaments and the date when it is placed on the provisional agenda of the Council for consideration as a legislative instrument, unless the matter is urgent.¹⁷⁷ Moreover, by resolutions of both Houses of 30 March 2010 (the ‘scrutiny reserve resolution’), ministers are not to agree to any EU legislation in relation to which the parliamentary scrutiny process has not been completed.¹⁷⁸

These latter obligations may be waived in the case of a proposal which is confidential, routine, or trivial, or is substantially the same as a proposal on which scrutiny has been completed. The minister may also give agreement before scrutiny is complete with the consent of the Committee or if there are ‘special reasons’, although the minister should explain the reasons to the Scrutiny Committee and in some cases the House itself. It is uncertain to what extent a minister is bound by the views expressed in one of the European scrutiny committees, and views are likely to differ between government and Parliament. But while ministers are unlikely to accept any formal constraint, any departure from a clear view expressed in

¹⁷² HC SO 143. The committee has 16 members.

¹⁷³ HL Deb, 16 May 2012, col 400.

¹⁷⁴ The sub-committees deal with Economic and Financial Affairs (A), Internal Market, Infrastructure and Employment (B), External Affairs (C), Environment and Agriculture, Fisheries, Environment and Energy (D), Justice and Institutions and Consumer Protection (E), Home Affairs, Health and Education (F). The sub-committee on Social Policy and Consumer Affairs (G) has been scrapped.

¹⁷⁵ HC SO 119. See generally, Cygan, *The United Kingdom Parliament and European Union Legislation*. A valuable guide to the Commons procedure is also produced by the Department of Chamber and Committee Services, *The European Scrutiny System in the House of Commons* (2012). There is also now a European and External Relations Committee of the Scottish Parliament with wide-ranging scrutiny functions.

¹⁷⁶ TFEU, art 12(a).

¹⁷⁷ Under art 3 of this Protocol, national Parliaments may send to the Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act is consistent with the principle of subsidiarity. See also Protocol 2 – Member states at request of national parliaments may bring an action before CJEU for breach of subsidiarity.

¹⁷⁸ For the text, see HL Deb, 30 March 2010, col 1292. The European and External Relations Committee of the Scottish Parliament considers and reports on proposed European Communities legislation and EU issues.

committee is unlikely to be taken lightly without the involvement of other ministers, thereby raising the possibility that the matter would become one of collective rather than individual responsibility.¹⁷⁹ The role of Parliament has been enhanced by the European Union Act 2011 (on which see below).

D. Response of the courts

As we have seen, the questions of parliamentary supremacy presented by Britain's membership were identified but not resolved in the pre-accession era. It would clearly be possible in principle for the United Kingdom to leave the EU,¹⁸⁰ and to that extent the supremacy of Parliament is preserved. But although in the current political climate this is perhaps no longer the theoretical point it was once thought previously to be (in the same way that in theory Parliament could legislate to regain sovereignty over former colonies),¹⁸¹ it is nevertheless an extreme step to have to take.

The real problem thus is whether Parliament can legislate in a manner expressly in defiance of EU law, while Britain remains a member of the EU. Should that happen, how should the United Kingdom courts respond? It is on this question that the politicians abdicated all responsibility in the pre-accession debates. The point was made by the Lord Chancellor in 1967:

There is in theory no constitutional means available to us to make it certain that no future Parliament would enact legislation in conflict with Community law. It would, however, be unprofitable to speculate on the academic possibility of a future Parliament enacting legislation expressly designed to have that effect. Some risk of inadvertent contradiction between United Kingdom legislation and Community law could not be ruled out.¹⁸²

EU law and parliamentary supremacy

For the first decade after the passing of the 1972 Act, the courts vacillated between mutually conflicting positions. In *Felixstowe Dock and Railway Co v British Transport Docks Board*,¹⁸³ Lord Denning commented that once a Bill 'is passed by Parliament and becomes a statute, that will dispose of all discussion about the Treaty. These courts will then have to abide by the statute without regard to the Treaty at all'.¹⁸⁴ Only three years later, Lord Denning appeared to change his mind. In *Macarthy's Ltd v Smith*,¹⁸⁵ the question was whether the Equal Pay Act 1970 permitted a woman to claim equal pay only with men currently in the employment of the employer or whether she could use as a comparator her male predecessor. The Court of Appeal was divided on the question: the majority (Lawton and Cumming Bruce LJ) were of the view that domestic law did not permit such claims, but that EC law (now EU law) was unclear.

The Court of Appeal was therefore minded to make a reference under art 177 (now TFEU, art 267) to determine whether equal pay for equal work under art 119 (now TFEU, art 157) was 'confined to situations in which men and women are contemporaneously doing equal work for their employer'. Lord Denning was of the view that EC law (now EU law)

¹⁷⁹ For further discussion, see Cygan (note 175 above).

¹⁸⁰ See TEU, art 50: 'Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements'. On which, see A Lazowski, (2012) 37 E Law Rev 523.

¹⁸¹ See ch 3 above.

¹⁸² HL Deb, 8 May 1967, col 1203.

¹⁸³ [1976] 2 Ll L Rep 656.

¹⁸⁴ *Ibid*, p 663.

¹⁸⁵ [1979] ICR 785. See T R S Allan (1983) 3 OJLS 22.

permitted the woman's claim and that domestic law should be construed accordingly, saying:

In construing our statute, we are entitled to look at the Treaty as an aid to its construction: and even more, not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient – or is inconsistent with Community law – by some oversight of our draftsmen – then it is our bounden duty to give priority to Community law. Such is the result of section 2(1) and (4) of the European Communities Act 1972.¹⁸⁶

The ECJ confirmed the interpretation of art 119 (now TFEU, art 157) which had been suggested by Lord Denning,¹⁸⁷ following which the Court of Appeal sought to make it plain that the provisions of the Treaty 'take priority over anything in our English statute on equal pay which is inconsistent with art 119 (now TFEU, art 157)', this priority having been 'given by our own law'.

According to Lord Denning:

Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it.¹⁸⁸

Although Lord Denning appeared thus to have changed his mind, he also observed:

Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act – with the intention of repudiating the Treaty or any provision in it – or intentionally of acting inconsistently with it – and says so in express terms – then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.¹⁸⁹

On this basis the European Communities Act 1972, s 2, effected only a limited form of entrenchment: it would have the effect that Community law (now EU law) will apply in preference to any post-1972 statute and to that extent Parliament would have bound its successors.

In these cases the courts would assume that Parliament had not intended to depart from Community (now EU) obligations. But Lord Denning left open the possibility that Parliament might wish to assert its supremacy by stating clearly that a domestic statute is to apply notwithstanding Community law (now EU law). In this case the domestic statute would displace to that extent s 2 of the 1972 Act. Further support in the early cases for the view that s 2 of the 1972 Act had only qualified the supremacy of Parliament was provided by *Case 12/81, Garland v British Rail Engineering Ltd.*¹⁹⁰ In an important passage which potentially goes further than Lord Denning in preserving the priority to be given to domestic legislation, Lord Diplock raised the question whether:

having regard to the express direction as to the construction of enactments 'to be passed' . . . contained in section 2(4), anything short of an express positive statement in an Act of Parliament passed after January 1, 1973, that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty, would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation of the United Kingdom.¹⁹¹

¹⁸⁶ Ibid, p 789.

¹⁸⁷ *Case 129/79, Macarthys Ltd v Smith* [1981] 1 QB 180.

¹⁸⁸ [1981] 1 QB 180, 200. See also Cumming Bruce LJ, at p 201.

¹⁸⁹ [1979] ICR 785, 789.

¹⁹⁰ [1983] 2 AC 751.

¹⁹¹ Ibid, p 771.

'Factortame'

The most recent and authoritative view on the question of a conflict between an Act of Parliament and EU law is that expressed in the *Factortame* series of cases.¹⁹² In *Factortame (No 1)* it was said by Lord Bridge (in upholding the Court of Appeal's refusal to grant interim relief to restrain the operation of the Merchant Shipping Act 1988 pending the outcome of the art 177 (now TFEU, art 267) reference) that s 2(4) was to be regarded as having

precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC.¹⁹³

As we have seen, however, the House of Lords held that they had no jurisdiction to grant the interim relief sought; on a reference under art 177 (now TFEU, art 267), the ECJ ruled that a national court must set aside a rule of national law which precludes it from granting interim relief in a case concerning Community law (now EU law). When the matter returned to the House of Lords, relief was granted, thereby restraining the operation of the Merchant Shipping Act 1988 in relation to the plaintiffs pending the final resolution of the case.¹⁹⁴ In a much quoted passage in *Factortame (No 2)*, Lord Bridge said:

Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the UK Parliament. But such comments are based on a misconception. If the supremacy . . . of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the UK joined the Community. . . . Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of UK statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.¹⁹⁵

In this way, the House of Lords appears to have effected a form of entrenchment of s 2(4) of the 1972 Act which thereby does what no statute has done before, namely fetter the continuing supremacy of Parliament.¹⁹⁶ The late Sir William Wade referred to this as a constitutional

¹⁹² See note 100 above. On the question of parliamentary sovereignty, see P P Craig (1991) 11 YBEL 221; N Gravells [1989] PL 568, [1991] PL 180; and H W R Wade (1991) 107 LQR 1, (1996) 112 LQR 568.

¹⁹³ [1990] 2 AC 85, 140.

¹⁹⁴ [1991] 1 AC 603.

¹⁹⁵ *Ibid*, pp 658–9.

¹⁹⁶ See also *R v Employment Secretary, ex p EOC* [1995] 1 AC 1 where declarations were made that provisions of the Employment Protection (Consolidation) Act 1978 were incompatible with art 119 (now art 141) of the EEC Treaty and Council Directive 75/117/EEC and that other provisions of the Act were incompatible with the latter. For subsequent developments see D Nicol [1996] PL 579.

revolution: ‘The Parliament of 1972 had succeeded in binding the Parliament of 1988 and restricting its sovereignty, something that was supposed to be constitutionally impossible.’¹⁹⁷ But although this may be necessary as a matter of European integration, it is unclear whether the House of Lords in *Factortame (Nos 1 and 2)* satisfactorily dealt with the issue as a matter of domestic constitutional law; nor is it clear that the decision answers all the questions which arise. Indeed, it is open to question whether the decisions advance the matter much beyond the Court of Appeal decision in *Macarthys Ltd v Smith*.¹⁹⁸ It is, however, unfortunate that in a case of such constitutional significance, the full range of constitutional authorities was not addressed in the course of argument, even if it would have been difficult for the defendants to have mounted a full frontal attack on the constitutional implications of s 2(4).

In terms of unanswered questions, what would be the position in the (admittedly unlikely) event that Parliament should say expressly (or by clear implication) that a statutory provision should apply notwithstanding any EU obligation to the contrary? Wade argued that: ‘If there had been any such provision in the Act of 1988 we can be sure that the European Court of Justice would hold that it was contrary to Community law to which by the Act of 1972 the Act of 1988 is held to be subject.’¹⁹⁹ But does it follow that in such a case national courts would be required to give effect to the 1972 Act rather than the 1988 Act? As a matter of British constitutional law (and regardless of what the ECJ might say), it would appear in such an eventuality that Parliament had repudiated the ‘voluntary’ ‘limitation of its sovereignty’, which it accepted when it enacted the 1972 Act (at least insofar as the 1988 Act is concerned). This is not to deny that such a decision would give rise to serious political and constitutional problems at EU level. But it would be for the Commission to take appropriate action by way of enforcement proceedings or otherwise, and it is perhaps in that way that any problems should be resolved rather than in the British courts.

Some of these matters were considered in *Thoburn v Sunderland City Council*²⁰⁰ (the so-called ‘Metric Martyrs’ case) where the appellant had been convicted for breaching the Weights and Measures Act 1985 by selling fruit in imperial rather than metric measurements. As originally enacted the 1985 Act had permitted fruit to be sold in either measure, but the Act had been amended by regulations and now required fruit to be sold in metric measures only. These regulations, made partially under the authority of the European Communities Act 1972, s 2(2), had been introduced in order to comply with the EC Metrication Directive. The appeal failed, with the Administrative Court rejecting on a number of grounds the argument that the Weights and Measures Act 1985 impliedly repealed the European Communities Act 1972, s 2(2), to the extent of any inconsistency. But in the course of his judgment Laws LJ made a number of important observations about the relationship between British and EC law.

According to Laws LJ, the House of Lords in *Factortame (No 1)* (above) had effectively accepted that s 2(4) of the 1972 Act could not be impliedly repealed (‘albeit the point was not argued’). In this way the common law had created an exception to the doctrine of implied repeal (an exception which in the view of Laws LJ should be extended to all

¹⁹⁷ (1996) 112 LQR 568. See also Bogdanor, *The New British Constitution*, p 28 (cited with approval in *R v Budimir* [2010] EWCA Crim 1486, [2011] 3 All ER 206).

¹⁹⁸ [1979] ICR 785.

¹⁹⁹ (1996) 112 LQR 568, p 570.

²⁰⁰ [2002] EWHC 195 (Admin), [2003] QB 151 (D Marshall and J Young [2002] PL 399, G Marshall (2002) 118 LQR 493, and A Perreau-Saussine [2002] CLJ 528).

'constitutional statutes', of which the European Communities Act 1972 was an example).²⁰¹ This did not mean that the 1972 Act could not be repealed or modified. But it did mean that repeal or modification could be achieved only by 'express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible'. By these means the courts were said to 'have found their way through the *impasse* seemingly created by two supremacies, the supremacy of European law and the supremacy of Parliament'. It is important to emphasise that in *Factortame* the House of Lords held that an Act of Parliament in breach of EU law was to be disapplied, not that it was a nullity.

This distinction was important in *R v Budimir*,²⁰² where convictions had been secured against the appellants under the Video Recordings Act 1984, which had been implemented in breach of the Technical Standards Directive 83/189/EEC. When the government became aware of the oversight, existing prosecutions were discontinued and the 1984 Act was re-enacted after EU procedural obligations were satisfied. But this left open the question of those who had been convicted under the 1984 Act, on behalf of whom the Court of Appeal refused to intervene. Under EU law the 1984 Act was not a nullity, and it was a matter of national law whether or not a conviction was to be re-opened. Clearly guided by the grave implications of overturning these and all other similar convictions, the Court of Appeal held that there was no obligation to do so in the interests of justice.

Parliamentary supremacy and the principle of indirect effect

Questions about parliamentary supremacy also arise, although rather less acutely, in the context of the interpretation of domestic legislation where questions are raised about the compatibility of the legislation with directives. This presents problems of what is sometimes referred to as the indirect effect of directives.²⁰³ In one case (*Von Colson*),²⁰⁴ a question arose about the relationship between German national law and the Equal Treatment Directive (76/207/EEC). According to the ECJ, 'in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [a directive], national courts are required to interpret their national law in the light of the wording and the purpose of the directive'. In a more recent case (*Marleasing*),²⁰⁵ the ECJ took a wider view of the application of directives, concluding now that 'in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter'.

This principle was stretched still further in *Pfeiffer*,²⁰⁶ where the ECJ said that 'a national court is required, when applying the provisions of domestic law adopted for the purpose of

²⁰¹ See ch 3 above on this aspect of the case.

²⁰² [2010] EWCA Crim 1486, [2011] 3 All ER 206.

²⁰³ The obligations here are said to derived from what is now TEU, art 4(3), which provides that 'Member states shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. See *FA Premier League v QC Leisure* [2012] EWHC 108 (Ch), [2012] 2 CMLR 514, para 23.

²⁰⁴ *Case 14/83, Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

²⁰⁵ *Case 106/89, Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135. See now *Cases C-397-403/01, Pfeiffer v Deutsches Roles Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835 (S Prechal (2005) 42 CMLR 1445), *Case C-212/04, Adeneler v Ellinikos Organismos Galaktos* [2006] ECR I-6057, and *Case C-268/06, IMPACT v Minister for Agriculture and Food* [2008] ECR I-02483.

²⁰⁶ *Cases C-397-403/01, Pfeiffer v Deutsches Roles Kreuz, Kreisverband Waldshut eV*, above.

transposing obligations laid down by a directive, *to consider the whole body of rules of national law* and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive'.²⁰⁷ Nevertheless, the obligation is not unconditional: for example, where a directive is implemented at national level after its prescribed commencement date, domestic courts are not required to construe the implementing legislation retrospectively to cover the period of the delay.²⁰⁸ Any such obligation would conflict with 'general principles of law, particularly those of legal certainty and non-retroactivity'.²⁰⁹ Under the *Francovich* principle, however, it may be possible in appropriate cases to bring an action against a national government for damages where an individual has suffered loss as a result of a failure properly to implement a directive which neither has direct nor indirect effect.²¹⁰ Any such action would be brought in the national courts.²¹¹

So far as the response of British courts to these questions is concerned, the issue first arose for consideration by the House of Lords in *Duke v Reliance Systems Ltd*,²¹² concerned with the differential retirement ages for men and women which were permitted by UK law but which were in breach of the Equal Treatment Directive. As we have seen, however, the directive does not have horizontal direct effect and so could not be enforced in the domestic courts by someone who was not employed by a public authority. It was argued, nevertheless, that the Sex Discrimination Act 1975 should be construed so as to conform to the directive, a contention which drew the following response from Lord Templeman:

a British court will always be willing and anxious to conclude that United Kingdom law is consistent with Community law. Where an Act is passed for the purpose of giving effect to an obligation imposed by a directive or other instrument a British court will seldom encounter difficulty in concluding that the language of the Act is effective for the intended purpose.²¹³

In the *Duke* case, however, the Act in question was not passed to give effect to the directive. Indeed, it was expressly intended to preserve discriminatory retirement ages and was not reasonably capable of bearing any construction to the contrary. In these circumstances, it was held that s 2(4) of the 1972 Act does not 'enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals'.

²⁰⁷ This should have implications for cases like *White v Motor Insurers Bureau* [2001] UKHL 9, [2001] 2 CMLR 1 where a directive was implemented not by legislation but by an agreement between the government and the insurance companies. Although there was no conflict between the agreement and the directive, it was nevertheless held that the *Marleasing* principle could not be stretched to require agreements of this kind to be interpreted in a manner that would impose obligations that the contract did not impose, even though the purpose of the agreement was to implement the directive.

²⁰⁸ *Case C-268/06, IMPACT v Minister for Agriculture and Food*, above. See also *Churchill Insurance Co Ltd v Fitzgerald* [2012] EWCA Civ 1166, [2012] 3 CMLR 1165: 'when the national court undertakes its obligation to refer to the content of a Directive in order to interpret and apply the relevant national law that implements the Directive, the national court must not use that obligation as the basis for an interpretation of the national law that is obviously contrary to its own laws or in a way that would, retroactively, re-interpret other existing laws' (para 48). See further *FA Premier League*, above.

²⁰⁹ *IMPACT*, above, para 100.

²¹⁰ *Cases C-6&9/90, Francovich and Bonifaci v Italy* [1991] ECR I-5357 (R Caranta [1993] 52 CLJ 272). Also *Case C-91/92, Faccini Dori v Recreb Srl* [1994] ECR I-3325; *Case C-261/95, Palmisani v INPS* [1997] ECR I-4025; *Case C-224/01, Gerhard Köbler* [2003] ECR I-10239. For a valuable account of the application of *Francovich* in different member states, see M-P F Granger (2007) 32 EL Rev 157.

²¹¹ See *Spencer v Secretary of State for Work and Pensions* [2008] IRLR 911.

²¹² [1988] AC 618.

²¹³ *Ibid*, p 638.

In more recent decisions, however, the House of Lords adopted a radically different approach in cases where statutory instruments had been introduced quite clearly to give effect to a directive. Indeed, in two cases the House was prepared to take the extraordinary step of implying words into the legislation quite consciously to change its literal meaning,²¹⁴ for fear that the measures would otherwise have ‘failed their object and the United Kingdom would have been in breach of its treaty obligations to give effect to directives’.²¹⁵ The courts now freely refer to directives to discover ‘the correct application’ of domestic law,²¹⁶ and in the course of doing so accept that ‘as between [a] directive and the domestic implementing regulations, the former is the dominant text’.²¹⁷ But what about legislation (primary and secondary) which covers the field occupied by a directive but which was not passed necessarily in order to implement it? The approach in *Duke* no longer appears to be followed, it now being accepted in *Webb v EMO Air Cargo (UK) Ltd*²¹⁸ (following *Marleasing*) that an English court should construe a statute to comply with a directive regardless of whether the statute was passed before or after the directive was made. Indeed, it is now recognised that ‘the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching’. To this end, the relevant principles of interpretation applicable in these cases was helpfully summarised in the following manner, where referring to the latter obligation it was said that:

(a) It is not constrained by conventional rules of construction; (b) It does not require ambiguity in the legislative language; (c) It is not an exercise in semantics or linguistics; (d) It permits departure from the strict and literal application of the words which the legislature has elected to use; (e) It permits the implication of words necessary to comply with Community law obligations; and (f) The precise form of the words to be implied does not matter.²¹⁹

E. European Union Act 2011: sovereignty revisited

Returning to some of the issues considered in the introduction to this chapter, the rapid growth of the EU and its competences has given rise to some concern in this country as well as in other member states. There is a section of the community sceptical about the nature of the European project, there are those who feel that a political promise was broken about a referendum on the Lisbon treaty in 2007–2008, and there are those who wish to reclaim powers from Brussels.

These views have a particular resonance within the Conservative party, the election of the party to government in 2010 as the dominant partner in the Coalition providing an

²¹⁴ *Pickstone v Freemans plc* [1989] AC 66 (see A W Bradley [1988] PL 485) and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546. This is a process that becomes less remarkable by usage in the lower courts: see *Leicestershire City Council v UNISON* [2005] IRLR 920, and *UK Coal Mining v NUM* [2008] IRLR 5.

²¹⁵ *Litster*, *ibid*, at p 558.

²¹⁶ *Whitehouse v Chas A Blatchford & Sons Ltd* [2000] ICR 542. See also *A v National Blood Authority* [2001] 3 All ER 289 (A Arnull (2001) 26 EL Rev 213); and *Director General of Fair Trading v First National Bank* [2002] 1 AC 481.

²¹⁷ *Director General of Fair Trading v First National Bank*, above, per Lord Steyn. Nevertheless, it is the duty of the court to ‘apply the national legislation implementing a directive and not the directive itself’: *FA Premier League v QC Leisure* [2012] EWHC 108 (Ch), [2012] 2 CMLR 514, para 22.

²¹⁸ [1992] 4 All ER 929. See N Gravells [1993] PL 44.

²¹⁹ *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446, [2010] Ch 77, para 37 (references omitted). Adopted in *Churchill Insurance Co Ltd*, above, para 52.

opportunity to address some of these concerns by legislation. The European Union Act 2011 thus introduces a number of innovations designed to give more parliamentary and popular control over decisions affecting the European Union.²²⁰ At least so far as the former is concerned, however, this is consistent with the provisions of the new TEU designed to enhance the role of national Parliaments generally in the work of the EU.²²¹

Requirement of parliamentary approval and a referendum

The starting point is both controversial and novel. Thus, any UK government support for further amendment to the EU treaties, or any further extension of the powers of the EU institutions at the expense of national sovereignty, will first need to be approved by an Act of Parliament AND by a referendum.²²² This is not simply an advisory referendum, but a requirement that the government shall not ratify a treaty until the referendum has been held and the referendum result is in favour of ratification. This in effect gives to the electorate the legal right of political veto over the actions of the government and the wishes of Parliament, and may be seen as a vindication of popular sovereignty at the expense of parliamentary sovereignty. Parliament may approve the treaty, but the electorate may not, in which case the will of Parliament must give way to the will of the people.

For these purposes, the 2011 Act distinguishes between (i) new treaties amending the EU Treaties, and (ii) revisions to the existing treaties by invoking powers in the TEU. Section 2 of the 2011 Act provides that no treaty amending the TEU or the TFEU is to be ratified unless the treaty is (i) laid before Parliament, (ii) approved in an Act of Parliament, AND (iii) either the ‘referendum condition’ or the ‘exemption condition’ is met. The ‘referendum condition’ is that ‘the Act providing for the approval of the treaty provides that the provision approving the treaty is not to come into force until a referendum about whether the treaty should be ratified has been held’. A majority of those voting must do so in favour of ratification. The ‘exemption condition’ is that the Act dispensing with the need for a referendum states that the treaty amendment does not fall within the European Union Act 2011, s 4.²²³

By virtue of the European Union Act 2011, s 3, a similar arrangement applies in relation to the less formal simplified revision procedure for making amendments to the TFEU. This procedure is to be found in the TEU, art 48(6), and requires the unanimous approval of member states. In the case of the United Kingdom, that approval can be given only if the procedure referred to in the previous paragraph has been followed, with the qualification that neither the ‘referendum condition’ nor the ‘exemption condition’ apply if the Act in question states that the ‘significance condition’ applies. This means that the decision falls within two of the 13 items listed in s 4 of the 2011 Act above, but the effect of the measure in question in relation to the United Kingdom is not significant²²⁴

²²⁰ See M Gordon and M Dougan (2012) 37 EL Rev 3. The Act was closely scrutinised in Parliament. See HL Paper 121, 2010–12 (HL Constitution Committee); HC 633, 682, 852, 2010–12 (European Scrutiny Committee).

²²¹ See also Protocol 1.

²²² European Union Act 2011, s 2.

²²³ This provides a list of 13 items to which in effect the referendum obligation applies.

²²⁴ Specifically, ‘the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an EU institution or body’; and ‘the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom’ (s 4(1)(i),(j)).

Any ministerial decision about which of these conditions applies is one that is subject to judicial review.²²⁵

The requirement for both parliamentary approval by legislation and the need for a referendum does not apply only to treaty amendments (s 2) or treaty revisions (s 3). By virtue of the European Union Act 2011, s 6, the need for both applies also to British ministerial support for a wide range of decisions that may be taken by the EU institutions under both the TEU and the TFEU. The list of 11 matters referred to in s 6(1) includes any decision to make the euro the currency of the United Kingdom, and a decision relating to the removal of border controls in the United Kingdom, in what is calculated to ensure that these decisions are never likely to be made, at least for the foreseeable future.²²⁶ Two additional matters (relating to defence and criminal justice) are dealt with in s 6(2) and (3).

Overall, the foregoing is a very important constitutional change, which significantly affects the government's power. It is also a very complex change. Thus, the referendum condition requires Parliament to provide for a referendum in each piece of legislation in which it approves a treaty covered by the 2011 Act. But what happens if a future Parliament declines to make such provision, but approves the treaty nevertheless, without expressly repudiating the need for a referendum? Does this mean that the referendum condition has not been met and that by virtue of the 2011 Act ministers may not support the treaty in question? Or does it mean that the requirement for a referendum in the 2011 Act has been impliedly repealed by the later Act? Following the hierarchy of statutes proposed by Laws LJ in *Thoburn* (above), however, is it even possible impliedly to repeal the 2011 Act? Is the 2011 Act a 'constitutional' statute for these purposes?

Requirement of parliamentary approval

In addition to the requirement of both parliamentary approval by Act of Parliament and a referendum, s 7 of the 2011 Act also provides that there are decisions that must first be approved by an Act of Parliament though not also by a referendum before they are confirmed by ministers. There are four categories of decision under the TFEU that must be approved by Act of Parliament before they are confirmed (including questions relating to rights of European citizens and elections to the European Parliament), and another six categories of draft decisions under the TEU and the TFEU that must not be supported by ministers unless approved by Act of Parliament. The standard procedure is thus that ministers are constrained in many areas from supporting EU initiatives without the authority of an Act of Parliament.

²²⁵ HL Deb, 23 May 2012, col 802 (Lord Howell, Foreign Office Minister of State). Questions about the application of the referendum condition were raised in the context of the 'eurozone' crisis. The 17 member states of the eurozone agreed to set up the European Stability Mechanism to secure economic stability in the eurozone countries. This required an amendment to the TFEU under the simplified revision procedure referred to above. The question was whether under the 2011 Act a referendum was necessary in the United Kingdom before the decision was confirmed. This could give rise to great difficulty, especially as the UK would not be bound by the treaty revision (not being a member of the eurozone), though possibly affected by it. Although UK confirmation of the decision required the approval of Parliament in legislation (by virtue of the 2011 Act), nevertheless it did not require a referendum, it being stated that the exemption condition had been met: European Union (Approval of Treaty Amendment Decision) Act 2012, s 1(3). See also as not requiring a referendum, the European Union (Croatian Accession and Irish Protocol) Act 2013 (dealing in part with the treaty for the accession of Croatia to the EU, but exempt from the referendum requirement because it 'does not fall within section 4 of the European Union Act 2011' (s 1(3))).

²²⁶ In the event of any such referendum ever taking place, provision is made in s 11 for those entitled to vote (in what would be a national referendum including Gibraltar), while s 13 imposes duties on the Electoral Commission to promote public awareness of the referendum and its subject matter.

The foregoing procedure is adapted slightly in the case of decisions taken under TEU, art 352, which gives a general power by unanimity to take steps to secure one of the objectives of the EU for which no express power is otherwise to be found in the treaties. Before a minister supports such a decision, he or she must have parliamentary approval, secured either by an Act of Parliament, or by a resolution passed by both Houses, though the resolution procedure may be adopted only if in the opinion of the minister the measure to which the resolution relates is required as a matter of urgency (s 8).²²⁷ In some cases the need for parliamentary approval in either form may be dispensed with if a minister lays before Parliament a statement specifying a draft decision, and stating that in his or her opinion, the decision relates only to one or more purposes exempt from this procedure.

Another variation on the standard procedure referred to above is to be found in the 2011 Act, s 9. This deals specifically with the provisions of the TFEU relating to the freedom, security and justice area, and specifically the provisions in TFEU, art 67(2) designed to ensure the absence of internal border controls for persons and the framing of a common policy on asylum, immigration and external border control. By virtue of Protocol 21, the United Kingdom is excluded from participating in any measures relating to these provisions, unless it gives three months notice of a desire to take part ‘in the adoption and application’ of any proposed measure. By virtue of the 2011 Act, s 9, however, this notice may only be given following a resolution approved by each House. Thereafter, a minister may not vote in favour of any decision taken under this procedure unless it is first approved by an Act of Parliament.²²⁸

We come finally to s 10, which provides yet another variation on the requirement of parliamentary approval. This applies to another category of six decisions, including those relating to the increase in the number of Advocates General or amendments to the statutes of the CJEU. Although in these cases there is no requirement of parliamentary approval by Act of Parliament, there is a requirement of parliamentary approval by a motion moved by a minister indicating the government’s intention to support the decision in question. The approval must be given before the minister votes in favour of the matter in question. Significantly perhaps, the procedure also applies to any decision relating to the EU’s accession to the ECHR. It is important to emphasise that the foregoing requirements for parliamentary approval are in addition to the requirements of parliamentary scrutiny referred to in section C above.

Parliamentary sovereignty restated

The foregoing provisions of the European Union Act 2011 are extremely significant. In terms of constitutional law and in terms of implications for the Westminster system, this is probably the most radical of all the Coalition’s constitutional initiatives. When the Blair government used the referendum in the context of devolution to Scotland and Wales, it asked the people if they wanted devolution *before* presenting legislation to Parliament: there was no question of the wishes of Parliament being subverted by a referendum, with Parliament responding to the people in advance of the legislation even being tabled. Here we have the possibility for the first time on a national question of great importance of the wishes of Parliament being usurped by the decision of the people.²²⁹

However, the same legal significance cannot be attached to the other provision of the Act which was the subject of great attention. This is the so-called ‘sovereignty clause’ in s 18,

²²⁷ See European Union (Approvals) Act 2013, giving approval for two draft decisions under art 352.

²²⁸ For earlier consideration of this question, see HC 955 (2010–12) (European Scrutiny Committee).

²²⁹ The fate of the Scotland Act 1978, when legislation adopted by Parliament failed to get a sufficient level of support in Scotland to come into force, is an unhappy example of such an approach.

which appears designed principally to pacify Euro-sceptics on the government benches. It provides that:

Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

It is doubtful, however, whether this adds anything to the existing law: to the extent that European Union law has direct effect in the United Kingdom and is applicable by the British courts, this is and can only be by virtue of an Act of Parliament.

The Act of Parliament in question of course is the European Communities Act 1972, which provides that directly effective EU law (such as provisions in the EU treaties) is to have direct effect by virtue of that enactment.²³⁰ The Act of 1972 (introduced by a Conservative government) also provides that a directly effective EU law is to take priority over any inconsistent Act of Parliament,²³¹ a provision which at least in its operation some commentators see as a direct threat to the sovereignty of Parliament. It is true that the courts have refused to apply an Act of Parliament that was inconsistent with Community law.²³² Nevertheless, as pointed out above, it is always possible as a matter of formal legality for Parliament to say in an Act of Parliament that the Act of Parliament in question is to take priority over any obligation arising under EU law to the contrary. In that situation, constitutional orthodoxy suggests that the duty of the courts would be to follow the Act of Parliament.²³³

Was there any need for this new declaratory statement? Enactment of the section may have to an extent placated some Euro-sceptics in Parliament, though they may have preferred express protection for the sovereignty of Parliament and/or national sovereignty. The government's justification for s 18 was that it provides 'clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU treaties or international law and principles which has become an integral part of the UK's legal system independent of statute'.²³⁴ This refers to an argument by counsel that was rejected by the court in *Thoburn v Sunderland Council*.²³⁵ Those who wish to defend British national sovereignty against the 'incoming tide' of EU law may see s 18 as forestalling any arguments that the Westminster Parliament has no power to repeal the European Communities Act 1972 (even if such an argument would in any event have little chance of success).

F. Conclusion

Whether or not the late Sir William Wade was correct in his assertion that a revolution has taken place,²³⁶ British membership of the European Union thus continues to generate political controversy and legal uncertainty. The European Union Act 2011 appears designed to establish a number of red lines in crucial areas, which it will be very hard for future

²³⁰ European Communities Act 1972, s 2.

²³¹ *Ibid.*

²³² *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.

²³³ For a fuller discussion, see ch 3 above.

²³⁴ European Union Act 2011, *Explanatory Note* (2011).

²³⁵ [2002] EWHC 195 (Admin), [2003] QB 151.

²³⁶ Cf J Eekelaar (1997) 113 LQR 185 and T R S Allan (1997) LQR 443.

governments to cross. It is, however, the case that in asserting parliamentary sovereignty, the authors of the 2011 Act are themselves subject to the same sovereignty. This means of course that as a matter of legality, it is open to a future Parliament to repeal all or part of the 2011 Act, and that as a matter of law its guarantees are effective only so long as there is a majority in Parliament willing to support them. As pointed out by the European Scrutiny Committee, the 2011 Act ‘applies until it is repealed’.²³⁷ To which we may add that it applies until expressly or perhaps impliedly repealed.²³⁸

The 2011 Act includes nothing that seeks to ‘entrench’ the requirement of a referendum against modification or repeal by a later Parliament, such as a requirement of a special majority of either or both houses of Parliament. On the orthodox view of Parliament’s legislative supremacy, even if such a clause had been included, it would not have been effective.²³⁹ Parliament may impose limitations on the future power of the *government* to ratify treaties, and these limitations will remain in force until repealed by a later Act. It is quite a different matter for today’s Parliament to stipulate how a future *Parliament* should legislate. While any attempt to depart from the 2011 Act might give rise to political difficulties, it remains open to a future Parliament to legislate on EU affairs in a manner that expressly or by implication dispensed with the need for a referendum.

However, the political difficulties in departing from the 2011 Act are not to be underestimated, nor is the capacity of the Act to give rise to problems in the future. It is not inconceivable that questions could arise about the compatibility of the Act with EU law itself, while as we have seen ministerial decisions about whether a referendum is required or not are almost certainly subject to judicial review. But whatever the formal legal position, it is difficult to escape the conclusion that the 2011 Act has imposed a serious practical restraint on future governments. Although perhaps not formally entrenched as a matter of law, it will be difficult in practice to repeal or amend it as a matter of political reality. Any political problems associated with repeal or amendment would be greatly compounded should its repeal (or more likely amendment) be required as a result of a CJEU decision.

²³⁷ HC 633 (2010–12), para 90.

²³⁸ This is conditional on the views of Laws LJ outlined above about the implied repeal of ‘constitutional’ legislation being generally accepted. See D Feldman (2013) 129 LQR 343.

²³⁹ See ch 3 above.

PART II

The institutions of government

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CHAPTER 7

Composition of Parliament

In this and the two following chapters, we examine the structure of Parliament, the functions of the two Houses and their privileges. Although both the House of Commons and the House of Lords meet in the palace of Westminster, they sit separately and are constituted on entirely different principles. The process of legislation is a matter in which both Houses take part and the two-chamber structure is an integral feature of the parliamentary system.

Within Parliament the House of Commons is the dominant House, as it is on the ability to command a majority in the Commons that a government depends for holding office. Under the Parliament Acts of 1911 and 1949, the formal power of the Lords in legislation is limited to imposing a temporary veto on public Bills, a power which may sometimes be an effective check on controversial legislation. The role of the Lords as a revising chamber is important, especially for securing amendments to Bills which have been subjected to time-tableting in the Commons,¹ and the House serves other constitutional purposes.

The Queen is formally also part of Parliament: she opens each session of Parliament and the royal assent is necessary for primary legislation. These functions are performed on the advice of the government, but in very rare circumstances the Queen may have a personal discretion to exercise in relation to Parliament.

A. The electoral system

Acts for widening the franchise were passed in 1832, 1867, 1884, 1918, 1928, 1948 and 1969, until today the total parliamentary electorate is over 46 million.² The details of the earlier Acts have passed into history. In 1918 a uniform franchise based on residence was established for county and borough constituencies.³ Votes for women over 30 were introduced in 1918 and in 1928 for women over 21.

The voting age for men and women is now 18, and it is sometimes suggested that it should be lowered still further to 16. After 1918 various categories of person had the right to vote more than once either by reason of occupying land for business purposes or because of the right of graduates to vote in separate constituencies representing the universities. These elements of plural voting were abolished in 1948.

¹ Ch 8.

² The local government electorate is slightly higher, at more than 47 million. These figures are provided by the Office for National Statistics.

³ See Butler, *The Electoral System in Britain since 1918* and, for the law and practice today, Price, De Silva and Clayton (eds), *Parker's Law and Conduct of Elections*; also Blackburn, *The Electoral System in Britain*, and Watt, *UK Election Law*.

The franchise

The law is now contained in Part I of the Representation of the People Act 1983,⁴ which consolidated earlier legislation and which has itself been amended, notably in 1985 when the right to vote was extended to certain British citizens resident outside the United Kingdom.⁵ As amended in 2000, s 1 of the 1983 Act provides that the right to vote at parliamentary elections is exercisable by all Commonwealth citizens (which in law includes all British citizens and British subjects),⁶ and citizens of the Republic of Ireland who are (a) registered in the register of electors for the constituency in which they wish to vote; (b) not subject to any legal incapacity to vote (on which see below); and (c) of voting age (now 18 years or over).⁷

Under the 1983 Act a person is entitled to be registered in a constituency if he or she is resident there and is otherwise entitled to vote.⁸ There is not now a qualifying period of residence before an elector may register in a particular constituency (except in Northern Ireland where the elector must be resident in the Province – not necessarily a particular constituency – for at least three months);⁹ and it is no longer necessary to be resident in the constituency on a particular date (which until the 2000 amendments used to be 10 October, which was referred to as the qualifying date). The meaning of residence for electoral purposes is governed by the 1983 Act, s 5 (as amended).¹⁰

No one may vote more than once at a parliamentary election.¹¹ The parliamentary franchise may not be exercised by:

- (a) persons who are subject to legal incapacity (such as those who because of mental illness, drunkenness or infirmity lack the capacity at the moment of voting to understand what they are about to do);¹²
- (b) persons who are neither Commonwealth citizens nor citizens of the Republic of Ireland;¹³
- (c) persons who have not attained the age of 18 by the date of the poll;¹⁴

⁴ The Act has been heavily amended since enactment, notably by the Representation of the People Act 2000, the Political Parties, Elections and Referendums Act 2000, the Electoral Administration Act 2006, and the Political Parties and Elections Act 2009. Although the amendments are taken in below, the specific sources of the amendments are not identified.

⁵ Representation of the People Act 1985, s 1; amended by the Political Parties, Elections and Referendums Act 2000 (PPERA), s 141, reducing from 20 to 15 years the period during which British citizens formerly resident in this country may continue to be registered to vote. See *R (Preston) v Wandsworth LBC* [2012] EWCA Civ 1378, [2013] QB 687 (loss of vote after 15 years not a breach of EU freedom of movement principles), and *Shindler v United Kingdom*, Application 19840/09, 9 September 2013 (loss of vote after 15 years not a breach of ECHR).

⁶ See British Nationality Act 1981, s 37.

⁷ Representation of the People Act 1983 (RPA), s 1.

⁸ *Ibid*, s 4 (as amended).

⁹ *Ibid*.

¹⁰ On which see *Scott v Phillips* 1974 SLT 32 (ownership of a country cottage as a second home may not be enough to make the owner resident there); and *Hipperson v Newbury Registration Officer* [1985] QB 1060 (Greenham Common women at peace camp held to be resident for electoral purposes).

¹¹ RPA, s 1(2)).

¹² *Ibid*, s 1(1)(b) (as amended). Nor may anyone vote on behalf of someone disqualified for lack of capacity: Mental Capacity Act 2005, s 29.

¹³ RPA, s 1(1)(c) (as amended). Citizens of the European Union resident in the UK may vote and stand in local government elections and in elections to the European Parliament.

¹⁴ RPA Act, s 1(1)(d) (as amended).

- (d) persons convicted of a criminal offence and detained in a penal institution in pursuance of a sentence.¹⁵ Remand prisoners may vote if they are on the register, and at the general election in 2005 prisoners who were part of an intermittent custody scheme were also permitted to vote;¹⁶
- (e) persons detained in mental hospitals under statutory authority, including the Mental Health Act 1983 and the Criminal Procedure (Insanity) Act 1964;¹⁷
- (f) persons who are members of the House of Lords. Hereditary peers were previously disqualified; but they may now vote in a parliamentary election unless they have retained a place in the Lords by virtue of the House of Lords Act 1999;¹⁸
- (g) persons convicted of corrupt or illegal practices at elections, the extent of disqualification depending on the nature of the offence.¹⁹

The most controversial of these disqualifications is (d): it is not clear why convicted prisoners should be denied the right to vote.²⁰ Although the domestic courts held that the restriction did not breach the Human Rights Act,²¹ in *Hirst v United Kingdom (No 2)*²² the Strasbourg court found that the blanket disqualification of convicted prisoners breached art 3 of the First Protocol to the Convention, noting that it applied automatically irrespective of the length of the prisoner's sentence, and irrespective of the nature and gravity of the offence.²³ But although the Strasbourg court has re-affirmed the position since *Hirst (No 2)*,²⁴ successive governments have been unwilling to comply with Convention obligations and at the time of writing the disqualification of prisoners remains in force.²⁵

The register of electors

As already pointed out, it is a condition precedent to exercising the vote that the elector should be entered in the register of electors. The register is prepared by the registration officer of each constituency, who in England and Wales is appointed by each district council or London borough.²⁶ Each registration officer is required to conduct an annual canvass of the area to determine who is entitled to be on the register, and is required to take all necessary steps to maintain the register in what traditionally has been a system of household voter registration, whereby every household is responsible for registering the electors in the household in question.

¹⁵ Ibid, s 3.

¹⁶ On which see RPA, s 7A (as amended).

¹⁷ Ibid, s 3A (as amended).

¹⁸ House of Lords Act 1999, s 3.

¹⁹ RPA, ss 160, 173.

²⁰ For the position in Canada, see *Sauve v Canada (No 1)* [1992] 2 SCR 438, and *Sauve v Canada (No 2)* [2002] SCR 519.

²¹ *R (Pearson) v Home Secretary*, *The Times*, 17 April 2001.

²² Application No 74025/01.

²³ *Hirst v United Kingdom (No 2)* [2005] ECHR 681, (2006) 42 EHRR 41. See also *Smith v Scott* 2007 SLT 137 (declaration of incompatibility re RPA, s 3). But see *R (Chester) v Lord President of the Council* [2013] UKSC, [2013] 3 WLR 376 (accepted that UK Law in breach of ECHR, but no need for a fresh declaration of incompatibility in light of *Smith v Scott*, above; see ch 14 below for fuller consideration of this important case).

²⁴ *Greens v United Kingdom* [2010] ECHR 868; *Scoppola v Italy (No 3)* [2012] ECHR 868.

²⁵ But see HL Paper 103, HC 924 (2013–14): 'all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections; and moreover that prisoners should be entitled to apply, up to 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released' (Joint Committee on the Draft Voting Eligibility (Prisoners) Bill 2013 – Report).

²⁶ RPA, s 8.

The canvass for any year is typically conducted between October and December, and a revised version of the register is then published in December each year.²⁷ But it was also possible for an elector to be added to the register between annual canvasses. The principle of the ‘rolling register’ was introduced in 2000, designed to remove obstacles to registration and voting. We have thus moved from what was referred to as a ‘fixed register’ (amended annually) to a ‘rolling register’ (amended constantly): the former may be said to be more sensitive to the needs of the administration responsible for maintaining the register; and the latter more responsive to the interests of electors. Although a long established practice, household voter registration is, however, susceptible to electoral fraud.

In their programme for government in 2010, the Conservative–Lib Dem Coalition undertook to ‘reduce electoral fraud by speeding up the implementation of individual voter registration’.²⁸ Initiatives to promote this undertaking are to be found in the Electoral Registration and Administration Act 2013, which sets in train the move towards individual rather than household registration of electors (s 1). This, however, is not a wholly uncontroversial initiative, as it is thought by some that individual registration will lead to fewer people being registered, and to fewer people being eligible to vote as a result. The Electoral Registration and Administration Act 2013 does, nevertheless, retain the annual canvass of households at least for the time being (s 4), with the Act also conferring a power on the appropriate Minister to abolish it by order (s 5).

While the duty to carry out the annual canvass continues, the registration officer must invite people in his or her area to apply for registration, ‘if (a) the officer is aware of the person’s name and address, (b) the person is not registered in the register, and (c) the officer has reason to believe that the person may be entitled to be registered in the register’ (s 5). In a notable provision, the Act also provides that a registration officer may follow an ‘invitation to register’ with a ‘requirement to register’, after complying with prescribed requirements set out in regulations (s 5(6)(b)). Failure to comply with the requirement to register may lead to the registration officer imposing a civil penalty (s 5(7)), in accordance with a procedure to be set out in regulations, with a right of appeal to the First-tier tribunal.²⁹

It will take some time for the new register to be created, though it is anticipated that it will be used for the first time at the general election in 2015.

Conduct of elections

The proceedings at parliamentary elections are conducted in accordance with the Parliamentary Elections Rules in Schedule 1 of the 1983 Act. These detailed rules deal with the nomination of candidates, as well as the procedure to be followed at the polling station and in particular help to ensure the secrecy of the ballot. Normally voting takes place in person at a convenient polling station allotted by the returning officer.³⁰ But there are circumstances in which absent voting may take place, the term absent voting meaning voting by proxy or by post.

The registration officer must grant an application to vote by proxy where the applicant is a registered service voter; blind or suffers another physical disability; is unable to attend the polling station because of work or educational commitments; or unable to go to the polling station in person without making a journey by sea or air (as in the case of overseas voters).³¹ The Representation of the People Act 2000 relaxed the rules with the aim of enabling more

²⁷ Ibid, s 13 (as amended).

²⁸ See also Cm 8108, 2011.

²⁹ Representation of the People Act 1983, s 9E, Sch ZA1, paras 3, 4, and 5.

³⁰ RPA, Sch 1(25).

³¹ RPA, Sch 4(3).

people to vote by post if they so wish. Under the existing rules, the registration officer must grant an application to vote by post if satisfied that the elector is registered,³² and otherwise meets prescribed statutory requirements.³³ The increased use of postal voting has been controversial. Apart from the failures of the postal system,³⁴ it has given rise to concerns about irregularity and fraud.³⁵

Responsibility for the official conduct of an election in each constituency rests with the returning officer, who in England and Wales in the case of a county constituency wholly contained within the area of a county council is the sheriff, and in the case of a borough constituency wholly contained within a local government district is the chairman of the district council.³⁶ Most functions of the returning officer are, however, discharged by the registration officer or by an appointed deputy. Certain matters, for example the declaration of the poll, may be reserved for the returning officer. The official costs of an election, as distinct from the expenses of the candidates, are paid out of public funds in accordance with a scale prescribed by the Treasury.

In the past, office-holders who conducted elections did not always exercise their functions impartially. In the great case of *Ashby v White*, the Mayor of Aylesbury as returning officer wrongfully refused to allow Ashby to vote and Ashby sued him for damages. The House of Lords upheld the view of Holt CJ (dissenting in the Queen's Bench) that the remedy of damages should be given. In Holt's words: 'To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections.'³⁷ Today, officials concerned with the conduct of elections are required to carry out their duties impartially and are subject to criminal penalties if they do not, but they cannot be sued for damages if breach of official duty is alleged.³⁸

B. Distribution of constituencies

Before 1832, the composition of the unreformed House of Commons was based on the general principle that every county and borough in England and Wales was entitled to be represented by two members. A similar principle applied to Scottish representation at Westminster, subject to the limit of numbers imposed in the Treaty of Union, which led to the grouping of certain shires and royal burghs for this purpose. Representation thus depended on the status of the unit of local government and bore no regard to population. Counties such as Cornwall, which contained many tiny boroughs, were grossly over-represented by comparison with areas of rapidly growing industrial population.

From the Reform Act 1832 onwards, successive measures of redistributing constituencies to remove glaring differences were undertaken, usually at the same time as reforms in the franchise were made.³⁹ Only since 1917 has there been general acceptance of the principle of broad mathematical equality in the size of constituencies,⁴⁰ and only since 1945 has there

³² Representation of the People Act 2000, Sch 4(3).

³³ SI 2001 No 341, Part IV.

³⁴ *Knight v Nicholls* [2004] EWCA Civ 68, [2004] 1 WLR 1653 (election not invalidated by late arrival of voting papers).

³⁵ See *R (Afzal) v Election Court* [2005] EWCA (Civ) 647. A number of anti-fraud measures were introduced by the Electoral Administration Act 2006, s 14.

³⁶ *Ibid*, s 24(1).

³⁷ (1703) 2 Ld Raym 938, 956.

³⁸ RPA, s 63.

³⁹ Butler note 3 above, app II.

⁴⁰ Report of Speaker's Conference, Cd 8463, 1917; Report of Committee on Electoral Machinery, Cmd 6408, 1943.

been permanent machinery to enable boundaries to be adjusted from time to time to take account of the shifting population and to avoid excessive disparities developing between constituencies. The legislation has sought to establish impartial machinery, but in practice the system has not operated without controversy.

The current system does not try to achieve strict arithmetical equality between constituencies, but lays emphasis also on the territorial aspect of representation, on the link between the elected member and his or her constituency, and on the desirability of parliamentary boundaries not clashing with local government boundaries. The degree of discretion built into the system of electoral apportionment makes it particularly necessary to ensure that the machinery is impartial and charges of gerrymandering are avoided. As the late Aneurin Bevan once said, there was ‘nothing that could undermine the authority of Parliament more than that people outside should feel that the constitutional mechanism by which the House of Commons is elected has been framed so as to favour one party in the State’.⁴¹

Boundary review

By the Parliamentary Constituencies Act 1986, there are four permanent boundary commissions, for England, Wales, Scotland and Northern Ireland. These commissions are ‘independent, non-political, and impartial’ bodies which ‘emphasise that the results of previous elections do not, and should not, enter into [their] considerations’.⁴² The Speaker is the chairman of each commission, but in practice does not sit, and a judge from the appropriate High Court (in Scotland, from the Court of Session) is appointed deputy chairman of each commission. Each commission includes two other members, those for England being appointed by ministers, as well as two official assessors, those for England being the Registrar General and the Director General of Ordnance Survey.

The commissions must undertake a general review of constituencies in that part of the United Kingdom assigned to them, at intervals of not less than ten or more than 15 years (reduced in 1992 to an interval of from eight to 12 years);⁴³ changes in particular constituencies may be proposed from time to time when necessary. Notice must be given to the constituencies affected by any provisional recommendations. If objections are received from an interested local authority or from a body of at least 100 electors, a local inquiry must be held into the recommendations. Having received a report on the inquiries, a commission must submit its report to the Secretary of State.

The 1986 Act, by s 3(5), imposes a duty on the Secretary of State, ‘as soon as may be after a Boundary Commission has submitted a report’, to lay the report before Parliament together with a draft Order in Council for giving effect, with or without modifications, to the recommendations in the report (reasons must be given to Parliament for any modifications). The draft Order must be approved by resolution of each House before the final Order can be made by the Queen in Council. The validity of any Order in Council which purports to be made under the 1986 Act and recites that approval was given by each House is not to be called into question in any legal proceedings.⁴⁴

The 1986 Act contains the rules which the commissions must observe in redistributing seats. Wales must be represented by not fewer than 35 seats, Northern Ireland by between 16 and 18 seats, and Great Britain by ‘not substantially greater or less than 613’.⁴⁵ Following

⁴¹ HC Deb, 15 December 1954, col 1872.

⁴² Boundary Commission for England, *Annual Report 2008/2009* (2009), p 4.

⁴³ Boundary Commissions Act 1992.

⁴⁴ 1986 Act, s 4(7).

⁴⁵ *Ibid*, Sch 2.

devolution, it is no longer the case that Scotland must be represented by at least 71 seats,⁴⁶ and in 2005 Scottish representation at Westminster was reduced from 72 to 59,⁴⁷ in the process reducing the number of seats in the House of Commons from 659 to 646. The legislation provides for the calculation of a separate electoral quota for each of England, Scotland, Wales and Northern Ireland, the quota to be determined by dividing the total electorate by the number of constituencies at the time the review begins.

Each commission must secure that the electorate of a constituency shall be as near the relevant electoral quota as is practicable, having regard to certain other rules, for example, that parliamentary constituencies shall as far as practicable not cross certain local government boundaries. Strict application of these principles may be departed from if special geographical considerations make it desirable; and account must be taken of inconveniences that may follow the alteration of constituencies and of local ties that might be broken by alteration. The commissions thus have a broad discretion to decide how much priority should be given to achieving arithmetical equality between constituencies.⁴⁸

The politics of boundary review

General reviews were completed by the four boundary commissions in 1954, 1969, 1982, 1994 and 2006. In 1954 the review resulted in the abolition of six constituencies and the creation of 11 new ones, all in England, to bring membership of the House up to 630. As well as other difficulties experienced by the English commission,⁴⁹ the method of calculating the electoral quota for England under the 1949 Act resulted in the draft Orders in Council being challenged in the courts. In *Harper v Home Secretary*,⁵⁰ however, the Court of Appeal expressed reluctance to interfere in these matters, though such intervention was not ruled out where the commissions had made recommendations manifestly in complete disregard of the Act, which was not the position in this case. In 1954 the government gave effect without modification to the recommendations of the four commissions.

Events took a different turn in 1969 when the next general review was completed. The commission for England proposed major changes to 271 constituencies and five new constituencies for England. At the time the commissions submitted their reports, a radical reorganisation of local government in England (outside Greater London) and in Wales was in train and the Labour government decided that revision of parliamentary boundaries should wait until local government had been reorganised. The government therefore delayed laying the commissions' reports in Parliament and instead introduced a Bill which gave effect only to the changes affecting Greater London and a few abnormally large constituencies elsewhere. The government thus sought by legislation to depart from its obligations under the Acts of 1949 and 1958.

The Bill passed the Commons against severe criticism but was drastically amended by the Lords and was abandoned by the government when in October 1969 that House refused to give way to the Commons. An elector for the borough of Enfield then sought an order of mandamus from the High Court requiring the Home Secretary to perform his statutory duty of laying before Parliament the commission reports together with draft Orders in Council.⁵¹

⁴⁶ Scotland Act 1998, s 86.

⁴⁷ SI 2005 No 250 (S1).

⁴⁸ *R v Boundary Commission for England, ex p Foot* [1983] QB 600.

⁴⁹ D E Butler (1955) 33 *Public Administration* 125.

⁵⁰ [1955] Ch 238, 251. See also Marshall and Moodie, *Some Problems of the Constitution*, ch 5; and S A de Smith (1955) 18 MLR 281.

⁵¹ *R v Home Secretary, ex p McWhirter*, *The Times*, 21 October 1969. The application was dismissed in view of the Home Secretary's action in October 1969 in laying the reports and draft Orders in Parliament.

Thereupon the Home Secretary laid before Parliament the reports and the draft Orders in Council, but invited the Commons to reject them, using the government majority for this purpose. By this tangled course of events, the Labour government succeeded in postponing the much needed adjustments of constituency boundaries until after the 1970 general election, following which the new Conservative government promptly secured parliamentary approval to the changes recommended in 1969.

Some MPs complained that Parliament had fettered its hands by setting up the boundary commissions and argued that Parliament must retain the right to make the final decisions. But the Conservative Home Secretary in the 1970s considered it ‘enormously important’ that Parliament comply with the impartial recommendations of the four commissions.⁵² In 1983 the general review again led to extensive changes in constituencies, with seats in Great Britain being increased by ten and the total in the House rising to 650. The Labour party leader challenged the English changes in the High Court, but with no success.⁵³ There were no legal challenges to either the fourth or fifth reviews completed in 1994 and 2006 respectively, the latter leading to the House of Commons membership being restored to 650, after having been reduced since 1983.

The current uncertainty

The Parliamentary Voting System and Constituencies Act 2011 radically amended the Parliamentary Constituencies Act 1986 by increasing the frequency of boundary reviews from periods of between eight and twelve years, to a period of every five years. In proposing to reduce the number of parliamentary constituencies to 600, the Parliamentary Voting System and Constituencies Act 2011 also introduced new principles to secure a more equal distribution of constituencies, which was to be completed by October 2013. This reflected a much cherished ambition on the part of the Conservative party in particular to create electoral boundaries that would place greater emphasis on numerical equality at the expense of geographical logic, reflecting a concern that the existing arrangements gave an undue advantage to the Labour party.

The implementation of these measures has, however, been thwarted by the withdrawal of support for the measures by Liberal Democrats in the Coalition government. This follows a disagreement between the two governing parties about the implementation of the government’s agreed proposals for constitutional reform, the Liberal Democrat resistance to boundary change being seen as retaliation for Conservative resistance to House of Lords reform (on which see below). The 2015 election will thus be fought on the old boundaries, in what is thought to have been a blow to the Conservative party in particular, it being widely believed for reasons explained above that a smaller House of Commons with redistributed boundaries would provide them with more seats in a future Parliament and a better prospect of forming government on their own.

This disagreement found formal expression in the Electoral Registration and Administration Act 2013, which by s 6 amends the Parliamentary Voting System and Constituencies Act 2011 by providing that there should be no boundary review until 2018. The process by which the latter provision was introduced was thought to be significant constitutionally, the government splitting on party lines in voting for (Liberal Democrat) and against (Conservative) it. In supporting an amendment to a government bill, this was ‘the first time in this Parliament that ministers in either house have voted against the government’. The Prime Minister’s spokesman was also reported as having said that ‘the

⁵² HC Deb, 28 October 1970, col 241 ff.

⁵³ *R v Boundary Commission for England, ex p Foot* [1983] QB 600.

application of collective responsibility has been set aside' for the Electoral Registration and Administration Bill'.⁵⁴

The Electoral Registration and Administration Act 2013, s 6, does not repeal the changes introduced by the 2011 Act: it simply postpones their implementation until after the general election in 2015. If the Conservative party wins a majority at the election, it is likely that the provisions of the 2011 Act will be fully implemented, and at that stage it will be necessary fully to master the new principles for the re-distribution of parliamentary constituencies. If, however, the other parties form government, either alone or in coalition, it seems possible that the relevant provisions of the 2011 Act will be repealed or heavily amended, and that the existing principles for boundary re-distribution will be retained with modifications if necessary.

C. Political parties

Central to the role of modern democracy are political parties: they provide the policies and personnel of government (and opposition) and have other important functions as well.⁵⁵ Although electors vote for individuals to represent them in Parliament, the candidates will typically be chosen by a political party. It is unusual for a candidate who is not representing one of the established parties to be elected to Parliament,⁵⁶ or for an independent to be elected.⁵⁷ The parties also dominate appointments to the House of Lords.

Yet political parties remain voluntary associations in the eyes of the law: bodies exercising a public function but governed by private law.⁵⁸ The relationship between a political party and its members is one based on contract and the contract may be enforced in the courts by an aggrieved member. Cases arise from time to time from individuals who claim to have been expelled from a party in breach of the rules, and from individuals challenging the procedures for the selection of a party's candidate for election to public office.⁵⁹ In one case it was held that all-women shortlists for the selection of parliamentary candidates were contrary to the Sex Discrimination Act 1975.⁶⁰

All-women shortlists had been introduced by the Labour party for the selection of some candidates in order to increase the number of women MPs, and the practice was restored following the Sex Discrimination (Election Candidates) Act 2002, the provisions of which now expire in 2030 unless renewed. Provisions in the Equality Act 2010 allow political parties more generally to take steps to promote the candidature of under-represented groups within the party. Otherwise, however, discrimination by political parties in the selection of candidates is likely to be unlawful under the Equality Act 2010, as it was under the legislation that the latter replaced.⁶¹

⁵⁴ *Guardian*, 29 January 2013. The Deputy Prime Minister was reported earlier as having said that 'conventions mutate and change over time': *Daily Telegraph*, 3 September 2012.

⁵⁵ See Fisher, *British Political Parties*, pp 194–9, and Webb, *The Modern British Party System*.

⁵⁶ In 2001 and again in 2005 a seat was won by a party registered as the Independent Hospital and Health Concern, while in 2005 a seat was won by Respect, a new party.

⁵⁷ In 1997 the broadcaster Martin Bell was famously elected as an independent for Tatton, while in 2005 Peter Law was elected as an independent for Blaenau Gwent.

⁵⁸ But see on the special and complex position of the Conservative party, *Conservative and Unionist Central Office v Burrell* [1982] 2 All ER 1.

⁵⁹ *Lewis v Heffer* [1978] 1 WLR 1061; *Weir v Hermon* [2001] NIJB 260; *Mortimer v Labour Party, The Independent*, 28 February 2000; and *Donaldson v Empey* [2004] NIJB 1.

⁶⁰ *Jepson v Labour Party* [1996] IRLR 116.

⁶¹ *Ahsan v Watt* [2007] UKHL 51, [2008] AC 696.

Registration of political parties

Provision for the registration of political parties was first made in 1998⁶² and is now to be found in the Political Parties, Elections and Referendums Act 2000.⁶³ Registration was first introduced in anticipation of the elections to the European Parliament for which a new electoral system was introduced by the European Elections Act 1999. This was known as a party list system whereby members are elected from large regional constituencies in proportion to the votes cast in favour of the different parties in the region in question. For this system to work effectively it was thought that only registered political parties should take part.

Registration is now important for other reasons. Only candidates representing a registered party may be nominated for election; other candidates must be nominated as independents or without description.⁶⁴ This overcomes an irritant of British elections whereby individuals would present themselves in a manner calculated to confuse electors, as in one case where a candidate stood as a Literal Democrat, causing confusion with the Liberal Democrat.⁶⁵ The other principal reason why registration is important relates to party political broadcasts, which broadcasters now may carry only if made by registered parties.⁶⁶

It is important to stress that registration of political parties is not compulsory, but that it is necessary in order to enjoy a number of prescribed benefits. There is no definition of a political party for this purpose, with registration being open to any association that declares that it intends to contest one or more 'relevant elections' in Great Britain or Northern Ireland.⁶⁷ There are separate registers for Great Britain and Northern Ireland. A party seeking registration must register its principal office-holders (including its leader and treasurer) and its financial structure.⁶⁸ The latter obligation is in pursuance of a requirement that the parties adopt a scheme approved by the Electoral Commission which 'sets out the arrangements for regulating the financial affairs of the party'.⁶⁹

An application for registration must be made to the Electoral Commission and must be granted unless the proposed name (i) is the same (or sufficiently similar to cause confusion) as that of a party already registered; (ii) comprises more than six words; (iii) is obscene or offensive; (iv) includes words which if published would be likely to amount to the commission of an offence; (v) includes any script other than Roman; or (vi) includes any words or expression prohibited by order made by the Secretary of State.⁷⁰ A registered party may also register three emblems to be used on ballot papers.⁷¹ At the general election in 2010, no fewer than 134 registered parties fielded a total of 4,152 candidates,⁷² which in both cases represented an increase on the election in 2005.

⁶² Registration of Political Parties Act 1998; for comment, see O Gay [2001] PL 245.

⁶³ For a fuller account of the Act (hereafter PPERA), see K D Ewing [2001] PL 542.

⁶⁴ PPERA, ss 22 and 28.

⁶⁵ *Sanders v Chichester* (1994) SJ 225.

⁶⁶ PPERA, s 37.

⁶⁷ *Ibid*, ss 22 and 28.

⁶⁸ *Ibid*, ss 24–7.

⁶⁹ *Ibid*, s 26(2). Where the party is composed of a number of separate 'accounting units' (such as the headquarters and each constituency party or association, as is the practice with the main parties), the treasurer of each accounting unit must also be registered (s 27).

⁷⁰ *Ibid*, s 28(4).

⁷¹ *Ibid*, s 29.

⁷² But many of these parties will have fielded candidates in only a small number of constituencies.

Funding of political parties

The funding of political parties has been a constant source of controversy.⁷³ The obligations of parties are such that it is not possible for them to rely on the subscriptions of members alone. Concern is frequently expressed about large private donations to political parties, which are sometimes associated with allegations of corruption.⁷⁴ The Political Parties, Elections and Referendums Act 2000 imposes obligations of transparency on political party funding and restricts the sources of party funding. The Act was passed to implement the recommendations of the Committee on Standards in Public Life,⁷⁵ the terms of reference of which were extended in 1997 to enable it to investigate party funding following a number of incidents involving both the Conservative party and the Labour party.

All donations to a political party in excess of £7,500 nationally, and £1,500 locally must be reported to the Electoral Commission on a quarterly basis,⁷⁶ with the names of donors and the amount of donation published by the Electoral Commission.⁷⁷ Donations may only be received from a permissible donor, defined to mean individuals who are on the electoral register in this country or organisations (such as companies and trade unions) that are based here and conduct business and activity here.⁷⁸ The aim is to stop the foreign funding of British political parties, although as we have seen it is possible to be resident overseas and yet be on the electoral register, while it is also possible to be a resident in the UK and yet not be on the electoral register.⁷⁹

A major political storm broke early in 2006 relating to the funding of political parties, when the Labour and Conservative parties were forced to reveal that they had accepted secret loans to finance their general election campaigns in 2005. In the case of the Labour party, 12 wealthy businessmen had loaned just under £14 million, while the Conservatives revealed loans of just under £16 million from 12 individuals and one company, and repaid another £5 million to anonymous lenders who did not wish publicly to be identified. The Liberal Democrats also admitted to having received loans, though on a much smaller scale. Apart from the secrecy of the loans, allegations were made that loans to the Labour party in particular had been made in return for the promise of a peerage.

Indeed, four of Labour's lenders were nominated for peerages without the House of Lords Appointments Commission being informed of the loans. Three of the nominees were vetoed by the Commission on other grounds; a fourth was rejected when the Commission was made aware of the undisclosed loan. The 'cash for honours' affair sparked a highly controversial police investigation into whether there had been a breach of the Honours (Prevention of

⁷³ See Ewing, *The Funding of Political Parties in Britain*, Ewing, *The Cost of Democracy*, and Pinto-Duschinsky, *British Political Finance 1830–1980*.

⁷⁴ Under the Honours (Prevention of Abuses) Act 1925 it is an offence to make or receive a donation in return for an honour. But the problems of proof are overwhelming.

⁷⁵ Cm 4057, 1998. See L Klein (1999) 31 *Case Western Reserve Journal of International Law* 1.

⁷⁶ PPERA, ss 62, 63. Before the changes made by the Political Parties and Elections Act 2009, the reporting thresholds were £5,000 and £1,000 respectively.

⁷⁷ *Ibid*, ss 69, 149. The information is made available by the Electoral Commission on its website: www.electoralcommission.org.uk. It is possible to track the main donors to the parties. The information is also reported in the press on a quarterly basis.

⁷⁸ PPERA, s 54. Additional restrictions were introduced by the Political Parties and Elections Act 2009 (ss 10, 11) prohibiting donations (and loans) from persons not resident in the United Kingdom for income tax purposes (so-called 'non-doms').

⁷⁹ *R (Electoral Commission) v City of Westminster Magistrates' Court and UKIP* [2010] UKSC 40, [2010] 3 WLR 705, where it was held by a majority that impermissible donations under PPERA, s 58 need not be forfeited where the donor was an eligible voter who was not on the electoral register (and thus an impermissible donor) by virtue of an administrative oversight.

Abuses) Act 1925 or the Political Parties, Elections and Referendums Act 2000. Although there were no prosecutions under either Act, the affair did, however, lead to (i) a change in the law, so that political parties must (under the Electoral Administration Act 2006) now report loans as well as donations to the Electoral Commission, and perhaps to (ii) a more active approach by the Commission in its supervision of the political parties.

State support for political parties

In many countries, political parties receive annual subventions of public funds to enable them more effectively to perform their functions without the need for excessive reliance on wealthy private donors.⁸⁰ In other countries the parties are assisted by the provision of income tax relief for donations to political parties, designed to encourage more people to make small donations. A scheme for public funding of political parties was proposed by the Houghton committee in 1976 but never implemented,⁸¹ and proposals by the Committee on Standards in Public Life (Neill committee) in 1998 for income tax relief for small contributions to political parties were rejected by the government.⁸² Media disquiet about large donations to the parties periodically revives interest in public funding, to relieve the parties of the need to rely on such donations.

The case for public funding of political parties was nevertheless rejected by the Electoral Commission in 2004, mainly for lack of public support and because of opposition from the two main parties.⁸³ Nevertheless, fresh proposals for public funding of political parties were made several years later by Sir Hayden Phillips, a retired civil servant who had been appointed by the then Prime Minister to look at the matter again in the light of the ‘cash for honours’ crisis. But although producing a well thought out scheme,⁸⁴ like others before and since, Sir Hayden was unable to secure all-party agreement for his proposals. At a time of public funding cuts, financial support for political parties is unlikely to be a popular priority for any government in the near future.⁸⁵

This is not to say that there is no state support for political parties in Britain, although it is limited when compared to some other countries. Parliamentary candidates are provided with free postage for one election communication and are permitted to use school halls for election meetings free of charge,⁸⁶ though in practice the latter appears rarely to be used in an era when there are more effective ways of reaching the electorate. Free time is made available to the political parties for party political broadcasts and party election broadcasts by both the BBC and the independent broadcasters, a facility which in the latter case exists as a matter of legal obligation.⁸⁷ The amount of time made available for the parties is determined by the broadcasters in consultation with the parties.⁸⁸

⁸⁰ Ewing and Issacharoff (eds) *Party Funding and Campaign Financing in International Perspective* (chapters on New Zealand, Australia, Canada, United States and Japan), and Ewing, Rowbottom and Tham (eds). *The Funding of Political Parties – Where Now?* (chapters on EU members states, US, Canada, UK, Australia and New Zealand).

⁸¹ Cmnd 6601, 1976.

⁸² HC Deb, 10 January 2000, col 114 (Mr Mike O’Brien).

⁸³ Electoral Commission, *The Funding of Political Parties* (2004).

⁸⁴ Sir Hayden Phillips, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties* (2007). See also HC 163 (2006–07).

⁸⁵ Nevertheless fresh proposals for public funding – building on Hayden Phillips – were later made by the Committee on Standards in Public Life: Cm 8208, 2011. But this too has failed to win the necessary support.

⁸⁶ Representation of the People Act 1983, ss 91, 95.

⁸⁷ Communications Act 2003, s 333. See pp 162–163 in this chapter.

⁸⁸ For an account of the arrangements, see L Klein at note 75 above.

Finally, public money is made available to the opposition parties in Parliament to assist them in the performance of their parliamentary activities;⁸⁹ and a relatively small sum of money (£2m) is now available for distribution to eligible parties (those with parliamentary representation) to assist with policy development.⁹⁰ In the case of the former the amounts involved are not inconsiderable, the principal opposition party now receiving in excess of £6.5m,⁹¹ with correspondingly smaller sums being made available to the other opposition parties in Parliament.⁹² The Public Administration Select Committee expressed concern about the lack of effective scrutiny to ensure that the money is spent only for parliamentary purposes,⁹³ and the audit and accounting procedures have been tightened up as a result.⁹⁴

There is also provision for the public funding of campaign groups (up to £600,000 for each side) in the event of a national referendum.⁹⁵ This did not apply to the Scottish independence referendum in 2014.

D. The conduct of elections

There is now a substantial body of law that has developed to regulate both local and national election campaigns. There are a number of objectives which legislation must promote, with the overriding objective being the need to maintain public confidence in the fairness and integrity of the electoral process. So it is necessary to ensure that neither electors nor candidates are subject to improper influences or pressures, and necessary also to ensure that there is a measure of equality of arms between candidates representing major strands of opinion.

In addition, it has been acknowledged judicially that there is a need

to achieve a level financial playing field between competing candidates, so as to prevent perversion of the voters' democratic choice between competing candidates within constituencies by significant disparities of local expenditure. At the constituency level it is the voters' perception of the personality and policies of the candidates, and the parties which they represent, which is intended to be reflected in the voting, not the weight of the parties' expenditure on local electioneering.⁹⁶

It is important also that no party is able to secure an electoral advantage because of its greater financial resources or because it has better access to radio and television.

British law has now developed detailed, sophisticated and in some respects uncompromising rules to help promote electoral fairness between the main parties and to reduce the influence of money in electoral politics. But because campaigning is expensive (yet of contestable effect), money cannot be removed completely from the conduct of campaigns. There will thus inevitably be disagreements about the content of some of the regulatory means which have been chosen to control its influence.

⁸⁹ These are the so-called Short and Cranborne monies for the House of Commons and House of Lords respectively. See Cm 4057, 1998, ch 9.

⁹⁰ PPERA, s 12.

⁹¹ This includes an allowance of £757,097 for the Leader of the Opposition (as at 1 April 2013).

⁹² A similar scheme operates in the Scottish Parliament: SI 1999 No 1745.

⁹³ HC 238 (1999–2000); HC 293 (2000–1). There is also uncertainty about what is covered by the term parliamentary purposes.

⁹⁴ HC Deb, 27 June 2005, col 1336 W.

⁹⁵ PPERA, s 110. Provision is also made for referendum campaign broadcasts (ibid). Cf on the latter, *Wilson v IBA* 1979 SC 351.

⁹⁶ *R v Jones* [1999] 2 Cr App R 253, at p 255.

Local spending limits

Under Part II of the Representation of the People Act 1983, Part II, every candidate must appoint an election agent; a candidate may appoint himself or herself to act in that capacity. There are now restrictions on who may donate to candidates,⁹⁷ but the most important control is the limit on candidates' election expenses in the 1983 Act, s 76, knowingly to breach which is an illegal practice. First introduced in 1883, the amount that may be spent by a candidate 'on account of or in respect of the conduct or management of the election' depends on the number of electors in the constituency and on whether it is a borough or county constituency. But at the time of writing a maximum sum of £10,000–£12,000 would not be atypical.⁹⁸ As a result of changes introduced in 2000, the limit applies only during the period an individual declares himself or herself to be a candidate, which means that there were no limits on prospective candidates' spending before the announcement.

Steps to address this problem were taken by the Political Parties and Elections Act 2009 (s 21), which applies an additional spending limit on people who are to become candidates. This applies in the period (i) after the 55th month from an election and (ii) before the individual declares his or her candidature. The permitted expenditure in this period is based on a formula that will yield a sum of about £25,000–£30,000, though this will be reduced where Parliament goes beyond 55 months but does not go to full term. This latter period in which the expenditure is incurred before the individual formally becomes the candidate is referred to as the 'long campaign'; the period which attracts the limit of £10,000–£12,000 after the candidature has been formally announced is referred to as the 'short campaign'.⁹⁹ Election agents must submit a return of their candidate's election expenses to the returning officer within 35 days of the result being declared.¹⁰⁰

Also important is the Representation of the People Act 1983, s 75, which imposes controls on the election expenses of third parties. These third parties may be local businesses, trade unions or local interest groups who believe that their cause would be well served by the election of one particular candidate or poorly served by the election of another. They may wish as a result to campaign in the election and in the absence of controls could, in theory, exceed the permitted expenditure of the candidates themselves. It is thus a corrupt practice under the widely construed s 75 to (i) incur an election expenditure with a view to promoting or procuring the election of a candidate, (ii) on account of holding public meetings, issuing advertisements or circulars or otherwise presenting the candidate or his views to the electorate, (iii) except with the authority of the candidate (in which case the authorised expenditure falls to be treated as part of the candidate's expenses).¹⁰¹

The foregoing controls on third parties are subject to an exception for the media to ensure that press and broadcasting activity is not inadvertently caught, though this is by no means

⁹⁷ RPA, s 71A, as inserted by PPERA, s 130 and Sch 16.

⁹⁸ A much higher level of expenditure is permitted at by-elections. In 2001, this was set at £100,000.

⁹⁹ In addition to these limits on the amount of permitted expenditure, certain forms of expenditure are forbidden. These include the payment to an elector for the display of election posters unless payment is made in the ordinary course of the elector's business as an advertising agent; and payments to canvassers (RPA, ss 109, 111). Corrupt practices include bribery, treating and undue influence, such as the making of threats and attempts to intimidate an elector (*ibid*, s 115).

¹⁰⁰ RPA, s 81 (as amended). The return, which must now also include a statement of donations to the candidate (Sch 2A), must be accompanied by a declaration made by the agent and the candidate that the return is a true record of expenses incurred. For a high-profile but unsuccessful prosecution of a candidate for allegedly making a false declaration, see *R v Jones* [1999] 2 Cr App R 253.

¹⁰¹ In *DPP v Lufi* [1977] AC 962 it was held that expenditure on negative publicity aimed at preventing the election of a candidate was covered by this provision, as well as expenditure on positive promotional material aimed at procuring the election of a candidate.

uncontroversial. Another exception permitted a third party to spend up to £5 without committing a corrupt practice. The £5 limit was found by the European Court of Human Rights in *Bowman v United Kingdom* to be too low, and a violation of art 10 of the ECHR.¹⁰² Following an amendment introduced by the Political Parties, Elections and Referendums Act 2000,¹⁰³ the limit is now £500, which means that individuals and campaign groups may spend up to £500 promoting or attacking candidates without any candidate having to account for the expense. However, they must do so in independent campaigns and must not collude with candidates or pool resources with other third parties.

National spending limits

Since 2001, the spending limits on candidates have been accompanied by spending limits on the national election spending incurred by political parties and others during a general election campaign. It was for a long time the case that, although the expenditure of candidates was subject to limits, there was no corresponding limit on the national election campaigns of the parties.¹⁰⁴ These campaigns were becoming more sophisticated and more expensive: at the general election in 1997 the Conservative and Labour parties were thought to have spent £28 and £26.5m respectively, which in each case was more than double the amount spent at the general election in 1992.

The Committee on Standards in Public Life (the Neill Committee as it then was) recommended that national spending should be limited,¹⁰⁵ and this recommendation forms the basis of Part V of the Political Parties, Elections and Referendums Act 2000 (with corresponding limits on national referendum expenditure in Part VII). This imposes a limit on the campaign expenditure of political parties,¹⁰⁶ the limit depending on the number of constituencies which are contested by party candidates.¹⁰⁷ But a national party which puts up a candidate in every constituency would be able to spend up to about £20m to promote the electoral success of the party. This is in addition to the amounts that may be spent by each candidate under the Representation of the People Act 1983 on the conduct or management of his or her campaign. The statutory spending limits on political parties for referendum campaigns is £5m for each of the largest in a national referendum.¹⁰⁸

It is not only the national campaigns of political parties that are subject to restrictions. Spending limits are also imposed on the campaigns of so-called third parties, such as trade unions, companies and pressure groups (such as the Countryside Alliance). These bodies may take part in an election by incurring expensive national advertising to promote particular issues that may tend to benefit one party at the expense of the others. Under Part VI of the 2000 Act, third parties may incur ‘controlled expenditure’ of up to £10,000 in England and £5,000 in each of Scotland, Wales and Northern Ireland without restraint. ‘Controlled expenditure’ is defined to mean expenses incurred in connection with the production or publication of election material that is made available to the public at large or any section of the public (s 85).

A third party wishing to spend more than the foregoing amounts must register with the Electoral Commission to become a ‘recognised third party’. A recognised third party may

¹⁰² *Bowman v UK* (1998) 26 EHRR 1.

¹⁰³ PPERA, s 131.

¹⁰⁴ *R v Tronoh Mines Ltd* [1952] 1 All ER 697.

¹⁰⁵ Cm 4057, 1998, ch 10.

¹⁰⁶ For the definition of campaign expenditure, see PPERA, s 72 and Sch 8.

¹⁰⁷ *Ibid*, s 79 and Sch 9.

¹⁰⁸ PPERA, Part VII. There are also limits on campaign groups and others. See Ewing, *Cost of Democracy*, note 71 above, ch 7 for fuller treatment of this issue.

incur controlled expenditure of up to just under £1m, though within this overall limit there are separate limits for England (£793,500), Scotland (£108,000), Wales (£60,000) and Northern Ireland (£27,000). A recognised third party must also submit an election return after the election, giving details of income received and controlled expenditure incurred. At the general election in 2010, there were 30 third party registrations,¹⁰⁹ compared with 22 in 2005 and only seven in 2001:¹¹⁰ the registrations included a number of trade unions and interest groups associated with a wide range of causes, from the countryside and animal welfare to abortion.

Broadcasting and elections

Political broadcasting at election times has also given rise to difficulties. It is an illegal practice for any person to procure the use of transmitting stations outside the United Kingdom with intent to influence voters at an election.¹¹¹ The Office of Communications (OFCOM) is under a statutory duty to review and revise standards designed to ensure that news programmes are accurate and impartial and that due impartiality is preserved in political programmes.¹¹² Political advertising is banned on ITV and on commercial radio stations,¹¹³ a measure justified judicially as being necessary to prevent elections from becoming ‘auctions’ and to stop wealthy interests dominating a scarce medium of communication.¹¹⁴ Although far-reaching, this restriction on political advertising (which applies not only to political parties and not only at election time) was found narrowly by the European Court of Human Rights to be a proportionate restriction on freedom of expression.¹¹⁵ But as already pointed out, free time is provided to the parties by the broadcasters for party election broadcasts. These broadcasts must comply with the various obligations of the broadcasters relating to matters such as taste and decency.¹¹⁶

The allocation of time is now governed by rules established in advance by OFCOM (for the independent broadcasters) and the BBC.¹¹⁷ At the general election in 2010, the Labour party and the Conservative party were allocated five broadcasts each and the Liberal Democrats two broadcasts in England; whereas in Scotland each of these parties was allocated four broadcasts, as was the Scottish National Party. In Wales, Labour, the Liberal Democrats and Plaid Cymru were allocated three broadcasts each, with the Conservatives being allocated two. Time was also provided for several of the smaller parties which had candidates standing in the election in Great Britain.¹¹⁸ These other parties had to contest at least one-sixth of the parliamentary seats to qualify: for a party contesting seats in England it would have to stand in 89 constituencies to qualify for an election broadcast. Some of the

¹⁰⁹ Though only 13 such bodies spent in excess of £25,000 each, the total third party expenditure being £3,000,665.

¹¹⁰ Electoral Commission, *Election 2001*, p 53.

¹¹¹ RPA, s 92.

¹¹² Communications Act 2003, s 319. The BBC, which exists under royal charter, seeks to maintain due impartiality but it is not subject to statutory restrictions.

¹¹³ Communications Act 2003, ss 319–21. A Geddis [2002] PL 615.

¹¹⁴ *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, paras [28], [29] (Lord Bingham). For a robust academic defence of these measures, see J Rowbottom, in Ewing and Issacharoff (eds), note 80 above, ch 5.

¹¹⁵ *Animal Defenders International v United Kingdom* [2013] ECHR 362, (2013) 57 EHRR 21.

¹¹⁶ *Pro-Life Alliance v BBC* [2003] UKHL 23, [2004] 1 AC 185.

¹¹⁷ For the OFCOM rules in force at the time of writing, see OFCOM, *Rules on Party Political and Referendum Broadcasts* (2013).

¹¹⁸ This does not include the arrangements in Northern Ireland where a number of parties had broadcasts.

small parties were allocated broadcasts in Scotland or Wales only. Legal challenges to allocations under the current or earlier rules have usually been unsuccessful.¹¹⁹

The other major issue relating to broadcasting concerns the ability of the broadcasters to report about activities in particular constituencies. The curious effect of the Representation of the People Act 1983, s 93, was that if a candidate took part in an item about a constituency election, the item could not be broadcast without his or her consent; and it was an offence for a candidate to take part in such an item for the purpose of promoting his or her election unless the broadcast had the consent of every other candidate for the constituency.¹²⁰ To ‘take part’ in a constituency item meant to participate actively, for example in an interview or discussion; a candidate could not prevent the BBC from filming while he or she was campaigning in streets.¹²¹ These measures – which effectively gave individual candidates a veto over what might be broadcast – were widely criticised and they were replaced by the Political Parties, Elections and Referendums Act 2000.

The Representation of the People Act 1983, section 93 now provides that each broadcasting authority must adopt a code of practice to deal with ‘the participation of candidates at a parliamentary or local government election in items about the constituency’. Before drawing up the code, the broadcasters must ‘have regard’ to any views expressed by the Electoral Commission. The broadcasters thus now have a freer hand, perhaps inevitably after the Human Rights Act 1998. The OFCOM Broadcasting Code (which on this matter does not apply to the BBC)¹²² provides that a candidate may take part in a broadcast about his or her constituency only if the candidates of each of the other major parties are also offered an opportunity to take part.¹²³ If, however, another candidate is unable or refuses to take part, the broadcast may nevertheless go ahead.

E. Supervision of elections

If elections are to be conducted according to law there must be effective machinery for investigating alleged breaches of the law and for imposing appropriate sanctions. Since the House of Commons has a direct interest in its own composition, it formerly claimed as a matter of privilege the right to determine questions of disputed elections.

The Commons exercised the right to determine such questions from 1604 to 1868; and objected, not always with success, to breaches of election law being raised in the ordinary courts.¹²⁴ From 1672 election disputes were decided by the whole House, but the growth of party government resulted in disputes being settled by purely party voting. In 1868, Parliament entrusted the duty of deciding disputed elections to the courts.

The matter is now governed by the Representation of the People Act 1983, which provides a procedure for contesting elections and for these contests to be dealt with in the courts. Also important, however, is the Electoral Commission established under the Political Parties,

¹¹⁹ See *Grieve v Douglas-Home* 1965 SLT 186, *R v Broadcasting Complaints Commission, ex p Owen* [1985] QB 1153 and *R v BBC and ITC, ex p Referendum Party* [1997] COD 459. Also *R (Pro-Life Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185. Cf *Wilson v IBA* 1979 SC 351 (restraints on referendum broadcasts; see now PPERA, s 110).

¹²⁰ RPA, s 93(1).

¹²¹ *Marshall v BBC* [1979] 3 All ER 80. And see *McAliskey v BBC* [1980] NI 44.

¹²² The BBC Trust agrees a fresh code before each election.

¹²³ OFCOM, *Broadcasting Code*, para 6.9.

¹²⁴ *Ashby v White* (1703) 2 Ld Raym 938; *R v Paty* (1704) 2 Ld Raym 1105.

Elections and Referendums Act 2000.¹²⁵ Apart from supervising the new regulatory regime introduced by the latter Act, the Commission has wide-ranging responsibilities for the conduct of elections.

Election petitions

The principal way of challenging an election is by way of an election petition.¹²⁶ This can be done only to challenge the election of a candidate: there is no way by which a general election result can be challenged. Within 21 days of the official return of the result of an election, an election petition complaining of an undue election may be presented by a registered elector for the constituency in question, by a person who claims the right to have been elected at the election, or by any person claiming to have been validly nominated as a candidate.¹²⁷ The petition may raise a wide variety of issues, including the improper conduct of the election by officials,¹²⁸ the legal qualification of the successful candidate to be a member of the Commons,¹²⁹ and the commission of election offences such as unauthorised election expenditure.¹³⁰

The petition is heard by an Election Court consisting of two judges of the Queen's Bench Division in England or of the Court of Session in Scotland. The Election Court, which 'has the authority of the High Court and is a court of record',¹³¹ has a wide range of powers, including the power to order a recount or a scrutiny of the votes. The court determines whether the person whose election is complained of was duly elected and whether any alleged corrupt or illegal practices at the election were proved. If the court finds the candidate to have been disqualified from membership of the House, the court may, if satisfied that the cause of the disqualification was known to the electorate, deem the votes cast for him or her to be void and declare the runner-up to have been elected.¹³² If the election has not been conducted substantially in accordance with the law or if there have been irregularities which have affected the result, the court must declare the election void and require a fresh election to be held.¹³³ If the candidate was disqualified from membership of the House, the court may deem the votes cast for him or her to be void, and declare the runner-up to have been elected.

An important reminder of the severe consequences of breaching electoral law is provided by *Watkins v Woolas*,¹³⁴ where a Labour MP was unseated for violating the Representation of the People Act 1983, s 106. The latter provides that it is an offence to make or publish any false statement of fact in relation to a candidate's personal character or conduct, where this is done for the purpose of affecting the return of a candidate at the election. In the *Watkins* case, Mr Woolas was found by an Election Court to have made three such false statements in relation to his Liberal Democrat rival whom he had defeated with a majority of only 103 votes. The statements in question 'were a serious personal attack on a candidate by saying he condoned violence by extremists and refused to condemn those who advocated violence'.¹³⁵ By virtue of the Representation of the People Act 1983, s 159, Mr Woolas' election was held

¹²⁵ For the Commission, see www.electoralcommission.org.uk.

¹²⁶ For less formal ways of correcting any mistakes in the conduct of elections, see *Gough v Local Sunday Newspapers (North) Ltd* [2003] EWCA Civ 297, [2003] 1 WLR 1836.

¹²⁷ See *Ahmed v Kennedy* [2002] EWCA Civ 1793, [2003] 1 WLR 1820.

¹²⁸ *Re Kensington North Parliamentary Election* [1960] 2 All ER 150.

¹²⁹ *Re Parliamentary Election for Bristol South East* [1964] 2 QB 257.

¹³⁰ *Grieve v Douglas-Home* 1965 SC 186.

¹³¹ *Attorney-General v Jones* [2000] QB 66, at p 69.

¹³² As in the *Bristol South East* case, above.

¹³³ *Morgan v Simpson* [1975] QB 151; *Ruffle v Rogers* [1982] QB 1220 (local election cases).

¹³⁴ [2010] EWHC 2702 (QB).

¹³⁵ *R (Woolas) v Speaker of the House of Commons* [2010] EWHC 3169 (Admin), [2012] QB 1, para 125.

to be void, and as a result of having thus been found to have committed an illegal practice, he was barred from standing for Parliament. This proved to be a rather pyrrhic victory for Mr Watkins, losing to the Labour candidate at the subsequent by-election by over 2,000 votes.

Although decisions of the Election Court are not subject to appeal, Mr Woolas challenged the foregoing decision in judicial review proceedings, in a case acknowledged to have raised important constitutional questions about the susceptibility of the Election Court (which consists of High Court judges) to judicial review by the Administrative Court (which consists of a panel of other High Court judges).¹³⁶ In holding that the latter has the power to review the former in order to prevent any mistakes of law from going unchecked, the Administrative Court overturned one of the findings against Mr Woolas, but not the other two. The case also raised important questions about the relationship between the Representation of the People Act 1983, s 106, and Convention rights, notably art 10. But according to Thomas LJ:

Freedom of political debate must allow for the fact that statements are made which attack the political character of a candidate which are false but which are made carelessly. Such statements may also suggest an attack on aspects of his character by implying he is a hypocrite. Again, imposing a criminal penalty on a person who fails to exercise care when making statements in respect of a candidate's political position or character that by implication suggest he is a hypocrite would very significantly curtail the freedom of political debate so essential to a democracy. It could not be justified as representing the intention of Parliament. However imposing such a penalty where care is not taken in making a statement that goes beyond this and is a statement in relation to the personal character of a candidate can only enhance the standard of political debate and thus strengthen the way in which a democratic legislature is elected.¹³⁷

Election offences

Apart from an election petition, the other way by which election law can be enforced is by a criminal prosecution.¹³⁸ A person convicted on indictment of a corrupt practice is liable normally to imprisonment of up to one year and a fine; summary conviction carries a lesser penalty that may still lead to six months' imprisonment.¹³⁹ Conviction for an illegal practice carries a penalty of a fine not exceeding level 5 on the standard scale.¹⁴⁰ Equally important, conviction brings certain political disabilities, in the sense that a person found guilty of a corrupt or illegal practice is disqualified from being registered as an elector 'or voting at any parliamentary election in the United Kingdom or at any local government election in Great Britain',¹⁴¹ or of holding elective office. In the case of a corrupt practice the disqualification is for five years, and for an illegal practice it is three years.

Anyone elected to the House of Commons who is subsequently found to have committed a corrupt or illegal practice, is required to vacate his or her seat.¹⁴² In the case of a conviction for a corrupt practice the disqualification is for five years, and three years in the case of an illegal practice. Similar disqualifications may face anyone found to have committed a corrupt or illegal practice by an election court following an election petition. Prosecutions must be brought within a year of the alleged offence being committed.¹⁴³

¹³⁶ Ibid.

¹³⁷ Ibid, para 124.

¹³⁸ See *Attorney-General v Jones* [2000] QB 66, at p 69.

¹³⁹ RPA, s 168.

¹⁴⁰ Ibid, s 169.

¹⁴¹ Ibid, s 173.

¹⁴² Ibid, s 173(1)(b).

¹⁴³ Ibid, s 176.

In *Attorney-General v Jones*,¹⁴⁴ the defendant – the Labour member for Newark – had been convicted of the corrupt practice of knowingly making a false declaration of her election expenses. As a result her seat became vacant by the operation of s 160(4) of the 1983 Act. The conviction was reversed on appeal, at which point it was held that the seat ceased to be vacant, and that the existing member was entitled to resume her seat.

Following this case the law was changed so that where a sitting member is convicted of a corrupt or illegal practice, the seat does not become vacant until the end of the period within which an appeal may be lodged against the conviction. If notice of appeal is given, the seat becomes vacant three months after the conviction, unless the appeal is withdrawn or is unsuccessful (in which case it is vacated immediately), or unless the appeal is heard and succeeds (in which case the seat is not vacated). Where a seat is vacated and the appeal ultimately succeeds, this will not entitle the member to resume his or her seat.¹⁴⁵

Failure to comply with the provisions of the Political Parties, Elections and Referendums Act 2000 has altogether much less dramatic consequences, although these are not to be underestimated. So far as elections are concerned, the main provisions here are the national spending limits that apply to political parties and third parties. Although it recommended that such limits should be introduced, in doing so the Committee on Standards in Public Life thought it ‘wholly unrealistic’ to suppose that a general election could be set aside and ‘the runner-up party to be declared the winner’ where the winning party exceeded the national limit.¹⁴⁶ The ‘only realistic sanction’ was thought to be the imposition of a ‘heavy financial penalty’ on the defaulting party, along with the adverse publicity that any such default would inevitably generate.¹⁴⁷

It is the criminal law which must thus bear the greater part of the burden of enforcing the limits in the 2000 Act, although financial penalties are combined with the possibility of imprisonment of party officials in the event of a breach. So in the event of expenditure in excess of the statutory maximum, an offence is committed by both the party and the treasurer who authorised the expenditure, in this case the penalty on the party being an unlimited fine.¹⁴⁸ But it is the treasurer who must accept responsibility for any failure to deliver a return of campaign expenditure to the Commission or for making a false declaration about its contents.¹⁴⁹ In the elections held since the 2000 Act was introduced, over-spending was not a problem as all parties reported spending below the permitted limits, which the Committee on Standards in Public Life has recommended should be reduced.¹⁵⁰

The Electoral Commission

One of the other major innovations of the Political Parties, Elections and Referendums Act 2000 was the creation of the Electoral Commission, with a wide range of functions. It must publish a report on the conduct of elections and referendums, and keep under review a number of electoral matters (including political party income and expenditure and political advertising in the broadcast media).¹⁵¹ The Commission must also be consulted about any

¹⁴⁴ [2000] QB 66.

¹⁴⁵ RPA s 173 (as amended).

¹⁴⁶ Cm 4057, 1998, para 10.25.

¹⁴⁷ *Ibid*, para 10.26.

¹⁴⁸ PPERA, s 79(2).

¹⁴⁹ *Ibid*, ss 80–3.

¹⁵⁰ Electoral Commission, *The Funding of Political Parties* (2004).

¹⁵¹ PPERA, ss 5 and 6. See Electoral Commission, *Election 2001*.

changes to electoral law,¹⁵² and is empowered to give advice and assistance (but not financial assistance) to registration officers, returning officers, political parties and others.¹⁵³ This advice may be sought during election campaigns about election law.¹⁵⁴ The Commission also administers £2m made available to the political parties by the government for policy development, the money distributed in accordance with a scheme drawn up by the Commission and approved by the Ministry of Justice, which is the government department responsible for elections.¹⁵⁵

As we have also seen, the Electoral Commission plays a crucial part in the administration of the law relating to donations to political parties and electoral expenditure. Under s 145 of the 2000 Act the Commission has a general duty to monitor compliance not only with the provisions of the Political Parties, Elections and Referendums Act, but also ‘the restrictions and other requirements imposed by other enactments’ relating to ‘election expenses incurred by or on behalf of candidates at elections’, which extends obviously to the Representation of the People Act 1983.¹⁵⁶ It has a similar administrative and supervisory role in relation to the conduct of referendums, which includes the distribution of state funding to referendum participants. But although the Commission has wide powers of investigation, it bears no responsibility for the prosecution of offenders.

The Political Parties and Elections Act 2009 introduced a number of important changes relating to the Electoral Commission, including its powers to monitor, investigate and enforce the law. The main impact of the changes is to introduce a more flexible enforcement regime, including a greater power to use civil sanctions.¹⁵⁷ There are also changes to its composition, with provision being made for the political parties to nominate four (out of 9 or 10) Commissioners. The three largest parliamentary parties are each entitled to nominate a Commissioner, with the fourth place to be allocated to one of the other parliamentary parties, provided it has at least two MPs.¹⁵⁸ This is a change which had been recommended by Sir Hayden Phillips in the wake of the cash for honours affair, when it was felt that the Commission was not sufficiently aware of how political parties operate.¹⁵⁹

It is unclear, however, whether political commissioners are a desirable or a necessary response to that crisis (especially as the performance of the Electoral Commission appears greatly to have improved): the new provisions challenge the political independence of the Commission, they favour the established national political parties at the expense of the others (notably the nationalist parties which compete in elections in different parts of the country), and there is already provision in the Political Parties, Elections and Referendums Act 2000 for a parliamentary parties panel to be an effective channel of communication between the Electoral Commission and the political parties. Apart from the foregoing, the 2009 Act relaxed the political restrictions on Electoral Commission staff: the old rule whereby staff had to be free of political activity for 10 years preceding their appointment was replaced by a restriction of 5 years.¹⁶⁰

¹⁵² Ibid, s 7.

¹⁵³ Ibid, s 9.

¹⁵⁴ See Electoral Commission, *Election 2001*, for details of the range of advice sought.

¹⁵⁵ PPERA, ss 11 and 12. The Commission also has an important educational function regarding the electoral systems (s 13).

¹⁵⁶ With the exception of Scottish local government elections, unless the Scottish ministers so provide (s 145(2)).

¹⁵⁷ 2009 Act, ss 1–3.

¹⁵⁸ Ibid, s 5.

¹⁵⁹ Sir Hayden Phillips, above, p 21.

¹⁶⁰ 2009 Act, s 7.

F. Electoral systems and electoral reform

Under the present electoral system in the United Kingdom, each constituency returns a single member. Each elector can vote for only one candidate and the successful candidate is the one who receives the highest number of valid votes. This system of ‘first past the post’ is known as the relative majority system since whenever there are more than two candidates in a constituency, the successful candidate may not have an absolute majority of votes but merely a majority relative to the vote of the runner-up.

This system is simple, but as a means of providing representation in Parliament it is very crude. It makes no provision for the representation of minority interests, nor does it ensure that the distribution of seats in the Commons is at all proportionate to the national distribution of votes. In Britain, the general tendency of the system has been to exaggerate the representation of the two largest parties and to reduce that of the smaller parties; but even for the larger parties there is no consistent relation between the votes and the seats they obtain. The distortion felt by some is illustrated by the general election of 2005 which saw the Labour party win 355 of the 646 seats (with a majority of 65) with only 36 per cent of the vote (and with the support of only 22 per cent of those eligible to vote).¹⁶¹

The advantages claimed for the system include the simplicity of the voting method, the close links which develop between the member and his or her constituency, and its tendency to produce an absolute majority of seats in the House of Commons out of a large minority of votes. In defence of the system it is claimed that the function of a general election is to elect a government as well as a Parliament, and that the system produces strong government. This last claim needs to be examined with care, particularly in the light of the 2010 election which produced the first Coalition government since 1945, though this was not the first time in that period that no one party had an overall majority in the House of Commons. The system also distorts the influence on electoral outcomes of a relatively few marginal constituencies.

Other voting systems

Other electoral systems have long been devised with a view to securing better representation of minorities and a distribution of seats which bears a less haphazard relation to the votes cast. Many different systems are used in other countries.¹⁶² One method, the alternative vote system which operates in Australia (where it is known as preferential voting), retains single-member constituencies but allows the elector to express a choice of candidates in order of preference. If no candidate has an absolute majority of first preferences, the lowest on the list is eliminated and his or her votes are distributed according to the second preference shown on the voting papers. The procedure continues until one candidate obtains an absolute majority. This system eliminates the return of a candidate on a minority vote when account is taken of second and later preferences, but it would not necessarily secure representation in the Commons proportional to the first preferences of the electorate on a national basis.

Other systems have been designed to secure representation in Parliament directly proportional to the national voting strengths of the parties. Thus by the list system, as used in Israel and South Africa, voting for party lists of candidates takes place in a national constituency,

¹⁶¹ In 2001 the Labour party won 412 of the 659 seats (with a majority of 165) with only 41% of the vote. It works the other way too. In 1983 the Conservatives won 42% of the votes and 61% of the seats and in 1992 they won 42% of the votes and 52% of the seats. The main losers have been the Liberal Democrats, whose parliamentary representation regularly falls far short of votes cast nationally. In 2001 the Liberal Democrats polled 18% of the vote for 8% of seats. (The Conservatives polled 32% of the vote for 25% of the seats.)

¹⁶² Bogdanor, *The People and the Party System*, parts III–V; and Blackburn, above, ch 8.

with each party receiving that number of seats which comes closest to its national votes; this system does not provide for any directly accountable local links between voters and their representatives. In Germany, a mixed system is used by which each elector has two votes, one to elect a candidate in a single-member constituency, the other to vote for a party list; the list seats are assigned to parties to compensate for disproportionate representation arising from the constituency elections, but a party must record 5 per cent of the national vote or win three constituencies to gain any list seats. A similar system to replace first past the post was introduced in New Zealand in 1993 where it is known as mixed member proportional.¹⁶³

The system which is likely to produce a reasonably close relationship between votes and seats while maintaining a local basis for representation is that of the single transferable vote. This method has been used within the United Kingdom for several purposes.¹⁶⁴ It would require the country to be divided into multi-member constituencies, each returning between three and, say, seven members. Each elector would have a single vote but would vote for candidates in order of preference. Any candidate obtaining the quota of first preferences necessary to guarantee election would be immediately elected, the quota being calculated by a simple formula: in a five-member constituency, this quota would be one vote more than one-sixth of the total votes cast.¹⁶⁵ The surplus votes of a successful candidate would be distributed to other candidates proportionately according to the second preference expressed; any candidate then obtaining the quota would be elected and a similar distribution of the surplus would follow.

If at any count under the single transferable vote no candidate obtained the quota figure, the candidate with the lowest number of votes would be eliminated and all his or her preferences distributed among the others. Under this scheme, parties would both nationally and locally be likely to secure representation according to their true strength; minority parties and independent candidates would stand a better chance of election; and the number of ineffective votes would be reduced. Within the constituency, electors could in their order of preference choose between candidates from the same party and could base their choice of candidates on non-party considerations. Unless voting habits were to change, one party would be less likely to secure an absolute majority of seats in the Commons than at present; and Britain would become used to periods of minority or coalition government,¹⁶⁶ which would become the norm rather than so far an unusual consequence of the sometimes unpredictable first past the post system.

Electoral reform

The case for electoral reform has been examined many times and a number of different electoral systems have been introduced in Britain since 1997. Under the Scotland Act 1998, a form of the additional member system has been adopted for elections to the Scottish Parliament, which contains 73 constituency members and 56 regional members.¹⁶⁷ Registered parties may submit lists of candidates to be regional members for a particular region, with up to 12 names on each party list, although only seven may be elected.¹⁶⁸ Electors have two

¹⁶³ On the New Zealand experience, see A Geddis and C Morris (2004) 32 *Federal Law Review* 451.

¹⁶⁴ E.g. for university constituencies between 1918 and 1948; in Northern Ireland for elections to Stormont in 1922–28, to the Assembly in 1973 and 1982, to the Constitutional Convention in 1975 and to the European Parliament. Its use for electing assemblies in Scotland and Wales was proposed by the Royal Commission on the Constitution in 1973 (Cmnd 5460, 1973, paras 779–88), but this proposal was not adopted either in 1978 or in 1998.

¹⁶⁵ See the formula in SSI 2007 No 42, Sched 1, paras 46–55 (STV for Scottish local government elections).

¹⁶⁶ Ch 10.

¹⁶⁷ Scotland Act 1998, s 1. This contrasts with the first past the post system which had been proposed in the Scotland Act 1978. See Cmnd 6348, 1975, p 9.

¹⁶⁸ Scotland Act 1998, s 5(6).

votes: one for a constituency member; and the other for regional members to be exercised by voting for a political party which has submitted a regional list.¹⁶⁹ Constituency members are to be elected by first past the post as is currently the case for Westminster elections, and a measure of proportionality is secured by the regional member seats.

The latter are allocated to the parties on the basis of a complex formula that allocates seats according to votes cast for the party in the region.¹⁷⁰ The regional member constituencies are the same constituencies that existed for the purposes of the European Parliament, before the European Parliamentary Elections Act 1999. The new electoral system for European Parliament elections is very different (based on closed party lists in much larger regional constituencies) and is considered in chapter 6. A system similar to the Scottish system is in place for the National Assembly for Wales.¹⁷¹ In the case of both Scotland and Wales the electoral system tends to ensure that no one party has a majority of seats in the devolved legislatures; and in the case of Scotland, after the election in 2007 the SNP assumed office with only 47 of the 129 seats, the defeated Labour administration securing 46 seats.

Different systems have been adopted for the Northern Ireland Assembly and the Greater London Authority. In the case of the former, the single transferable vote is used to elect six candidates from each of the parliamentary constituencies for Northern Ireland.¹⁷² The single transferable vote is defined in the Act as a vote (a) 'capable of being given so as to indicate the voter's order of preference for the candidates for election as members for the constituency', and (b) 'capable of being transferred to the next choice when the vote is not needed to give a prior choice the necessary quota of votes or when a prior choice is eliminated from the list of candidates because of a deficiency in the number of votes given for him'.¹⁷³ In the case of London, the system is different again. An elector has three votes: one for a mayoral candidate; one (a constituency vote) for an Assembly candidate; and one (a London vote) for a registered party or an individual candidate standing for election as London member.¹⁷⁴

Mayoral candidates are elected by simple majority unless there are more than two in which case the supplementary vote system is used: this means that where none of the candidates has a majority of the votes cast, all but the first two are eliminated with the second preference votes of the eliminated candidates then distributed to the candidates still in the contest.¹⁷⁵ The Assembly is elected on the basis of a variation of the additional member system used in Scotland and Wales.¹⁷⁶ There are thus three or four electoral systems operating in different parts of the country for the purposes of different elections, with still more variety introduced when STV was adopted for Scottish local authority elections in 2007.¹⁷⁷ This gave rise to considerable confusion when the new system was introduced for local authority elections held on the same day as the Scottish Parliament elections with a different electoral system.¹⁷⁸

¹⁶⁹ Ibid, s 6.

¹⁷⁰ Ibid, s 1; Sch 1.

¹⁷¹ Government of Wales Act 1998, Part 1. This contrasts with the first past the post system which had been proposed in the Wales Act 1978.

¹⁷² Northern Ireland Act 1998, s 34.

¹⁷³ Ibid, s 34(3).

¹⁷⁴ Greater London Authority Act 1999, s 4(1).

¹⁷⁵ The candidate with the largest number of first preference votes and distributed second preferences from the other candidates is the winner. See Greater London Authority Act 1999, s 4(3).

¹⁷⁶ Ibid, s 4(4) (Assembly members elected under simple majority system) and s 4(5) (London members elected from party lists in a single London-wide constituency). It is in this latter respect (one rather than several additional member constituencies) that London differs from Scotland and Wales.

¹⁷⁷ SSI 2007 No 42.

¹⁷⁸ See Electoral Commission, *Independent Review of the Scottish Parliamentary and Local Government Elections, 3 May 2007* (2007) – a stinging review by Ron Gould, a senior Canadian election administrator. For comment, see N Ghaleigh (2008) 12 Edin LR.142, and H Lardy [2008] PL 214.

Electoral Reform and Westminster

There are thus new electoral systems for the European Parliament, the devolved bodies and local government (in some parts of the country). But what about Westminster? There have been many proposals for reforming the Westminster system, one of the earliest being a recommendation by a royal commission in 1910 for the introduction of the alternative vote.¹⁷⁹ This was followed in 1917 by the recommendations of a Speaker's Conference on electoral reform for the adoption of the single transferable vote.¹⁸⁰ But after some vacillation Parliament refused to accept either this or the alternative vote. The matter was revived by the second Labour government in 1929,¹⁸¹ and a Bill which sought to introduce the alternative vote was passed by the Commons but abandoned when the government fell in 1931. The Speaker's Conference on electoral reform in 1944 rejected by a large majority proposals for change, as did a similar conference in 1967.¹⁸²

Electoral reform nevertheless continued to have its strong advocates, with few countries electing their legislatures on the basis of first past the post and with all the new electoral regimes adopted in Britain in recent years rejecting it in favour of a system which is perceived to be fairer in terms of producing a more representative outcome. Before the general election in 1997, the Labour and Liberal Democratic parties agreed that an early referendum should be held on electoral reform and a commitment to this effect was included in the Labour party's general election manifesto of that year. In acknowledgement of the manifesto commitment, in December 1997 the Prime Minister appointed the Independent Commission on the Voting System under the chairmanship of Lord Jenkins to consider and recommend alternatives to the voting system for Westminster elections. But although the report and its proposals were widely praised for their elegance and subtlety, no referendum on these or any other proposals was ever held until the formation of the Coalition government in 2010.

The Liberal Democrats have a particularly strong long-standing interest in electoral reform. This is because under the first past the post electoral system, they are typically under-represented in terms of seats in proportion to the number of votes they manage to win. At the general election in 2010, for example, the Liberal Democrats won 23 per cent of the vote but less than 10 per cent of the seats in the House of Commons. However, in proposing electoral reform, the Coalition programme for government made provision for an electoral system (the alternative vote) that was the least likely to deliver a legislature reflecting the national vote. As explained above, under the alternative vote the country would still be divided into single member constituencies. The only major country to use this system is Australia, where it is said to produce the strongest two party system in the world, with small parties having even greater difficulty of breaking through in the House of Representatives than under the first past the post system in the United Kingdom.¹⁸³ The extent to which small parties and independents are represented in Australia is due in large part to the different electoral arrangements used for election to the Senate.

Nevertheless, the Parliamentary Voting System and Constituencies Act 2011 imposed a duty to bring forward an order to change the existing electoral law if 'more votes are cast in [a] referendum in favour of the answer "Yes" than in favour of the answer "No"'.¹⁸⁴ The referendum was duly held on 5 May 2011, with a large vote in favour of the status quo: 6.1 million voted in favour of change and 13 million against. Most people appeared to be

¹⁷⁹ Cd 5163, 1910.

¹⁸⁰ Cd 8463, 1917 and Representation of the People Act 1918, s 20. See Butler, above, part 1.

¹⁸¹ Cmd 3636, 1930.

¹⁸² Cmd 6534, 1944; Cmnd 3202, 1967.

¹⁸³ See G Orr and K D Ewing, Written Evidence to Political and Constitutional Reform Committee on Parliamentary Voting System and Constituencies Bill, HC 437 (2010–11).

¹⁸⁴ Parliamentary Voting System and Constituencies Act 2011, s 8.

indifferent, with a turnout of only 41.9 per cent, which means that a change to the voting system was supported by only 12 per cent of those eligible to vote. A majority in favour was recorded in only 10 out of 500 voting centres (including Cambridge and Oxford). As a result, it is likely to be a long time before serious attempts are made to change the voting system. Despite its failure to produce a Parliament representative of the nation as a whole; despite its failure to produce MPs who have majority support in their own constituency; and despite the barriers it presents to new parties and small parties from breaking through, first past the post has the virtue of simplicity, even if many now consider it to old-fashioned. It is not clear if the referendum result would have been different if a different kind of electoral reform had been chosen.

G. Membership of the House of Commons

The following are the main categories of persons who are disqualified from sitting and voting in the House of Commons.¹⁸⁵

- (a) Both by common law and by statute, aliens are disqualified,¹⁸⁶ ‘qualifying’ Commonwealth citizens and citizens of the Republic of Ireland are not disqualified.¹⁸⁷
- (b) Persons under 18 on the day they are nominated as candidates.¹⁸⁸
- (c) Peers and peeresses. But following the House of Lords Act 1999, hereditary peers are no longer disqualified unless they are one of the 92 hereditary peers (on which see below) who has retained his or her membership of the House under s 2 of the Act.
- (d) Bankrupts. Under the Insolvency Act 1986, s 426A, a person who is subject to a bankruptcy restriction order is disqualified from membership of the Commons. Where a sitting member is adjudged bankrupt, his or her seat becomes vacant and if he or she stands for re-election, his or her return shall be void should he or she be re-elected. Where a court makes a bankruptcy restriction order on a sitting MP, it must inform the Speaker.¹⁸⁹
- (e) Persons guilty of corrupt or illegal practices, under the Representation of the People Act 1983. A person found to have committed a corrupt practice is disqualified from being elected to the Commons for five years; and anyone found to have committed an illegal practice is disqualified for three years.¹⁹⁰
- (f) Under the Forfeiture Act 1870, a person convicted of treason is disqualified from membership until expiry of the sentence or receipt of a pardon. The effect of the Criminal Law Act 1967 was that other criminal convictions, even where a substantial prison sentence was imposed, did not disqualify from membership of the House. Since 1981, a person convicted of an offence and sentenced to prison for more than a year by a court in the United Kingdom or elsewhere is, while detained in the British Isles or in the Republic of Ireland or unlawfully at large, disqualified from being nominated and from being a member. If he or she is already a member, the seat is vacated.¹⁹¹

¹⁸⁵ For greater detail, see Erskine May, *Parliamentary Practice*, ch 3.

¹⁸⁶ See for example, Act of Settlement 1700, s 3.

¹⁸⁷ British Nationality Act 1981, Sch 7; Electoral Administration Act 2006, s 18.

¹⁸⁸ Electoral Administration Act 2006, s 17.

¹⁸⁹ Insolvency Act 1986, s 426A(5).

¹⁹⁰ RPA, ss 160, 173.

¹⁹¹ Representation of the People Act 1981; and see C P Walker [1982] PL 389.

It is within the disciplinary powers of the House to expel a member, but expulsion does not prevent him or her from being re-elected.¹⁹² Formerly a person who held contracts with the Crown for the public service was disqualified from membership. But this disqualification was abolished in 1975 along with the disqualification of those who held pensions from the Crown. It was also the case that ordained clergy and ministers of the Church of Scotland were disqualified from membership of the House of Commons.¹⁹³ But these disqualifications were removed in 2001,¹⁹⁴ although it is still provided that a person is disqualified from being or being elected as a member of the House of Commons if he is a Lord Spiritual (that is to say, one of the Bishops of the Church of England who is a member of the House of Lords). More recently still, disqualification from membership of the House of Commons on grounds of mental illness was removed by the Mental Health (Discrimination) Act 2013.

Disqualification of office-holders

In addition to the above, there are a number of office-holders who are disqualified from membership of the House of Commons, the law governing disqualification having emerged from the ancient conflicts between the Crown and Commons. During the early 17th century, the House secured recognition of the right to control its own composition. In particular, the House asserted the principle that a member could not continue to serve when appointed by the Crown to a position the duties of which entailed prolonged absence from Westminster. After 1660, the House feared that the Crown would exercise excessive influence over it by the use of patronage and sought to avert a situation in which members held positions of profit at pleasure of the Crown. This fear led in 1700 to a provision in the Act of Settlement to the effect that no one who held an office or place of profit under the Crown should be capable of serving as a member of the House.

This latter provision would have excluded ministers from the Commons. It was, however, repealed before it took effect. In its place, the Succession to the Crown Act 1707 enabled certain ministers to retain their seats in the House, subject to re-election after appointment, but excluded those who held office of a non-political character, for example in what today would be regarded as the civil service. But much legislation was necessary to establish the distinction between ministerial, or political, office-holders, who were eligible for membership and non-political office-holders, who were ineligible and excluded. Moreover, it was necessary to restrict the number of people appointed to ministerial office from the Commons, in order to avoid a situation in which the executive (now in the form of the Prime Minister) exercised excessive control by patronage over the House. The position is now governed by the House of Commons Disqualification Act 1957 (re-enacted in 1975).

The latter replaced disqualification for holding ‘an office or place of profit under the Crown’ by disqualification attached to the holding of specified offices. There are three broad reasons for disqualification: (1) the physical impossibility for certain office-holders of attendance at Westminster, (2) the risk of patronage and (3) the conflict of constitutional duties. Under s 1 of the 1975 Act, the disqualifying offices fall into the following categories:

- (a) Lords spiritual (that is to say the 26 bishops who are also members of the House of Lords);

¹⁹² Ch 9.

¹⁹³ House of Commons (Clergy Disqualification) Act 1801, Roman Catholic Relief Act 1829, s 9. There was no similar disqualification from membership of the European Parliament, the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly.

¹⁹⁴ House of Commons (Removal of Clergy Disqualification) Act 2001. The Act implements a recommendation of the Home Affairs Committee (HC 768-I (1997–8), para 127). See Blackburn, note 3 above, ch 5.

- (b) A great variety of judicial offices, listed in Sch 1 of the Act, including judges of the Supreme Court of the United Kingdom; judges of the Court of Appeal, High Court and circuit judges in England and Wales; and judges of the Court of Session and sheriffs in Scotland, as well as the holders of less senior judicial office. The principle is that no person may hold full-time judicial office and be a practising politician. Lay magistrates are not affected.
- (c) Employment in the civil service of the Crown, whether in an established or temporary capacity, whole time or part time. The disqualification extends to members of the civil service of Northern Ireland and the diplomatic service. Civil servants who wish to stand for election to Parliament are required by civil service rules to resign before becoming candidates.¹⁹⁵ This applies also to civil servants in the politically free group of civil servants, the rule being said to apply in part to prevent their election being held to be void.¹⁹⁶
- (d) Membership of the regular armed forces of the Crown. Members of the reserve and auxiliary forces are not disqualified if recalled for active service. Members of the armed forces, like civil servants, must resign before becoming candidates for election to Parliament and they may apply for release to contest an election. A spate of such applications in 1962 led to the appointment of an advisory committee of seven members to examine the credentials of applicants and to test the sincerity of their desire to enter Parliament.¹⁹⁷
- (e) Membership of any local policing body or police force maintained by a police authority.
- (f) Membership of the legislature of any country or territory outside the Commonwealth, except – following the Disqualifications Act 2000 – in the case of the Republic of Ireland. It is likely that members of a legislature other than that of the Irish Republic would be debarred by their status as aliens from membership of the Commons.
- (g) A great variety of disqualifying offices arising from chairmanship or membership of commissions, boards, agencies, administrative tribunals, public authorities and undertakings; in a few cases the disqualification attaches only to particular constituencies (Sch 1, Parts 2–4). As these offices cover such a wide range, each office is specified by name. The Schedule may be amended by Order in Council made following a resolution approved by the House of Commons (s 5). This power – which is frequently used – avoids the need for amendment by statute as and when new offices are created.

For one purpose alone acceptance of an office of profit continues to disqualify. From early times a member of the House was in law unable to resign his seat and acceptance of an office of profit under the Crown was the only legal method of release from membership. The offices commonly used for the purpose were the office of Steward or Bailiff of the Chiltern Hundreds or of the Manor of Northstead. Under the Act of 1975 these offices are disqualifying offices (s 4). Appointment to them is made by the Chancellor of the Exchequer on the request of the member concerned.

Other matters

1. Ministers in the House of Commons

British practice requires that the holders of ministerial office should be members of either the House of Commons or the House of Lords and that the great majority should be drawn from

¹⁹⁵ Servants of the Crown (Parliamentary, European Assembly and Northern Ireland Assembly) Order 1987, *Civil Service Management Code*, paras 4.4.20–4.4.21.

¹⁹⁶ *Civil Service Management Code*, *ibid*, para 4.4.20. On the politically free category, see ch 11.

¹⁹⁷ HC 111 and 262 (1962–3); HC Deb, 18 February 1963, col 163.

the Commons. But it has long been necessary for limits to be imposed on the number of ministers who may sit in the Commons, lest excessive powers of patronage be exercised by the Prime Minister over the House. The present law is found partly in the House of Commons Disqualification Act 1975 and partly in the Ministerial and Other Salaries Act 1975.

Section 2 of the former Act allows no more than 95 holders of ministerial office (whether paid or unpaid, it would seem) to sit and vote in the Commons; this limit had been raised from 70 to 91 in 1964,¹⁹⁸ and to 95 in 1974.¹⁹⁹ If more members of the Commons are appointed to ministerial office than are allowed by law, those appointed in excess must not sit or vote in the House until the number has been reduced to the permitted figure (s 2(2)).

The Ministerial and Other Salaries Act (as amended) sets out the salaries payable to various categories of ministerial office, these salaries being subject to revision.²⁰⁰ Schedule 1 to the Act imposes limits on the total number of such salaries payable at any one time to the various categories. Thus, in category 1 (holders of posts in the Cabinet apart from the Lord Chancellor) not more than 21 salaries are payable. Not more than 50 salaries are payable to posts in category 1 taken together with category 2 (ministers of state and departmental ministers outside the Cabinet).

Not more than 83 salaries are payable to posts in categories 1, 2 and 4 (parliamentary secretaries) taken together. In addition, salaries are paid to the law officers of the Crown (category 3), to five Junior Lords to the Treasury (government whips in the Commons) and to seven assistant whips in the Commons, as well as to various political posts in the royal household, some of which may be held only by members of the Lords. Provision is also made for the payment of salaries to the Leader of the Opposition and to the Opposition whips (s 2).

2. Effects of disqualification

If any person is elected to the House while disqualified by the 1975 Act, the election is void (s 6(1)) and this could be so determined on an election petition. If a member becomes disqualified after election, his or her seat is vacated and the House may so resolve. Before 1957, Parliament might pass an Act of Indemnity in favour of members who had unwittingly become subject to disqualification. Today, the House may direct by order that a disqualification under the 1975 Act which existed at the material time be disregarded if it has already been removed (for example, by the member's resignation from the office in question) (s 6(2)).

Thus a new election is unnecessary where the House itself has dispensed with the consequences of the disqualification, but no such order can affect the proceedings on an election petition (s 6(3)). Disputed cases of disqualification are in general determined by the House after consideration by a select committee. Thus in 1961 the Committee of Privileges reported that Mr Tony Benn was disqualified because he had succeeded to his father's peerage while a member of the Commons.²⁰¹

While disputes under the 1975 Act as to disqualifying offices arise rarely, the Judicial Committee of the Privy Council has jurisdiction to declare whether a person has incurred a disqualification under that Act (s 7). Any person may apply to the Judicial Committee for a declaration of disqualification but must give security for costs. Issues of fact may on the direction of the Judicial Committee be tried by the High Court in England, the Court of Session in Scotland or the High Court in Northern Ireland (s 7(4)).

A declaration may not be made if an election petition is pending, if one has been tried in which disqualification on the same grounds was in issue, nor where the House has given relief

¹⁹⁸ Ministers of the Crown Act 1964, noted by A E W Park (1965) 28 MLR 338.

¹⁹⁹ Ministers of the Crown Act 1974.

²⁰⁰ See Ministerial and Other Salaries Act 1997.

²⁰¹ HC 142 (1960–61).

by order (s 7(5)). This procedure has yet to be used.²⁰² Another procedure open where there is a dispute over disqualification is for the Commons to petition the Crown to refer the matter to the Judicial Committee of the Privy Council for an advisory opinion on the law.²⁰³

H. The House of Lords

Historically, membership of the House of Lords was confined to hereditary peers and the bishops of the Church of England.²⁰⁴ The former inherited their status and a considerable body of law has developed to regulate title to the peerage.²⁰⁵ The latter held their position *ex officio* and ceased to occupy a seat in the Lords on resignation or retirement.

In 1876, provision was made for the appointment of Lords of Appeal in Ordinary to conduct the judicial business of the House;²⁰⁶ and in 1958 the Life Peerages Act allowed for the appointment of others to the peerage for life, without the conferring of a title which would pass to succeeding generations. Membership of the House of Lords was thus confined to those who inherited their position or who were appointed by the Crown (in the case of the bishops, the law lords and the life peers).

The House of Lords Act 1999 broke the link between the hereditary peerage and membership of the House of Lords:²⁰⁷ until then all hereditary peers were entitled to a seat in the Lords. There continue to be four categories of members of the House of Lords, although the effect of the House of Lords Act 1999 and the Constitutional Reform Act 2005 has been greatly to alter the balance between the different categories, with hereditary peers displaced by the life peers as the largest group. The four categories of membership are as follows:

- (a) Life peers created under the Life Peerages Act 1958.
- (b) Law Lords appointed under the Appellate Jurisdiction Act 1876.
- (c) Lords Spiritual, being 26 senior clergy of the Church of England.
- (d) Hereditary peers, of whom there are 92.

Life peers

It was decided in 1856 that the Crown, although able to create a life peerage, could not create such a peerage carrying with it the right to a seat in the House of Lords.²⁰⁸ If life peers were to be created to sit in the Lords, legislation was thus necessary. The Life Peerages Act 1958 both strengthened the Lords and weakened the hereditary principle. The Act enabled the Queen by letters patent to confer a peerage for life with a seat in Parliament on a man or woman. It did not restrict the power of the Crown to confer hereditary peerages, although it made it unnecessary for new hereditary peerages to be created. In fact very few hereditary peerages have since been created, although Mrs Thatcher revived the practice

²⁰² Erskine May, above, p 41.

²⁰³ Under the Judicial Committee Act 1833, s 4; and see *Re MacManaway* [1951] AC 161.

²⁰⁴ A good history is provided by Lowell, *The Government of England*, ch 21. See also Maitland, *The Constitutional History of England*, pp 166–72.

²⁰⁵ HLE, vol 35. See also 12th edition of this work, pp 164–6.

²⁰⁶ Appellate Jurisdiction Act 1876.

²⁰⁷ House of Lords Act 1999, s 1: ‘No one shall be a member of the House of Lords by virtue of a hereditary peerage.’ This is subject to s 2, on which see below.

²⁰⁸ *Wensleydale Peerage case* (1856) 5 HLC 958.

of making such appointments when she nominated Viscount Whitelaw and Speaker Thomas in 1983.²⁰⁹

Life peers may not vote in House of Commons elections and they may not stand as parliamentary candidates. They may vote and stand for election to the devolved parliament and assemblies, but not the European Parliament.²¹⁰ An appointment under the 1958 Act is irrevocable: unlike a hereditary peerage a life peerage cannot be disclaimed,²¹¹ and there are no limits to the number of peers who may be appointed. In June 2013, there were 755 life peers (an increase from 601 in March 2009), of whom 177 were women (compared to 145 in 2009), giving rise to concerns about the unsustainable increase in the size of the House, as each Prime Minister appoints more members to redress the balance in the direction of his or her own party.

There is a great deal of criticism that the system of appointment on the recommendation of the Prime Minister is an inappropriate way to recruit a legislative chamber and that it allows too much patronage on the part of the Prime Minister. In order to address such criticism, Mr Blair (when Prime Minister) established the House of Lords Appointments Commission which is a non-statutory, non-departmental public body, attached to the Cabinet Office.²¹² It is chaired by a peer and its members include nominees of the three main national political parties and three independent members. The role of the Commission is to make recommendations for non-political peers and to vet all nominations for peerages by the political parties on grounds of propriety.

It is important to point out that although recommendations for the peerage are made by the Prime Minister, he or she will act on the advice of party leaders when nominating members from political parties other than his or her own. It appears, however, that it is for the Prime Minister to decide how many new opposition peers may be created at any one time, there being no clear formula to provide guidance for this purpose. All parties need constantly to refresh their active membership in the House of Lords, in the government's case to ensure that its business is carried forward, and in the opposition's case to expose weaknesses and propose amendments. It remains the case that although Canada also has a nominated second chamber (the Senate), this is nevertheless a very unusual method for choosing a parliamentary chamber.²¹³

Law Lords and Lords Spiritual

The peers appointed under the Appellate Jurisdiction Act 1876 to perform the judicial functions of the House of Lords were styled Lords of Appeal in Ordinary. They could sit and vote for life, notwithstanding resignation or retirement from their judicial appointment. In March 2009, 22 members of the House of Lords had been appointed under the 1876 Act. Since the creation of the Supreme Court, however, the House of Lords ceases to have a judicial function, and the Appellate Jurisdiction Act 1876 has been repealed. Supreme Court judges are ineligible to sit in the House of Lords, and while the Lords of Appeal in Ordinary at the time of the creation of the Supreme Court were by statute to become the first justices of the Supreme Court,²¹⁴ they no longer sit and vote in the House of Lords or its committees.

²⁰⁹ See Brazier, *Constitutional Practice*, p 241.

²¹⁰ See p 149 above.

²¹¹ See p 179 below.

²¹² Full details of the activities of the Commission are to be found on its website. For proposals to enhance the status and role of the Commission, see HC 153 (2007–08); HC 137 (2008–09) (Public Administration Committee).

²¹³ For a full account, see Russell, *Reforming the House of Lords*.

²¹⁴ Constitutional Reform Act 2005, s 24.

Supreme Court judges appointed to the peerage under the 1876 Act are able to resume their parliamentary activities following their retirement from judicial office, though several who are eligible to do so have taken leave of absence from the House, whereby they effectively withdraw from participating in its activities. All holders of judicial office are disqualified from taking part in the activities of the House,²¹⁵ which means that the need for legal expertise to carry out its scrutiny work will now have to be met by the appointment as life peers under the Life Peerages Act 1958 of lawyers who do not hold judicial office. The judicial members of the House had in the past taken a particular interest in EU law and in debates about the reform of the legal profession on the one hand,²¹⁶ and human rights on the other.²¹⁷

The Lords Spiritual are 26 bishops of the Church of England; they hold their seats in the Lords until they resign from their episcopal office. The Archbishops of Canterbury and York and the Bishops of London, Durham and Winchester have the right to a seat. The remaining Lords Spiritual are the 21 other diocesan bishops having seniority of date of appointment, with the exception of the Bishop of Sodor and Man who may not take a seat. When a bishop with a seat in the Lords resigns or retires, his place in the Lords is taken by the next senior diocesan bishop.²¹⁸ In 1847, it was enacted that the number of bishops sitting in Parliament should not be increased whenever a new diocesan bishopric is created.²¹⁹ This right of representation is nevertheless not extended to other faiths or churches and its continued existence reflects the special constitutional position of the Church of England.

Although justified historically, such representation is bound to be closely questioned in an age which is simultaneously both more multicultural and more secular. It is possible for members and clergy of other churches and faiths to be appointed under the Life Peerages Act 1958, in the case of those churches and faiths which do not prohibit their senior clergy from accepting positions of political authority.²²⁰ But this is not the same as an entitlement to a guaranteed number of places. It is striking nevertheless that the House of Lords Reform Bill introduced by the Coalition government in 2012 proposed to retain the Lords Spiritual in what would have been a predominantly elected House. The government's ill-fated Bill proposed gradually to reduce the number of Lords Spiritual from its current 26 to 12 over a period of 15 years.

Hereditary peers

It was previously the case that a hereditary peerage carried with it the right to a seat in the House of Lords. The House of Lords Act 1999 now provides that hereditary peers are no longer entitled to membership of the Lords. But hereditary peers have not been excluded altogether. In order to expedite the passing of the House of Lords Act 1999, the government accepted an arrangement whereby 90 hereditary peers (plus the Earl Marshal and the Lord Great Chamberlain)²²¹ would remain in the Lords until the process of reform was

²¹⁵ Ibid.

²¹⁶ See HL Deb, 7 April 1999, cols 1307–1480.

²¹⁷ Particularly on the proceedings relating to the Human Rights Bill: see K D Ewing (1999) 62 MLR 79.

²¹⁸ Under the Ecclesiastical Offices (Age Limit) Measure 1975, bishops retire from their sees, and therefore from membership of the House, at age 70. Retired bishops are entitled to use the facilities of the House available to members of the House outside the Chamber.

²¹⁹ Ecclesiastical Commissioners Act 1847, s 2; Bishopsrics Act 1878, s 5.

²²⁰ For a valuable account of religious representation in the House of Lords, see C Smith [2002] PL 674, and A Harlow, F Cranmer and N Doe [2008] PL 490.

²²¹ The Earl Marshal has responsibility for ceremonial matters, while previous editions of the *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* referred to the Lord Chamberlain as 'the hereditary officer of state to whom the sovereign entrusts the custody and control of those parts of the Palace of Westminster not assigned to the two Houses' (such as the Queen's Robing Room). This passage has been removed from the current edition of the Companion.

completed.²²² These 90 are elected in accordance with the standing orders of the House. In 2013, the House of Lords was thus still graced by one duke, one marquess, 21 earls and countesses and 18 viscounts.

The removal of the hereditary peers was nevertheless challenged as breaching the Treaty of Union, which provides a guarantee that 16 Scottish peers would be accepted into membership of the House of Lords. But this was rejected by the House of Lords Committee of Privileges, which concluded that the Treaty of Union did not provide an unalterable restraint on the power of Parliament.²²³ Hereditary peers are now eligible to vote and to stand for election to the House of Commons, unless they are members of the House of Lords by virtue of the new procedures.²²⁴

Under the standing orders of the House governing the election of hereditary peers,²²⁵ 15 of the 90 places were set aside for those hereditary peers who were office-holders in the House: deputy speakers and deputy chairmen of committees. They were elected by the whole House, the remaining 75 places being elected by the hereditary peers to reflect the strength of the different parties from among their number. So, 42 places were allocated to the Conservatives; three to the Liberal Democrats; two to Labour; and 28 to the cross-benchers. These members were elected from constituencies of their own party or group (so that, for example, only Conservative hereditary peers elected the 42 Conservatives),²²⁶ though hereditary peers supporting other parties may stand as candidates in these elections.

A peerage cannot be alienated or surrendered, although under the Peerages Act 1963 a hereditary peer may disclaim his or her title for life.²²⁷ The primary purpose of granting this right was to enable hereditary peers to sit in the Commons, following an unsuccessful action by Tony Benn, then Viscount Stansgate by succession, who challenged the existing law which disqualified members of the Lords from standing for election to Parliament.²²⁸ In addition, the government's Constitutional Reform and Governance Bill 2009 proposed that excepted hereditary peers (that is to say those hereditary peers who survived the 1999 cull) should be entitled to resign from membership of the House of Lords, in the same way proposed for life peers. More importantly, the Bill also proposed an end to the by-elections to replace hereditary peers who die or resign. But these proposals were not included in the Constitutional Reform and Governance Act 2010.

²²² House of Lords Act 1999, s 2. For an account of how these figures were arrived at, see R Brazier, *House of Lords Act 1999*, *Current Law Statutes 1999*. In addition to the places reserved to hereditary peers by the House of Lords Act 1999, another ten were made life peers to enable them to remain. These were mainly hereditary peers of first creation. Another two hereditary peers reverted to sitting under the authority of life peerages which they already had.

²²³ *Lord Gray's Motion* 2000 SC (HL) 46.

²²⁴ House of Lords Act 1999, s 3.

²²⁵ HL SO 9.

²²⁶ Should a vacancy arise, provision is made in Standing Order 10 for a by-election, at which only those hereditary peers who remain in membership of the House may vote. So only the 41 remaining Conservative hereditary peers could vote in a by-election for a new Conservative hereditary peer to become a member of the House. See A Murphy (2003) 71 *The Table* 11.

²²⁷ Under the 1963 Act existing peers were given 12 months from royal assent to disclaim and new peers were given 12 months from the date of their succession (s 1). This still applies unless the peer is excepted from s 1 of the 1999 Act by s 2 of the same Act. A sitting member of the Commons was given one month from the death of his predecessor in which to disclaim (1963 Act, s 2); but this has been repealed by the 1999 Act. Where a peer disclaims his title, it could not be restored to him, although the title would pass to the next generation following the death of the person who disclaimed. A person who disclaimed could be restored to the House of Lords by a life peerage under the 1958 Act. It would presumably be possible – if unlikely – for a new hereditary peerage to be conferred on the person who disclaimed.

²²⁸ *Re Parliamentary Election for Bristol South East* [1964] 2 QB 257. It was under the 1963 Act that the Earl of Home disclaimed his title on being appointed Prime Minister in 1964 in succession to Mr Harold Macmillan.

I. Membership of the House of Lords

Although there are thus a number of different routes to membership of the House of Lords, a member may not take his or her seat until he or she has obtained a writ of summons, which is issued by direction of the Lord Chancellor, from the office of the Clerk of the Crown in Chancery (a senior officer of the House). New writs are issued before the meeting of each Parliament to all Lords – temporal and Spiritual – who are entitled to receive them.²²⁹ Writs are also issued to peers newly created during the life of a Parliament. But no writs are issued to any peer who is known to be disqualified.

There are currently six categories of disqualification:²³⁰

aliens;²³¹

those under the age of 21;²³²

those in respect of whom a bankruptcy restriction order has been made;²³³

those convicted of treason (until they have served their sentence or been pardoned);²³⁴

those convicted of other offences may resume their seats after serving a prison sentence,²³⁵

though the government's Constitutional Reform and Governance Bill 2009 proposed that members should be removed from the Lords on conviction of a criminal offence with a prison sentence of more than a year);

those who hold judicial office of certain kinds, which includes not only those who hold judicial office and who have been made life peers under the Appellate Jurisdiction Act 1876, but also those who hold less senior judicial office but who have been made life peers under the Life Peerages Act 1958.²³⁶

It is also necessary for a new peer to be formally introduced into the House. A day for this purpose is fixed by the Speaker and by custom not more than two introductions may take place on any one day. Lords are normally introduced by two peers 'of the same degree in the House'.²³⁷ It is not to be overlooked that despite the manner of its composition and the formality of its proceedings, the House of Lords exists principally to transact political business. This gives rise to questions about the political balance of the chamber and the obligations of its members.

The political composition of the House of Lords

The effect of the House of Lords Act 1999 was significantly to reduce the size of the House of Lords: in 1999, there were 1,295 members who were culled to 695 by October in the following year. The House of Lords was nevertheless by some way still the largest second

²²⁹ House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, para 1.09.

²³⁰ The Peerage Act 1963, s 6 removed the disqualification on peeresses in their own right to receive a writ of summons. See *Viscountess Rhondda's Claim* [1922] 2 AC 339.

²³¹ Act of Settlement 1700, s 3 (as amended by the British Nationality Act 1981, Sch 7).

²³² HL SO 2.

²³³ Insolvency Act 1986, s 426A.

²³⁴ Forfeiture Act 1870.

²³⁵ This is a matter which gave rise to some concern following the imprisonment of Lord Archer of Weston-super-Mare in 2001. There have been others since.

²³⁶ Constitutional Reform Act 2005, s 137.

²³⁷ House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, para 1.13.

parliamentary chamber in Europe, and since then its numbers have continued to grow, as the Coalition government has made a large number of appointments to redress the political balance it inherited from the previous Labour administration. It appears to be accepted that pending more radical reform of the House, (i) no one party should have an overall majority in the Lords (as was previously the case when the large body of hereditary peers gave the Conservatives a guaranteed majority), but (ii) the governing party should be the largest party, with the political composition of the Lords to be broadly reflective of ‘the share of the vote secured by the political parties in the last general election’.²³⁸

But although admirable, this is a principle that will be difficult to implement in a system where existing members cannot be removed, and where balance can be achieved only by new appointments. Thus, although the House has been reformed by the 1999 Act and although a large number of Labour peers were created, it was not until 2005 that Labour became the largest party, despite Labour having been in government since 1997. Similarly, although Labour lost the election in 2010, by 2013 it was still the largest party in the House, with 213 members, compared to the Conservatives of whom there were 160, the Liberal Democrats of whom there were 85, and ‘other parties’ of whom there were 12. The remaining places were occupied by 151 ‘crossbenchers’ (who sit as independents), 21 peers who were said to be ‘non-affiliated’, and 24 (not 26) Bishops. These figures exclude 52 peers deemed ineligible, either by disqualification or leave of absence.

The legislative role of the House of Lords makes it inevitable that the government should have some presence in the chamber, to ensure that business is conducted efficiently and that an account is given of government proposals. In recent years the practice has been for only two or three Cabinet ministers to be drawn from the House of Lords, though these do not now necessarily include the Lord Chancellor. By convention the Prime Minister must be a member of the House of Commons and the same is true of other senior Cabinet posts: it is inconceivable in particular that the Chancellor of the Exchequer could be a member of the House of Lords.²³⁹ But there is no reason in principle why other ministers should not be based in the Lords and the life peerage provides an opportunity for the Prime Minister to bring into his or her government an individual who may not be a member of Parliament (as in the case of Lord Mandelson by Mr Brown).

The 1958 Act also provides an opportunity for the Prime Minister to retain the services of a minister who may have lost his or her Commons seat in a general election (as in the case of Mrs Lynda Chalker who lost her seat in 1992 but who was elevated to the peerage, retaining her position as minister for overseas development in Mr Major’s government). In 2013 there were in fact 16 ministers who held seats in the Lords, with the ministerial teams of most departments including a member of the Lords. However, only one of these was a member of the Cabinet (the Leader of the House), with another (a ‘Senior Minister of State’ with responsibility for faith and communities) being entitled to attend Cabinet. There are also 10 government whips in the Lords, this position sometimes combined with other ministerial responsibilities. Previous governments in contrast have tended to draw more freely on the House of Lords for recruitment to the Cabinet.

Obligations of membership

Unlike the House of Commons, many members of the House of Lords are not engaged full time in the business of the House or activities incidental thereto. Indeed it is one of the strengths of the House that its many part-time members are occupied in other pursuits, on

²³⁸ HM Government, *The Coalition: Our Programme for Government* (2010), p 27.

²³⁹ Lord Carrington was Foreign Secretary in the House of Lords in Mrs Thatcher’s government until he resigned in 1982 following the invasion of the Falkland Islands.

the experience of which they may draw in their work in the upper chamber. But there must be some obligation of attendance and participation, particularly on the part of the life peers who have voluntarily assumed the benefits of office, and complaints are sometimes made that not all members play as full a part in the work of the House as they should. House of Lords Standing Order 23 – introduced on 16 June 1958 – provides that ‘Lords are to attend the sittings of the House or, if they cannot do so, obtain leave of absence, which the House may grant at pleasure’.

It is also provided, however, that this particular standing order ‘shall not be understood as requiring a Lord who is unable to attend regularly to apply for leave of absence if he proposes to attend as often as he reasonably can’.²⁴⁰ At any time during a Parliament, a Lord may obtain leave of absence for the rest of the Parliament by applying in writing to the Clerk of the Parliaments.²⁴¹ Before the beginning of every new Parliament, the Clerk of the Parliaments (a senior officer of the House) writes to each member who was on leave in the previous Parliament asking whether he or she wishes to apply for leave in the forthcoming Parliament.²⁴² In 2013, there were seven peers who had applied for leave of absence, including a number of life peers who had been appointed under the Appellate Jurisdiction Act 1876.

A peer who has been granted leave of absence is expected not to attend sittings of the House during the period of leave, although provision is made for a peer who wishes to terminate his or her leave of absence to give a month’s notice.²⁴³ The House has no power to expel a member but it does have the power to suspend members for breach of the rules governing conduct.²⁴⁴ This power was exercised in 2009 in relation to two Labour peers who had been reported by the *Sunday Times* as being willing to use their position to promote commercial interests for financial advantage.²⁴⁵ More recently a number of other peers were suspended in 2010 and 2011 following irregularities over expenses, in the latter case the suspensions coinciding with the imprisonment of the members in question. The length of the suspensions varied, but one case was until the end of the parliamentary session in question and another was for 12 months, in that case coinciding with a prison sentence relating to the same matter.

Since 1957 a daily attendance allowance has been paid and travel costs are met; attending peers also receive allowances for overnight stays away from home, as well as for secretarial and research assistance. It was the breach of the rules relating to these allowances that led to the disciplinary suspensions referred to above. These allowances notwithstanding, there is a sense that membership of a part-time legislative chamber on an unpaid basis is difficult for people from outside London and the south-east. To this end, it is noteworthy that the ill-fated House of Lords Bill 2012 (on which see below) proposed that peers (whether elected or nominated under the scheme in the Bill) should be paid. Remarkably, however, it also proposed that payment should be linked to the member’s participation in the work of the House, with a determination to be made by Independent Parliamentary Standards Authority as to what counts as participation for these purposes. Members of the House of Lords continue to be unpaid.

²⁴⁰ HL SO 23(1).

²⁴¹ *Ibid.*, 23(2).

²⁴² *Ibid.*, 23(3).

²⁴³ *Ibid.*, 23(4). It was hoped in this way to diminish the influence of backwoodsmen – mainly hereditary peers who played little part in the work of the House but who might be summoned by their party leaders to vote on crucial and contentious divisions. After the culling of the hereditary peers, this ought to be much less of a problem today.

²⁴⁴ HL 87 (2008–09). Powers of expulsion were included in the government’s Constitutional Reform and Governance Bill 2009. But they were not enacted.

²⁴⁵ HL 88 (2008–09). And see ch 9.

Further reform

The House of Lords Act 1999 was designed to be only the first step in the process of reform. But as was discovered by the Royal Commission on the Reform of the House of Lords which reported in 2000, it is difficult to produce a solution for a reformed House which commands agreement across the political spectrum.²⁴⁶ Democratic instinct suggests that the only credible solution is a wholly or largely elected (directly or indirectly) Upper House (perhaps one renamed as a Senate).²⁴⁷ But the difficulty with this is that it could end up with a House wholly dominated by the political parties and, depending on election results, with the same party in control of both the Commons and the Lords. In that case, there would be little prospect of effective scrutiny or revision of government business. Conversely, election could lead to a House with a majority different from that of the Commons, leading to the alternative result of stalemate or gridlock in the legislative process.

It is thus a curious paradox that a nominated House without an electoral mandate is able to produce a revising chamber which simultaneously provides a greater measure of independent scrutiny of government than the House of Commons, without at the same time undermining the political supremacy of the House of Commons, or unduly impeding or frustrating the implementation of the government's programme.²⁴⁸ Any change to these arrangements ought logically to begin by asking what it is we expect the House of Lords to do and to tailor composition to function. If the purpose is to act as a restraint on government, the case for an elected chamber would be irresistible (provided election were guaranteed to produce a House with a different political majority from the Commons). If, however, the purpose is (as currently) that of revision and scrutiny, there may be a case for other methods of composition, which is not to say that the current arrangements for the nominated house can easily be justified.

It has, however, proved to be impossible to build a consensus around the next stage of reform, perhaps because there is no consensus on the role of a second chamber in the British constitution. Deep divisions were on display in 2007 when the Commons voted for a wholly or largely (80 per cent) elected House of Lords, to be followed only a few days later by the House of Lords voting for a wholly nominated chamber.²⁴⁹ A House of Lords Reform Bill was introduced in 2012, all three main political parties having promised further House of Lords reform in the general election campaign in 2010. The latter measure provided for the phased introduction of a second chamber of 360 directly elected members, plus 90 appointed members, 12 Bishops and an indefinite number of 'ministerial members'. The elected members would be directly elected by a system of proportional representation for terms of 15 years each, with elections taking place every five years for a third of the seats in the reformed Chamber.

It was not proposed under these plans to affect the primacy of the House of Commons, or alter the powers of the House of Lords. Indeed, it was expressly provided that the Parliament Act 1911–1949 would remain in force, a provision that seemed unnecessary in the light of the lack of any intention to repeal them.²⁵⁰ The electoral system would be similar to that used for

²⁴⁶ For good accounts of the difficulties, see Bogdanor, *Politics and the Constitution*, ch 14; Brazier, *Constitutional Reform*, ch 11; and Shell, *The House of Lords*.

²⁴⁷ See Richard and Welfare, *Unfinished Business*. See also R Blackburn, in Blackburn and Plant, *Constitutional Reform*, ch 1 and Billy Bragg, *A Genuine Expression of the Will of the People*.

²⁴⁸ The elected option was rejected by the Royal Commission on the Reform of the House of Lords which had been appointed in 1999, although it did recommend that there should be an elected element: Cm 4534, 2000.

²⁴⁹ HC Deb, 6 March 2007, col 1389, 7 March 2007, col 1524; HL Deb, 12 March 2007, col 451, 13 March 2007, col 626.

²⁵⁰ On the continuing significance of the Parliament Acts, see Pannick [2012] PL 230.

European parliamentary elections, with Great Britain being divided into ten regional constituencies from which members would be elected from party lists (and in Northern Ireland by single transferable vote from a single constituency). But although a government Bill designed to implement a provision in the Coalition agreement, this apparently well thought-out and elegant solution to an intractable problem was withdrawn after Second Reading, in the face of strong opposition from Conservative backbenchers.

J. Conclusion

The Coalition government attempted unsuccessfully to change the rules relating to the composition of Parliament, ostensibly to make the House of Commons more representative of popular opinion, and to make the House of Lords more democratic. The failure of both initiatives – for different reasons – may make it difficult to revive campaigns for electoral reform or an elected House of Lords, at least for the foreseeable future.

The United Kingdom thus unusually retains a legislature in which the lower house is elected by first past the post in single member constituencies, and the upper house is wholly unelected. In this broad sense, the United Kingdom thus began the 21st century with a legislature similar in structure to the one in which it began the 20th century. Yet behind these formal structures a great deal has changed, with universal suffrage for the House of Commons creating controversial and politically loaded problems about eligibility to vote, the registration of electors, the distribution of boundaries, and the regulation of candidates and political parties.

The position of the House of Lords is no less controversial or politically loaded. The removal of the great bulk (but not all) of the hereditary peers has been accompanied by a large increase in the number of peers appointed under the Life Peerages Act 1958 in order to create a House more representative of party strength in the country. While this is a laudable goal, the current method by which it is advanced is unlikely to be sustainable for long.

CHAPTER 8

Role of Parliament

In this chapter we move from a consideration of the composition of Parliament to an assessment of its role and functions in the modern constitution. At a simplistic level, Parliament's role and purpose seems obvious: it is the body that makes the laws by which we are governed. Of course, it does not make all the laws by which we are governed: many laws are now made by the institutions of the EU, and others still are the product of the common law and as such they are made by judges. Nevertheless, EU law applies in the United Kingdom by virtue of an Act of Parliament, while Parliament always has the authority to change common law rules and frequently does so, with legislation having displaced the common law in most areas where the latter had generally prevailed.

In performing its law-making function, Parliament purports to be broadly representative of the mood of the nation, as determined at the most recent general election. Law will thus have a partisan edge, being the product of the political process. But beyond this rather simple account, Parliament has many other functions the scope and content of which are unclear, as would be expected of an institution that has no expressly defined role, and which has had an existence for an unbroken period of many hundreds of years. Although we live in a more democratic age, Parliament existed in pre-democratic times; it had a role and functions before the emergence of the democracy that it helped to create, and of which it is now the living embodiment, in what is a dynamic and evolving process.

A. The functions of Parliament

Contemporary discussions of the place of Parliament in the Westminster system might begin with its role in (i) supplying the personnel of government, as (ii) the institution through which the government in turn must govern to secure its money and its business, while (iii) having a responsibility to hold the government to account in the conduct of the nation's affairs. The effectiveness of these sometimes conflicting roles depends to some extent on the partisan and adversarial nature of Parliament, which – although sometimes apparently unattractive to many – is a necessary feature of the Westminster system if its contradictions are to be reconciled: one side of the House supplies the government and will generally ensure safe passage of its measures; the other will principally be responsible for scrutiny and accountability. Both are important.

A classic statement of the importance of parliamentary control of government and its limitations was made by the political philosopher, John Stuart Mill:

Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors.¹

¹ Mill, *Representative Government*, ch 5.

This high-principled analysis is still of value, and finds an echo in the important report of the House of Commons Reform Select Committee that ‘Government should get its business, the House should get its scrutiny and the public should get listened to’.² Analysis of this kind also has important implications for Parliament: if it is a duty of the House to find out about, scrutinise and influence the many acts of government agencies, two consequences follow. First, the House needs procedures and resources to match the scale of the task; second, the members of the House who do not hold ministerial office need the political will to do more than simply sustain the government in office while voting through the measures laid before it. There is a need for committed parliamentarians as much as for committed ministers.

In this chapter we concentrate on three major areas of Parliament’s work. We begin with its role in voting supply, which Parliament is expected both to scrutinise and authorise simultaneously. We begin with supply because of its importance: without money the government would be unable to do very much. Thereafter we consider the legislative process, and the means by which the government gets its business through a Parliament where government business has priority over that of private members. And finally we examine the role of Parliament in the scrutiny of government, and the different procedures that have been adopted for this purpose. In all of these areas, significant procedural changes have taken place or have been proposed in recent years, often in response to criticism of parliamentary shortcomings.

In concentrating on these three core functions, we do not suggest that these exhaust the functions of Parliament. Thus, Parliament also has an important role to play in the redress of individual grievances. The redress of individual grievances is an aspect of the scrutiny of administration generally, and also relevant is the Parliamentary Ombudsman, whose work will be considered in chapter 23 D. Parliament’s other main role is to act as a constitutional watchdog, and to this end influential select committees dealing with constitutional questions have been formed by both the House of Commons and the House of Lords. This is a matter to which we return later in this chapter, while the related work of the Joint Committee on Human Rights is addressed in chapter 14.

Beyond that, it is sometimes said that Parliament represents the ‘conscience of the nation’,³ which places it in a unique legal and political position. In the United Kingdom, unlike in other countries, it is Parliament that has the last word on controversial moral questions, and it is to Parliament that the courts look for guidance and leadership.⁴ Thus, as pointed out in the Court of Appeal, ‘the circumstances in which a pregnancy may be terminated were decided by Parliament’, while ‘the abolition of the death penalty following the conviction for murder was, similarly, decided by Parliament’.⁵ It is because it is Parliament and not the judges who represent the ‘conscience of the nation’ that the courts in recent years have been reluctant to sanction as a defence to murder those who participate in euthanasia and assisted suicide.

B. Authorising expenditure and providing income⁶

No government can exist without raising and spending money. In the Bill of Rights 1689, art 4, the levying of money for the use of the Crown without grant of Parliament was declared illegal. Relying on the principle that the redress of grievances preceded supply, the Commons could after 1689 insist that the Crown pursued acceptable policies before granting the taxes

² HC 1117 (2012–13), para 20.

³ *R (on the application of Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961, [2013] WLR(D) 326, para 155.

⁴ *Ibid*, para 112.

⁵ *Ibid*, para 155.

⁶ See also J F McEldowney, in Jowell and Oliver (eds), *The Changing Constitution* (7th edn), ch 13.

or other revenue that the Crown needed. It has been said of the financial procedure of Parliament that the Crown requests money, the Commons grants it, and the Lords assents to the grant.⁷ Today, the assent of the Lords is only nominal and it is generally regarded as vital to a government's existence that its financial proposals be accepted by the Commons. It is unlikely that a government would accept that the Commons should modify its expenditure proposals, and it is likely that a government that failed to ensure supply would have to resign.⁸

It is important to emphasise that Parliament has two roles: the first is to authorise the government's proposed expenditure; and the second is to authorise the raising of money (through taxation) to pay for it. Both require legislation. It is important also to emphasise that it is a fundamental constitutional principle that no payment out of the national Exchequer may be made without the authority of an Act of Parliament, and then only for the purposes for which the statute has authorised the expenditure.⁹ Taxpayers and certain interest groups may have a sufficient interest in an expenditure decision to seek judicial review of its legality.¹⁰ It is an equally fundamental constitutional principle that no charges by way of taxation may be imposed by the government on the citizen without the authority of an Act of Parliament, a principle that gives the citizen protection in the courts against unauthorised tax or other charges.¹¹

Basic principles and rules of financial procedure

The financial procedures of the Commons are intricate and can only be outlined here, the basic principles of financial control by, and accountability to, Parliament forming part of a broader public expenditure process, which has helpfully been described as having four stages: (i) expenditure planning by the executive; (ii) parliamentary debate and approval of the executive's request for supply; (iii) spending by the executive of the money voted by Parliament; and (iv) accounting for the money spent.¹² Our concern in this chapter is principally with the second of these steps in the process. But although the 'power of the purse' is 'central to the ability of Parliament to call government to account',¹³ it ought not to be assumed that Parliament has developed adequate methods for this purpose.

It has been pointed out that, in reality 'little substantial scrutiny is involved' in these procedures, for 'the policy objectives on which the money is spent are not determined by the Commons but by the government of the day'.¹⁴ Indeed, one prominent backbencher referred to the 'charade' of the House of Commons 'rubber stamping tablets of stone handed down by the executive of the day'.¹⁵ This is perhaps inevitable in a parliamentary democracy which operates generally on the basis of a mandate claimed by government for a range of actions: the government can normally expect that its promises will not be frustrated by the Commons.

⁷ Erskine May, *Parliamentary Practice*, p 711.

⁸ Hence the need for a general election after the Lords had rejected the Liberal government's Finance Bill in 1909. In 1975, the failure of the Prime Minister of Australia to ensure supply (because of opposition from the Australian Senate to two Appropriation Bills) was the reason given by the Governor General for dismissing him.

⁹ *Auckland Harbour Board v R* [1924] AC 318.

¹⁰ *R v Foreign Secretary, ex p World Development Movement* [1995] 1 All ER 611: decision to finance Pergau Dam in Malaysia declared to be ultra vires the Overseas Development and Cooperation Act 1980. The government made up the money from other public funds: HC Deb, 13 December 1994, col 773.

¹¹ And see *Congreve v Home Office* [1976] QB 629; *Woolwich Building Society v IRC (No 2)* [1993] AC 70.

¹² White and Hollingsworth, *Audit, Accountability and Government*, p 1.

¹³ *Ibid.*

¹⁴ J F McEldowney, in Jowell and Oliver (5th edn), p 381.

¹⁵ HC Deb, 3 December 2002, col 871 (Andrew Mackinley).

Yet although government can properly claim the opportunity to implement its mandate, this ought not to be at the expense of rigorous and effective financial scrutiny of how money is to be spent. As the Clerk of Supply has pointed out, it is for the members of Parliament themselves to determine ‘the extent to which the process of authorising public expenditure constitutes a rubber stamp’.¹⁶

According to Erskine May, three key rules govern present procedure.¹⁷ For the purpose of these rules, the word ‘charge’ includes both charges upon the public revenue, i.e. expenditure, and charges upon the people, i.e. taxation:

(1) A charge ‘whether upon public funds or upon the people’ must be authorised by legislation;¹⁸ it must generally originate in the Commons, and money to meet authorised expenditure must be appropriated in the same session of Parliament as that in which the relevant estimate is laid before Parliament.

(2) A charge may not be considered by the Commons unless proposed or recommended by the Crown. The latter requirement is expressed in House of Commons Standing Orders, dating in part from 1713: ‘This House will receive no petition for any sum relating to public service or proceed upon any motion for a grant or charge upon the public revenue . . . unless recommended from the Crown.’¹⁹ The government thus has formal control over almost all financial business in the Commons, the ability of Opposition and backbenchers to propose additional expenditure or taxation correspondingly subject to serious restrictions.

(3) A charge must first be considered in the form of a resolution passed by the House, which forms an essential preliminary to the Bill or clause by which the charge is authorised. Certain financial Bills must be preceded by such a resolution before they can be read a second time. But for most Bills, whether the main object or an incidental object is the creation of a public charge, the financial resolution normally follows the second reading and must be proposed by a minister.²⁰

The elaborate system of controlling expenditure that exists today still owes much to reforms linked with Gladstone’s tenure of office as Chancellor of the Exchequer in the 1860s, though they have since been overhauled, most notably by the Government Resources and Accounts Act 2000.²¹ The work of the Commons is conducted on a sessional basis. Following the Fixed-term Parliaments Act 2011, each session now runs for a year from early May, having previously run from November. However, the government’s financial year runs from April, thereby still (just) crossing two parliamentary sessions. The result is a complex annual financial cycle, which will now be described – first in relation to the authorisation of expenditure (supply), and second in relation to taxation.

The system of supply: government estimates

Funds are requested by the government by means of estimates. These are prepared in government departments and examined by the Treasury to ensure that they are consistent with the government’s overall spending plans. After scrutiny by and debate in Parliament, the estimates are approved by a resolution of the House of Commons. Scrutiny of individual

¹⁶ C Lee (2004) 72 *The Table* 14.

¹⁷ Erskine May, ch 32. For discussion of earlier forms of the rules, see Reid, *The Politics of Financial Control* and M Ryle, in Walkland (ed.), ch 7.

¹⁸ Erskine May, p 713.

¹⁹ HC SO 48. For background, see Reid, pp 35–45.

²⁰ HC SO 50.

²¹ See HC 841 (1999–2000), Annex A; and HC 426 (2007–8), paras 15–22.

departmental estimates is now mainly undertaken as a ‘core task’ of select committees,²² which may take evidence from ministers and officials (but there is no suggestion that the estimates should be ‘cleared’ by the select committees before being put to the House for approval).²³ Although select committees may receive advance copies of the estimates in draft, it has been claimed that they may have only between two and four weeks at most to consider them.²⁴ However, there is also an opportunity for the House as a whole to debate and vote on individual estimates on three estimates’ days set aside for this purpose under the Commons standing orders.²⁵

These debates in principle are informed by the reports of the select committees, with the time allocated on the basis of advice given by the chairman of the Liaison Committee (the committee of select committee chairmen).²⁶ Under Standing Order 55, 14 days must elapse between the presentation of the estimates and the vote to authorise spending. Nevertheless, serious questions have been raised about the adequacy of the procedures, having regard to the sums of money involved, the resources at the disposal of the House, and the time available to it.²⁷ According to one leading parliamentarian when in opposition:

Select committees need to exercise more oversight of departments’ spending. Most now look at annual reports and spending plans. But few get into the detail of their department’s budget, and there’s no real link between the government’s estimates and the committee responsible, other than the nomination by the liaison committee of a handful of reports for debate on the floor of the house.²⁸

While at times difficult to comprehend, the financial procedure of the House remains crucially important: the scrutiny of government spending (and the attendant authorisation for the raising of taxes) is one of the most important functions of Parliament. The current procedure provides that once the House of Commons has agreed the grants set out in the estimates, the Supply and Appropriation (Main Estimates) Bill is introduced and passed through all stages before the summer recess. Once passed, the Act (known until recently as the Appropriation Act) will do the following:

(a) authorise the issue from the Consolidated Fund of the balance of the grant of the estimates for the current financial year.²⁹ Some money will already have been voted on account to meet departmental expenditure. This is because – as already indicated – the Supply and Appropriation (Main Estimates) Act will not normally be passed until after the financial year has started, which means that unless some other method were available to supply money to the departments, they would be unable to carry out their business. So in the Supply and Appropriation (Anticipation and Adjustments) Act passed earlier in the session (but in the previous financial year), money will be provided by a vote on account to fund activities pending the enactment of the Supply and Appropriation (Main Estimates) Act.³⁰

²² HC 514 (2008–9).

²³ HC 426 (2007–8), para 68. See also HC 321 (2000–1), para 5.

²⁴ *The Guardian*, 9 December 2009 (Michael Fallon).

²⁵ HC SOs 54, 55. It has been proposed that this should be extended to five days. See HC 426 (2007–8) and HC 1117 (2008–9).

²⁶ HC SO 145(3). See HC 514 (2008–09).

²⁷ HC 426 (2007–8).

²⁸ *The Guardian*, 9 November 2009 (Michael Fallon). For proposals that answer such concerns, see HC 426 (2007–08) (pp 193–4 below).

²⁹ The Consolidated Fund is the government’s account into which revenue derived from taxation is paid.

³⁰ The vote on account is typically 45 per cent of the amount voted to the service or activity in the year to which it is to apply. See HC 1235 (2004–5), para 3.

(b) specify in a detailed schedule to the Act the total net resources, the net capital, and the net cash authorised for each department or service in the year in question. In relation to each department or agency, there is also a brief description in the Schedule of the ways in which this money is to be used. But this description is in the most general terms, there being no detailed breakdown of how the allocated cash is to be distributed between identified uses. In the case of the Department of Work and Pensions, less than a page explains how over £85 billion is to be spent on social security benefits.³¹ Nevertheless, in this way, the Supply and Appropriation (Main Estimates) Act specifies both the use and expenditure of money as well as the general purposes for which it may be spent.

There will not normally be a debate on the Supply and Appropriation (Main Estimates) Act.

Although the Supply and Appropriation (Main Estimates) Act will authorise the bulk of expenditure for the current year, there are, however, two wrinkles that may need to be ironed out. First, a department may exceed its estimated expenditure during the current financial year – because of unforeseen circumstances or a new policy initiative; in that case supplementary estimates will have to be approved, usually towards the end of the financial year in question. Secondly, there is also the possibility that a department may spend more than provided for in the annual estimate, but has been unable to cure the excess before the end of the financial year. This will have to be authorised after the event by what is referred to as an excess vote (usually in an Act of Parliament in the next financial year, though sometimes later still). These matters are usually addressed in a separate Supply and Appropriation Act.

The system of supply: statutory authorisation

The three principal statutes in a typical financial year for the grant of supply are thus the Supply and Appropriation (Anticipation and Adjustments) Act (passed in March) to provide money on account to fund activities from the start of the new financial year; the Supply and Appropriation (Main Estimates) Act (passed in July) to deal with the main estimates for the new financial year; and the Supply and Appropriation (Anticipation and Adjustments) Act (passed in the following March) to deal with supplementary estimates in the financial year about to end, and excess spending in the previous financial year. Any excesses for the year just ending will be dealt with in the Supply and Appropriation (Anticipation and Adjustments) Act in the following March (and perhaps in the March after that).

By way of illustration, between March 2012 and March 2013, the three pieces of financial legislation crossing the boundaries of two parliamentary sessions provided as follows:

(1) The Supply and Appropriation (Anticipation and Adjustments) Act 2012 received the royal assent on 8 March 2012. This authorised on account the use of resources for the service of the following financial year (ending on 31 March 2013) and the issuing of money from the Consolidated Fund for these purposes. The sums involved were £233.1 billion and £205 billion respectively. The same Act also authorised the use of additional resources in the current financial year (ending 31 March 2012) of £12 billion for purposes specified in the Schedule, and a much smaller sum to cover excesses in the previous year 2010–2011.

(2) The Supply and Appropriation (Main Estimates) Act 2012 received the royal assent on 17 July 2012, well into the financial year. This authorised the use of additional resources of £287.6 billion for the service of the year ending 31 March 2013. It also authorised the Consolidated Fund to pay out up to an additional £252.9 billion, the sums being appropriated under many separate headings. Together the Supply and Appropriation (Anticipation and Adjustments) Act 2012 and the Supply and Appropriation (Main Estimates) Act 2012

³¹ See Supply and Appropriation (Main Estimates) Act 2012, Schedule.

thus authorised a total of c £458 billion to be paid from the Consolidated Fund in the financial year 2012–2013.³²

(3) The Supply and Appropriation (Anticipation and Adjustments) Act 2013 received the royal assent on 26 March 2013. Apart from providing money on account for the financial year 2013–2014 in the manner described above, it also made supplementary provisions for 2012–13 (which included a small increase in current spending, and a bigger reduction in capital spending, so that there was an overall reduction). These supplementary measures related to several departments. The 2013 Act in addition made provision for an excess vote for 2011–2012, as well as for late excesses (of very small amounts) for both of the years before that.

This, however, will not be the whole of it; other government expenditure is authorised by what are referred to as Consolidated Fund standing services: these charges have separate statutory authority and do not need annual approval. This form of public spending is used for matters such as the Civil List, judicial salaries, and payments to the European Union,³³ and accounts for in excess of another £20 billion.³⁴ An additional standing charge was introduced by the Banking Act 2009 in the wake of the global banking crisis. If the Treasury is satisfied that the need for the expenditure is too urgent for arrangements to be made for the provision of money by Parliament, it may be met by payments from the Consolidated Fund.³⁵ Where money is paid in reliance of this remarkable power, the Treasury must report to Parliament specifying the amount paid ('but not the identity of the institution to or in respect of which it is paid').³⁶

And this still is not the whole of it, for there is also a Contingencies Fund which may be used to meet unforeseen government expenditure,³⁷ the fund being of an amount equal to 2 per cent of the net cash requirement for the previous year.³⁸ Although the Fund may not be drawn upon for any purpose for which legislation is necessary until a second reading has been given to the Bill in question, the existence of the Fund is a striking exception to the principle that parliamentary authority should be obtained before expenditure is incurred; effective scrutiny of the Fund depends on the Treasury, backed up by the Comptroller and Auditor General's powers of audit. The legality of payments from the Fund appears uncertain, but is not likely to arise for decision in the courts.³⁹ Indeed, decisions of the courts that certain government expenditure is unlawful may lead to the Fund being used to underwrite the contested expenditure.⁴⁰

The raising of money: taxation and the budget

Government expenditure must be paid for from taxation, which must in turn be authorised by Parliament.⁴¹ While many forms of revenue, such as customs and excise duties, are raised

³² As might be expected the largest appropriations were to the large spending departments, such as Health, Work and Pensions, Defence and Local Government.

³³ See HC 385 (2013–14) (Consolidated Fund Account).

³⁴ See HC 484 (2004–05). This contributes to what has been said to be 'more than a third of government spending included in budgets' which is not voted in Estimates: HC 426 (2007–08), para 28.

³⁵ Banking Act 2009, s 228(5).

³⁶ Ibid, s 228(6). But even this latter obligation can be dispensed with on public interest grounds: s 228(7).

³⁷ See J F McEldowney [1988] PL 232.

³⁸ Miscellaneous Financial Provisions Act 1946; Contingencies Fund Act 1974.

³⁹ HC 118–1 (1980–81) p xiv; HC 137 (1981–2), app 20; HC 24–1 (1982–3), p xliii. And see J F McEldowney, in Jowell and Oliver (6th edn), pp 367–8.

⁴⁰ See McEldowney, *ibid*, pp 367, 370 citing *R v Foreign Secretary, ex parte World Development Movement* [1995] 1 All ER 611 (Pergau Dam).

⁴¹ See *Congreve v Home Office* [1976] QB 629.

under legislation that continues in force from year to year, some taxes, notably income tax and corporation tax, are authorised from year to year. The machinery for the collection of these taxes is permanent but Parliament must approve each year the rates of tax. The current practice is still for the government to present its budget in the Spring (despite the change to the parliamentary calendar), with an assessment of the economic position and an account of the government's proposed tax and spending plans having previously been announced in the *Autumn Statement*.

The contents of the budget are kept secret until the speech is delivered. While the government is collectively responsible for the budget speech and the Chancellor prepares it in close consultation with the Prime Minister, the contents are traditionally made known to the Cabinet only on the previous day or even on the morning of the speech. Coalition government will make it necessary to ensure that both parties in government are fully aware of Budget proposals, and it is important to this end that a Liberal Democrat occupies the position of Chief Secretary to the Treasury. The Chancellor may find it necessary to announce changes in indirect taxation and expenditure decisions at other times in the year.

As soon as the Chancellor's speech is completed, the House passes formal resolutions that enable immediate changes to be made in the rates of existing taxes and duties, and give renewed authority for the collection of the annual taxes. These resolutions are confirmed by the House at the end of the budget debate. The taxing resolutions are later embodied in the annual Finance Act. The effect of any changes made by the Finance Act may be made retrospective to the date of the budget or any selected date. It was for long the practice to begin at once to collect taxes under the authority of the budget resolutions alone. But in *Bowles v Bank of England*,⁴² Bowles successfully sued the Bank for a declaration that it was not entitled to deduct any sum by way of income tax from dividends, until such tax had been imposed by Act of Parliament.

This latter decision illustrates the principle in *Stockdale v Hansard*,⁴³ that no resolution of the House of Commons can alter the law of the land. The decision made it necessary to pass a law which has now been re-enacted in the Provisional Collection of Taxes Act 1968, which gives statutory force for a limited period to resolutions of the House varying an existing tax or renewing a tax imposed during the preceding year. The Act was amended most recently by the Finance Act 2011 to take account of the Fixed-term Parliaments Act 2011.⁴⁴ The effect of these latter amendments is that a resolution can be carried over from one parliamentary session to another (as the new parliamentary calendar requires), and that an Act confirming the resolutions must become law within seven months of the date of the resolution.⁴⁵

Because the Finance Bill must become law by a set date, the government must ensure that it is passed by the Commons and sent to the Lords as quickly as possible. Although the House of Lords generally debates the Finance Bill on its second reading, its passage through the Lords is unopposed. Unlike the Appropriation Bills, the Finance Bill is not always certified as a 'money Bill' for the purposes of the Parliament Act 1911. Nevertheless, it would be a serious challenge to the financial privileges of the Commons for the Lords to seek to amend a Finance Bill, which comes within the hallowed class of 'Bills of Aids and Supplies',⁴⁶ amendments to which the House of Commons typically opposes without any reason being given, in circumstances where the House of Lords would always give way.⁴⁷

⁴² [1913] 1 Ch 57.

⁴³ (1839) 9 A & E 1; ch 9A.

⁴⁴ HMRC, Provisional Collection of Taxes Act 1968: Amendments to Section 1 (2011).

⁴⁵ As now amended the Act applies to income tax and corporation tax, as well as a range of other taxes and duties. For details, see Erskine May, pp 778–9.

⁴⁶ Erskine May, p 795.

⁴⁷ House of Lords Constitution Committee, HL Paper 97, 2010–12, App 2 (Commons Financial Privilege).

Improving financial scrutiny

As pointed out above, it is expected that Parliament should play a key role in scrutinising government spending. But as also pointed out, there are serious concerns about the way in which that role is currently being performed, concerns which were reinforced by a powerful report by the Liaison Committee (the committee of Select Committee chairmen) entitled *Recreating Financial Scrutiny*.⁴⁸ The purpose of this latter report was to propose steps to enhance parliamentary control of government spending, in view of the Committee's concern that for 'far too long the House has shirked the task of providing itself with the means to carry out financial scrutiny effectively, and it is time that the House was more assertive in this area'.⁴⁹

The first problem identified by the Committee was the complexity of government finances, with three different financial frameworks in use: government spending reviews (which do not require parliamentary authority); estimates (for which parliamentary authority is required for anticipated government spending); and resource accounts (in which departments account for their expenditure). The Treasury had, however, undertaken a major revision of government finances,⁵⁰ aiming 'to create a single, coherent financial regime, that is effective, efficient and transparent, enhances accountability to Parliament and the public, and underpins the Government's fiscal framework'. This 'highly ambitious' initiative was warmly welcomed by the Liaison Committee, which also recognised that in 'revising the basis of Parliament's financial control and the system of reporting to Parliament, [the project] is potentially a historic development in the long story of Parliament's scrutiny of government finances'.⁵¹

Simplification of government finances and better quality information for Parliament address only part of the problem: others are the opportunities for and the willingness of the House to take its responsibilities more seriously. Apart from a 'sensible division of tasks' between select committees and the House itself, the Liaison Committee identified other needs if these responsibilities are more effectively to be discharged, notably (a) the ability to engage with financial issues under discussion within government before decisions are made; (b) adequate opportunities to debate and vote on financial decisions, including specific spending proposals, after the government has made them; and (c) expert assistance for members on financial matters.⁵² The main issue in relation to (a) is the government's triennial spending review, which sets out the government's spending plans for the next three years.

So far as (a) is concerned, the committee was critical of the limited time available to the House to consider the Spending Review, this making 'a mockery of the House's right to scrutinise government expenditure'. It recommended that 'the results of Spending Reviews be the subject of a day's debate on the floor of the House', and that 'the timing be such that select committees can report on the outcome in order to inform that debate'.⁵³ So far as (b) is concerned, steps were proposed to enhance the work of the committees, while growing cooperation between the Public Accounts Committee (responsible for monitoring government expenditure) and the other select committees (responsible for scrutinising government estimates) was welcomed.⁵⁴ And so far as (c) was concerned, the need here was for increased expertise in scrutiny of budgets and budget management, a need that could be met in part by increased resources for the Committee Office Scrutiny Unit and the better training of MPs.⁵⁵

⁴⁸ HC 426 (2007–08).

⁴⁹ *Ibid.*, para 89.

⁵⁰ See Cm 7170, 2007; 7567, 2009; HC 804 (2008–09); HC 1074 (2008–09).

⁵¹ HC 426 (2007–08), para 38.

⁵² *Ibid.*, para 62.

⁵³ *Ibid.*, para 66.

⁵⁴ *Ibid.*, paras 69–71.

⁵⁵ *Ibid.*, paras 85–87. The Scrutiny Unit is part of the Committee Office and provides expert advice to Select Committees, especially on financial matters.

Although the Coalition's *Programme for Government* contained a number of proposals to strengthen the House of Commons (on which see below) and to enhance public engagement with the legislative process,⁵⁶ it had nothing to say about improving financial scrutiny, and little further consideration has been given to these questions by the Parliament elected in 2010 (including by the Liaison Committee itself, though the latter has produced an important report on the select committee system, on which also see below).

C. Enacting legislation – House of Commons procedure

In chapter 3, we saw that the legislative supremacy of Parliament does not mean that the whole work of legislating is carried on within Parliament or that the parliamentary stage is the most formative stage in the process of legislation. Many government policies can be achieved within the framework of existing legislation: for example, by the provision of more money for certain purposes or by the use of existing powers to direct local authorities. But other policies require legislation and most legislation is initiated by the government. The scope for legislative initiatives by individual MPs is severely limited, both because of restricted parliamentary time, and the tight hold the government maintains over departmental action.

The process by which government policies are turned into law falls into three broad stages:

- (a) before publication of the Bill;
- (b) the passage of the Bill through Parliament;
- (c) after the Bill has received the royal assent.

In this section, emphasis is placed on the second of these stages. But stages (a) and (c) are both important to an understanding of the legislative process.

The process of legislation, like most aspects of parliamentary procedure, is complicated.⁵⁷ A distinction must be drawn between public and private Bills. A public Bill seeks to alter the general law and is introduced into Parliament under the standing orders of the two Houses relating to public business. A private Bill is a Bill relating to a matter of individual, corporate or local interest and is subject to separate standing orders relating to private business.⁵⁸ A private Bill must not be confused with a public Bill introduced by a private member, which is known as a private member's Bill.⁵⁹

Origins of legislation and pre-legislative scrutiny

A Bill will typically be included in a government's legislative programme, which will be announced in the Queen's Speech, delivered at the beginning of each parliamentary session. The history of a Bill will, however, usually have begun long before this, originating perhaps in the efforts of a pressure group to get the law changed. Public authorities may have experienced difficulties in administering the existing law and may seek wider powers. Bodies such as the Law Commissions or the Committee on Standards in Public Life may have published

⁵⁶ The Coalition, *Our Programme for Government* (2010), p 27.

⁵⁷ The authoritative work on legislative procedure is Erskine May, above. See also Griffith, *Parliamentary Scrutiny of Government Bills*, and Griffith and Ryle, *Parliament*, ch 6. See also HC 538 (1970–71); HC 1097 (2005–6).

⁵⁸ See p 119 below.

⁵⁹ See p 198 below.

reports recommending law reform, while a decision of the courts (including the European Court of Human Rights and the European Court of Justice) may have shown the need for legislation. There may also be obligations to change the law as a result of a new international treaty.

The most likely source of legislation, however, will be the election manifestos of the political parties, which set out the steps they will take if elected to government. In the modern era governments can be expected to carry out manifesto pledges, with the manifesto providing governments with both an obligation and a defence to justify their actions. In the case of the Coalition government that assumed office in 2010, however, compromises had to be made by both sides, with neither in a position fully to implement its own manifesto commitments. These compromises were set out in an agreement between the two Coalition parties (said to be the ‘contract that underwrites this government’), followed by a comprehensive programme for government, which in turn was the subject of a ‘mid-term review’.

Once it is decided to proceed with a Bill, it is for the department primarily concerned to determine precisely what it should contain, and these instructions are conveyed to Parliamentary Counsel who are responsible for drafting all government Bills. While a Bill is being drafted, extensive consultation may take place with other departments affected and successive revisions of the draft Bill will be circulated confidentially within government. There may also be consultation with organisations outside government representing the interests primarily affected, but until recently it was uncommon for a draft Bill to be disclosed. These consultations will normally cover both the general principles of the Bill as well as some of its more detailed provisions, especially where they are contentious.

Modern governments have adopted the practice of publishing a number of Bills in draft form, a practice welcomed by the now defunct House of Commons Modernisation Committee in 2002, as providing a ‘real chance for the House to exercise its powers of pre-legislative scrutiny in an effective way’.⁶⁰ In an important report on the *Legislative Process*, the Modernisation Committee returned to the theme in 2006 and announced that pre-legislative scrutiny of draft Bills was ‘one of the most successful Parliamentary innovations of the last ten years’, and ‘should become more widespread, giving outside bodies and individuals a chance to have their say before a bill is introduced and improving the quality of the bills that are presented to Parliament’.⁶¹ This practice of publishing Draft Bills has been continued by the Coalition government.

Parliamentary procedure

In the case of government Bills, the sponsoring minister presents the Bill to the Commons; it receives a formal first reading and is then printed and published. There follows the **second reading** of the Bill, when the House may debate its general proposals. If the second reading is opposed, a division may take place on an opposition amendment to postpone the second reading for three or six months or (more usually) on a reasoned amendment opposing the Bill. For a government Bill to be lost on second reading would be a serious political defeat, to be generally avoided. Indeed, it appears to be the case that the last government to lose a Bill at second reading was the Thatcher government in 1986 when the Shops Bill, to reform the law on Sunday opening of shops, was defeated on second reading in the Commons by 296 votes to 282.⁶²

⁶⁰ HC 1168 (2001–2). For an account of scrutiny of draft Bills, see A Kennon [2004] PL 477.

⁶¹ HC 1097 (2005–6).

⁶² HC Deb, 14 April 1986, cols 584–702. See Brazier, *Constitutional Practice*, pp 219–20. On the willingness of MPs to rebel, see Cowley, *The Rebels*.

The amount of time devoted to the second reading of a Bill will vary, though modern practice has been to schedule all second reading debates to last for no more than a day.⁶³ Where a Bill involves new public expenditure or new taxation, the Commons must approve a financial resolution on the proposal of a minister before the clauses concerned may be considered in committee; the financial resolution is approved immediately after a Bill's second reading.⁶⁴ Provision is made in the Standing Orders for the second reading to take place in some cases in the Scottish Grand Committee,⁶⁵ or the Welsh Grand Committee,⁶⁶ but there is no recent experience of this having been done. In exceptional circumstances non-controversial Bills may be taken in a second reading committee,⁶⁷ while a separate expedited procedure exists for Consolidation Bills.⁶⁸

After second reading, a Bill is normally referred for detailed consideration to a **public bill committee**, consisting of between 16 and 50 members nominated by the Committee of Selection.⁶⁹ The Committee of Selection must have regard to the qualifications of the members and to the composition of the House, which means in practice that the parties are represented as nearly as possible in proportion to their parliamentary representation. If the government came into office with an overall majority over other parties and later lost that majority, questions would arise about its continuing majorities on public bill committees.⁷⁰ Following the House of Commons Modernisation Committee's report on the *Legislative Process*, public bill committees may now receive both written and oral evidence from interested parties as part of their examination of a Bill.

Instead of referring a Bill to a public bill committee, the House may commit the Bill to a committee of the whole House,⁷¹ for which purpose the Speaker's place is taken by the Chairman of Ways and Means, or by one of the deputy chairmen. In practice this happens only on the proposal of the government, whether for minor Bills on which the committee stage is purely formal, conversely for Bills of outstanding political or constitutional importance, or for Bills which the government wishes to see become law as soon as possible.⁷² Occasionally the committee stages of parts of a Bill will be dealt with in a committee of the whole House, with the other parts being dealt with in a public bill committee.

Whether a Bill is considered in a public bill committee or in a committee of the whole House, the object of the committee stage is to consider the individual clauses of the Bill and to enable amendments to be made. While general approval has been given to the Bill on second reading, members opposed to the Bill may use the committee stage to propose amendments narrowing its scope, or in other ways rendering it more acceptable to them.

⁶³ HC 1096 (2005–06), paras 41–45. It has been suggested that this is too long for some Bills and too short for others, and that more flexibility is required by the business managers in the House (*ibid*).

⁶⁴ See p 188 below; Erskine May, ch 34; Griffith and Ryle, p 324.

⁶⁵ HC Standing Orders (HC SO(s)) 92–99. See C M G Himsforth (1996) 1 Edin LR 79.

⁶⁶ HC SOs 102–108.

⁶⁷ HC SO 90; Griffith and Ryle, p 323.

⁶⁸ HC SO 140. See Lord Simon of Glaisdale and J V D Webb [1975] PL 285.

⁶⁹ HC SOs 84, 86; Griffith and Ryle, pp 325–30.

⁷⁰ See Erskine May, p 860, footnote 2.

⁷¹ HC SO 63, 66.

⁷² It is a 'long-standing convention of the House' that 'bills of first class constitutional importance' should 'have all their stages on the floor of the House'. This is said to derive from a memorandum submitted by the Labour government to the Procedure Committee in 1945. See HC 190 (1997–8), paras 74–5. Major Bills taken in committee of the whole House have included the Bills for the European Communities Act 1972, the Scotland Act 1998, the Government of Wales Act 1998, the Northern Ireland Act 1998, the Human Rights Act 1998, the House of Lords Act 1999, the Representation of the People Act 2000, and parts of the Political Parties, Elections and Referendums Act 2000, and the Political Parties and Elections Act 2009.

Members may be able to persuade the minister in charge of the Bill to reconsider a specific point, but the government expects to maintain its majority in committee and an amendment is not often made against the wishes of the government. On one notable occasion, however, a committee of the whole House inflicted the first Commons defeat on the post-1997 Labour government when it accepted an amendment to reject proposals for the detention without charge of terrorist suspects for up to 90 days.⁷³

On completion of the committee stage, the Bill is reported as amended to the whole House. At that stage, ministers may propose further amendments to the Bill, sometimes to give effect to undertakings they have given in committee, sometimes to remove amendments made in committee but not accepted by the government. The Opposition may use the report stage to propose further amendments, though it is rare for these amendments to succeed and the Speaker has the discretion to select the amendments which will be debated.⁷⁴ A Bill committed to the whole House and not amended in committee is not considered by the House on report. After a Bill has been considered on report, it receives its third reading; only verbal amendments may be made to a Bill at this stage.⁷⁵

Programme orders and guillotines

In the legislative work of the Commons, the time factor is always of importance both to the government, which wishes to see its Bills pass through Parliament without delay, and to the Opposition and backbench MPs, who may seek to prolong proceedings as a means of persuading the government to make concessions. As well as the power of the Speaker or chairman to require a member to discontinue speaking who persists in irrelevance or tedious repetition,⁷⁶ various methods of curtailing debates have been adopted by the House, of which the most important are now programme orders, whereby a fixed amount of time is allocated in advance to each stage of a Bill in the House of Commons.⁷⁷

The effect of a programme order is to 'provide for the allocation of time for any proceedings on a Bill'.⁷⁸ A programme motion may be moved only by a minister before second reading, with the vote on the motion taking place immediately after second reading. Although this seems a rather obvious way to conduct legislative business, it is a fairly recent innovation, being first used in 1998 following a recommendation of the Modernisation Committee.⁷⁹ It also remains a mildly controversial innovation, with the Modernisation Committee addressing concerns that a good idea had been corrupted in practice and that programming was undermining the rights of backbenchers by squeezing them out of debates. Acknowledging these concerns, the Committee nevertheless noted that programming 'has become much less prescriptive and is used to ensure full debate', while the government 'works hard to make programming consensual' and that 'opposition to programming has decreased'.⁸⁰

Although initially opposed by the Conservatives when in opposition, the Coalition has embraced the programming of Bills. It is recognised as a way of ensuring that the government's business is conducted in a timely manner, while also ensuring that time is allocated in such a way to ensure that all provisions of a Bill are properly considered, with programming also

⁷³ HC Deb, 9 November 2005, col 386.

⁷⁴ HC SO 32(1).

⁷⁵ HC SO 77.

⁷⁶ HC SO 42.

⁷⁷ HC SO 83A–83I. See Griffith and Ryle, p 416.

⁷⁸ HC SO 83A(6).

⁷⁹ See HC 190 (1997–98). See also HC 589 (1999–2000), HC 382 (2000–1), HC 1222 (2002–3), and HC 1097 (2005–6).

⁸⁰ HC 337 (2006–07), paras 120–2. For continuing problems, see HC 767 (2013–14).

applying in committee. However, not all Bills are subject to programming. The procedure does not apply to Bills for which it is unnecessary (for example because the Bill is uncontroversial), to appropriation bills (expressly exempt by Standing Orders), or to a number of other specific categories of Bill where there are special parliamentary procedures (such as consolidation Bills). Otherwise, the government may choose not to use programming for fast-track bills where it wishes to restrict the time at second reading, the procedure not applicable at this early stage in the life of a Bill.

Programming has largely (though not wholly) displaced the other means available to the government to curtail debates. These include the ‘guillotine’, which may also be moved by a minister with a view to allotting a specified number of days or portions of days to the consideration of a Bill in committee of the whole House or on report.⁸¹ The difference between this and a programme order is that the latter is moved after the second reading, while the guillotine motion will be moved at a later stage if the government believes that a Bill is being held up deliberately.⁸² The guillotine motion may be debated for no more than three hours, and if it is carried, it is the duty of the Business Committee, which consists of the Chairman of Ways and Means and up to eight other members nominated by the Speaker, to divide the Bill into parts and to allot to each part a specified period of time.⁸³ The effect of a guillotine motion is that at the end of each allotted period, the portion of the Bill in question is voted on without further discussion.

Private members’ Bills

The bulk of the legislative programme is taken up by government Bills, with only a small albeit significant part consisting of Bills introduced by backbench MPs. Although standing orders generally give precedence to government business, Standing Order 14 provides that 13 Fridays in each session are set aside for private members’ Bills. On the first seven of these Fridays, precedence is given to the second reading of Bills presented by members who have secured the best places in the ballot for private members’ Bills held at the beginning of each session. On the remaining Fridays, precedence is given to the later stages of those Bills which received their second reading earlier in the session.⁸⁴ As with government Bills, private members’ Bills are referred to a public bill committee, the composition of a public bill committee usually reflecting the voting of the House on second reading, so that the supporters of the Bill form a majority. There is no programming of private members’ Bills, even if supported by the government.

Otherwise, a member may seek leave under Standing Order 23 to introduce a Bill under the ‘ten-minute rule’ procedure (on Tuesdays and Wednesdays only), and may speak briefly in support of the Bill, while an opponent may reply, and the House may then divide on the issue.⁸⁵ There may also be an opportunity under Standing Order 57 for a private member simply to present a Bill for its first reading, after giving notice, but without previously obtaining the leave of the House.⁸⁶ Under each of these latter procedures the chances of a Bill

⁸¹ See HC SOs 82 and 83.

⁸² It may also be dealt with to deal with Lords amendments, an unfortunate use of the procedure given that the Lords stage is often used by government to introduce its own amendments to Bills incomplete at the time of their introduction in the Commons, which means that measures will be enacted without debate in the Commons.

⁸³ For the history, see Jennings, *Parliament*, pp 241–6; for more recent practice, Griffith and Ryle, pp 413–18.

⁸⁴ HC SO 14(4), (5).

⁸⁵ HC SO 23.

⁸⁶ HC SO 57(1).

proceeding further depend on whether it is completely unopposed, or on whether some time can be found for a second reading debate and later stages, either by the government or on a Friday devoted to private members' business. These are nevertheless valuable ways of giving publicity to a question about which a backbencher feels strongly, and by seeking leave to introduce a Bill there may be no need to have a Bill to present.

In the 25-year period between 1983 and 2008, some 230 private members' Bills were enacted. Most of these (179) originated under Standing Order 14, which means that a not insignificant number originated under the Standing Order 23 and 57 procedures. Private members' Bills are used for a variety of purposes, including matters of social reform (such as, abortion and the abolition of capital punishment) which were too divisive for the government to wish to take the initiative, matters of special interest to minority groups and topics of law reform which may be useful but have too low a priority to find a place in the government's programme.⁸⁷ A private member may not, however, propose a Bill the main object of which is the creation of a charge on the public revenue,⁸⁸ and where a Bill proposes charges on the revenue which are incidental to its main object, a financial resolution moved by a minister is needed before the financial clauses can be considered in committee.

It is not the practice for the government to use its majority to defeat a private member's Bill by applying the whips.⁸⁹ Indeed, the government has undertaken 'to make available the resources of parliamentary counsel whenever it appears that a Bill is likely to pass, for the purpose of ensuring that its terms give effect to its supporters' intentions'. This assistance is provided whether or not the government supports the Bill.⁹⁰ Not all private members' Bills become law: many are talked out by their opponents. Allocation of time orders are not applicable (whether in the form of programme motions or the guillotine), and the closure of debate needs the support of 100 members, which may not be easy to achieve on a Friday. A Bill that has not become law by the end of the session lapses. While less than 10 per cent of private members' Bills are enacted, these initiatives form a small but valuable part of the whole legislative work of Parliament.

Private Bills

A private Bill is a Bill to alter the law relating to a particular locality or to confer rights on or relieve from liability a particular person or body of persons (including local authorities and statutory undertakers, providing public utilities). The procedure is regulated by the standing orders of each House relating to private business.⁹¹ When the objects of the Bill have been advertised and plans and other documents have been displayed in the locality concerned, a petition for the Bill together with the Bill itself must be deposited in Parliament by 27 November each year. Landowners and others whose interests are directly affected are separately notified by the promoters and they may petition against the Bill. The practice in recent years has been for the second reading debate on private Bills to be wide ranging debates on the merits of the Bill.

If the Bill is read a second time, it is committed to a committee of four members in the Commons or of five members in the Lords. The committee stage is usually the most important stage in the passage of a private Bill, particularly if there are many petitions of objection

⁸⁷ See Richards, *Parliament and Conscience*, and (same author) in Walkland (ed), *The House of Commons in the Twentieth Century*, ch 6; Bromhead, *Private Members' Bills in the British Parliament*; Griffith and Ryle, pp 539–58; and Cowley (ed.), *Conscience and Parliament*.

⁸⁸ HC SO 48.

⁸⁹ Richards, *Parliament and Conscience*, p 27, describes this as a 'strong convention'.

⁹⁰ HC 610 (2003–04), para 20. Also HC Deb, 23 June 2008, col 10w.

⁹¹ See Williams, *History of Private Bill Procedure*, vol I; and Erskine May, chs 41–5.

to it, and committee members are obliged to attend the meetings. The promoters and opponents of the Bill are usually represented by counsel and call evidence in support of their arguments. For its part, the committee first considers whether or not the facts stated in the preamble, which sets out the special reasons for the Bill, have been proved. If the preamble is accepted, the clauses are taken in order and may be amended. If the preamble is rejected, the Bill is dead. After the committee stage the Bill is reported to the House and its subsequent stages are similar to those of a public Bill.

This method of obtaining special statutory powers is useful to local authorities who seek wider powers than are generally conferred or who have special needs for which the general law does not provide. One reason for the elaborate procedure is to ensure that Parliament does not inadvertently take away an individual's private rights.⁹² But this curious process – as much quasi-judicial as it is legislative – is elaborate, expensive and lengthy. Nowadays, there are other means of obtaining statutory authority for the exercise of special powers, notably under the Transport and Works Act 1992. This applies principally to schemes for the construction of railways, waterways and guided transport systems so that the need to use the private Bill procedure in these cases has been displaced by what is intended in contrast to be a relatively speedier and more streamlined statutory procedure. This is not to say that developers will not encounter long delays.

Where the latter Act applies, the proposed developer (public authority or private body) may make an application to the appropriate minister in England or the National Assembly in Wales, with applications being made typically in the past by bodies like Railtrack, London Underground and local authorities.⁹³ If an order is made under the Act by the minister or the National Assembly (after a local inquiry where objectors will have an opportunity to be heard), it may authorise the construction of the project, the compulsory purchase of land, and the power to make by-laws. It is now only in the case of projects which in the opinion of the Secretary of State are of 'national significance' that any parliamentary approval is required under the Act, in this case in the form of a motion approved by both Houses before an order is made by the minister.⁹⁴ Other schemes for the taking of land without the need for a private Act of Parliament are to be found in the Statutory Orders (Special Procedure) Acts 1945 and 1965.

A hybrid Bill has been defined as 'a public Bill which affects a particular private interest in a manner different from the private interest of other persons or bodies of the same category or class'.⁹⁵ Thus a Bill to confer a general power on the Secretary of State to acquire land for the construction of railway tunnels is not a hybrid Bill since all landowners are potentially affected: but the Bill which became the Channel Tunnel Act 1987, after a protracted parliamentary battle, was a hybrid Bill since it sought to confer power to acquire specific land and construct specific works. After its second reading, a hybrid Bill is referred to a select committee and those whose rights are adversely affected by the Bill may petition against it and bring evidence in support of their objections. The Bill may then pass through committee and later stages as if it were an ordinary Bill.

Whether a public Bill is hybrid and therefore subject to the standing orders for private business is a matter decided initially by the Examiners of Petitions for Private Bills, usually before the second reading. This is a procedure that governments may seek to avoid being drawn into, and it is notable that when the Labour government intervened to rescue

⁹² *Pickin v British Railways Board* [1974] AC 765.

⁹³ A separate and infrequently used procedure operates for Scotland under the Private Legislation Procedure (Scotland) Act 1936. But this does not apply where the public authority or persons are seeking powers wholly within the competence of the Scottish Parliament: Scotland Act 1998, Sch 8.

⁹⁴ Transport and Works Act 1992, s 9.

⁹⁵ Erskine May, p 652.

Northern Rock in 2008 it did so by enacting legislation of a general nature, purporting to authorise the acquisition of other financial institutions should the relevant provisions of the Act have been met. Although these powers did need to be used in other cases, it was acknowledged that one reason why the Banking (Special Provisions) Act 2008 was not confined to Northern Rock was the belief that a Bill with such an effect would have to be treated as a hybrid Bill, giving rise to time-consuming procedures which would have frustrated the urgent response the government believed to be necessary.⁹⁶

D. Enacting legislation – House of Lords and after

Before it can be presented for the royal assent, a Bill must be approved by both Houses of Parliament. In practice, however, the two Houses do not have the same political composition, so that it cannot today be assumed that the Lords will always acquiesce with the wishes of the Commons. Historically this was not a problem for the Conservative Party, as traditionally it enjoyed a large in-built majority as most of the hereditary peers tended to be Conservatives. But it was a problem for Labour governments, even after the Life Peerages Act 1958 allowed for life peers to be appointed. Since the House of Lords Act 1999 the hereditary peers have all but gone, and no one party has a majority in the House of Lords, which is now a problem for all governments. The formal position is that the House of Lords has the power to reject any Bill which is presented to it, regardless of whether it is a government Bill, and regardless of whether it has been approved by the House of Commons.

The House of Lords also has the power to make whatever amendments it likes to Bills and to insist that these amendments are included in the Bill as a condition of its acceptance. In practice, however, the relationship between the two Houses is regulated by law (the Parliament Acts 1911–1949) and by convention (the so-called Salisbury–Addison Convention), both designed to affirm the supremacy of the House of Commons as the democratically elected chamber. But although subordinated to the Commons in these ways, it would be a grave mistake to under-estimate the very real political power retained by the House of Lords, and a mistake also to under-estimate its willingness to use that power.⁹⁷ In 2002–3, for example, the government was defeated 88 times on 14 separate Bills. This was ‘more than in any one session since 1975–76’.⁹⁸ The Labour governments were defeated thereafter on no fewer than 278 times in the seven sessions beginning in 2003–04, while the Coalition was defeated on 75 occasions between 2010 and 25 June 2013.

Legislative procedure⁹⁹

Except under the Parliament Acts 1911 and 1949, which are considered later, a Bill may be presented for the royal assent only when it has been approved by both Houses. After a public Bill has had its third reading in the Commons, it will be introduced into the Lords. The various stages in the Lords are broadly similar to those in the Commons, although they are governed by separate standing orders. The main difference has been that the committee stage of Bills is usually taken in committee of the whole House. In 1995 for the first time

⁹⁶ HC Deb, 19 February 2008, col 173 (Chancellor of the Exchequer).

⁹⁷ Between 1970 and 1995, there were 603 government defeats in the Lords: HL Deb, 16 October 1995, col 90 (WA) and 27 November 1995, col 23 (WA), an average of 24 per session.

⁹⁸ P Cowley and M Stuart (2004) 57 *Parliamentary Affairs* 301, at p 304. See also P Cowley and M Stuart (2005) 58 *Parliamentary Affairs* 301.

⁹⁹ Griffith and Ryle, ch 12; Shell, *The House of Lords*, chs 5 and 6.

the ‘committee of the whole House’ sat in a separate room at Westminster to consider the Children (Scotland) Bill, enabling the House itself to deal with other business.¹⁰⁰ Bills not considered in a ‘committee of the whole House’ may be considered instead by a Grand Committee which is a committee unlimited in number and which all members of the House are entitled to attend.¹⁰¹

In committee, there is no provision for the selection of amendments so that any amendments tabled may be moved. Even if no amendments are made in committee, there may be a report stage; although there is no limitation on the amendments which may be moved at the third reading, the House agreed normally to resolve major points of difference by the end of the Report stage, and to use Third Reading for tidying up the Bill. It is generally accepted that the House must consider government business within a reasonable time, but whether in fact this occurs often gives rise to disagreement. Exceptionally, a Bill may be referred to a select committee after second reading as in the case of the controversial Constitutional Reform Bill in 2004, which was so referred against the wishes of the government.¹⁰²

The distinctive procedures of the House, in contrast with those of the Commons, facilitate the submission and consideration of amendments.¹⁰³ While some Bills coming from the Commons are approved by the Lords unchanged and with little debate, it is more usual for Bills to be considered in detail by the Lords and amendments made. This is particularly valuable when the effect of timetabling has been that only part of a Bill has been considered in detail by the Commons. The government itself tables many amendments in the Lords, some in response to undertakings given in the Commons. The passage of a Bill through the Lords thus enables the drafting of Bills to be improved as well as substantial amendments to be made and new material introduced. While the foregoing account has assumed that Bills are always introduced in the Commons, in principle Bills may originate in either House.

The major exception is that by ancient privilege of the Commons, Bills of ‘aids and supplies’, i.e. those which relate to national taxation and expenditure or to local revenues and charges upon them, must begin in the Commons.¹⁰⁴ Moreover, the democratic character of the Commons and the fact that most ministers are MPs mean that Bills of major political importance start there. These factors often mean that early in a session the Lords have too little legislative work and have too much later in the session when a load of Bills approved by the Commons reaches them. In 1972 a standing order was adopted by the Commons which relaxed the extent of the Commons’ financial privilege in the case of government Bills and made it easier for Bills with financial provisions to begin in the Lords.¹⁰⁵

Parliament Acts 1911–49

The immediate origin of the Parliament Act 1911 was the crisis caused when the House of Lords rejected Lloyd George’s ‘People’s Budget’ in 1909. However, conflict between the two houses had been simmering for some time,¹⁰⁶ and it was unsurprising that the matter would reach boiling point as a Liberal government with a popular mandate from an ever-widening franchise confronted a second chamber with a permanent majority of Conservative hereditary peers. The budget crisis of 1909 was resolved only when, after two general elections in 1910, the Liberal government made known George V’s willingness on the Prime Minister’s

¹⁰⁰ HL Deb, 6 June 1995, col CWH 1.

¹⁰¹ Erskine May, ch 28.

¹⁰² See HL 125 (2003–04). For an account, see R Walters (2005) 73 *The Table* 87.

¹⁰³ See D N Clarke and D Shell [1994] PL 409, 412.

¹⁰⁴ Erskine May, p 526; HC 538 (1970–71), paras 19–21. And see M Ryle, in Walkland (ed), above, pp 355–9.

¹⁰⁵ HC Deb, 8 August 1972, col 1656; Erskine May, pp 526, 629–30, 780–790.

¹⁰⁶ See Lowell, *The Government of England*, ch 22.

advice to create over 400 new Liberal peers to coerce the Lords to accept formal restraints on its powers.¹⁰⁷ Rather than have their control of the House of Lords overturned by the influx of a large number of new peers, the Conservative majority accepted a reduction in their powers.

The 1911 Act, which did not alter the composition of the upper House, made three main changes: (a) it reduced the life of Parliament from seven to five years; (b) it removed the power of the Lords to veto or delay money Bills; and (c) in the case of other public Bills, apart from a Bill to prolong the life of Parliament, the veto of the Lords was abolished and there was substituted a power to delay legislation for two years. But the period of delay the Lords could impose meant that in the fourth and fifth years of a Parliament the Lords could hold up a Bill knowing that it could not become law until after a general election. After 1945, faced with a massive programme of nationalisation to get through Parliament, the Labour government proposed to reduce the period of delay from two years to one year. After extensive discussions on the reform of the House of Lords, which broke down on the period of delay, the Parliament Act 1949 became law under the 1911 Act procedure.

Under the Parliament Acts 1911–49, Bills may in certain circumstances receive the royal assent after having been approved only by the Commons. This may happen (a) if the Lords fail within one month to pass a Bill which, having passed the Commons, is sent up at least one month before the end of the session and is endorsed by the Speaker as a money Bill (s 1);¹⁰⁸ or (b) if the Lords refuse in two successive sessions, whether of the same Parliament or not, to pass a public Bill (other than a Bill certified as a money Bill or a Bill to extend the maximum duration of Parliament beyond five years) which has been passed by the Commons in those two sessions, provided that one year has elapsed between the date of the Bill's second reading in the Commons in the first of those sessions, and the date of its third reading in that House in the second of those sessions (s 2).¹⁰⁹

A money Bill is a public Bill which, in the opinion of the Speaker, contains only provisions dealing with: the imposition, repeal, remission, alteration or regulation of taxation; the imposition of charges on the Consolidated Fund, or the National Loans Fund or on money provided by Parliament for the payment of debt or other financial purposes, or the variation or repeal of such charges; supply; the appropriation, receipt, custody, issue or audit of public accounts; or the raising or guarantee or repayment of loans. Bills dealing with taxation, money or loans raised by local authorities or bodies for local purposes are not certifiable as money Bills.¹¹⁰ The statutory definition has been so strictly interpreted that many annual Finance Bills have not been endorsed with the Speaker's certificate.¹¹¹ However, Consolidated Fund Bills are invariably certified as money Bills.¹¹²

Where a Bill is presented for the royal assent under s 2 of the 1911 Act, it must be endorsed with the Speaker's certificate that s 2 has been complied with. As the Speaker must certify that it is the same Bill that has been rejected in two successive sessions, there are strict limits on the alterations which may be made to a Bill between the first and second sessions. But the Bill in the second session may include amendments which have already been approved by the Lords and, in sending up the Bill in the second session, the Commons may

¹⁰⁷ See Jenkins, *Mr Balfour's Poodle*; Nicolson, *King George V*, chs 9 and 10; Jennings, *Cabinet Government*, pp 428–48. For an account of why the 1911 Act took the form it did, see J Jaconelli (1991) 10 *Parliamentary History* 277. See also *R (Jackson) v A-G* [2005] UKHL 56, [2006] 1 AC 262, discussed more fully below.

¹⁰⁸ The original s 1 has only been lightly amended, but not in a way relevant here.

¹⁰⁹ As amended by the Parliament Act 1949.

¹¹⁰ *Ibid*, s 1 (as amended by the National Loans Act 1968). See D Morris (2001) 22 *Statute LR* 211.

¹¹¹ Erskine May, p 796, footnote 50; and Jennings, *Parliament*, pp 416–19. Before giving the certificate, the Speaker must, if practicable, consult two members appointed from the chairmen's panel each session by the Committee of Selection of the House of Commons.

¹¹² Erskine May, p 796, footnote 50.

accompany it with further suggested amendments without inserting them into the Bill.¹¹³ Any certificate of the Speaker given under the 1911 Act ‘shall be conclusive for all purposes, and shall not be questioned in any court of law’,¹¹⁴ a formula which seeks to exclude any challenge to the validity of an Act passed under the Parliament Acts based on alleged defects in procedure.

Apart from not applying to Bills which seek to extend the maximum duration of Parliament beyond five years, the Parliament Acts do not apply to local and private legislation or to public Bills which confirm provisional orders. Nor do they apply to delegated legislation: here the formal powers of the Lords will depend on whether the parent Act expressly empowers the Lords to approve or disapprove of the delegated legislation in question.¹¹⁵ This power of the Lords to veto delegated legislation is not insignificant, and although proposals have been made to subject it to some kind of procedure similar to that in the Parliament Acts 1911–1949, none of these proposals has been implemented. The matter was not addressed in the ill-fated House of Lords Reform Bill 2012, which generally proposed to retain the status quo on Lords’ powers.

Parliament Acts in operation

Apart from the Welsh Church Act 1914 and the Government of Ireland Act 1914, only the Parliament Act 1949 became law under the Parliament Act procedure before the War Crimes Act 1991. The War Crimes Bill proposed retrospectively to authorise prosecutions in Britain in respect of war crimes in Germany between 1939 and 1945 by persons who had become British citizens. It had not been part of the Conservative programme at the 1987 election and was carried on free votes in the Commons. It was, however, twice defeated on second reading in the Lords: following the second such defeat, the royal assent was given to it. The debates in the Lords on the War Crimes Bill were confused on the constitutional issues,¹¹⁶ but those peers who voted against the Bill on the second occasion knew that their action would not prevent the Bill from becoming law.

The willingness on the part of the House of Lords more readily to challenge the Commons led to the Parliament Acts being used on several occasions since 1997: on one occasion following the defeat of the European Parliamentary Election Bill, and on another following the defeat of the Sexual Offences (Amendment) Bill. Most controversially the Parliament Acts were used to secure the enactment of the Hunting Bill in 2004. Recent events have also revealed some of the limitations of the Parliament Acts: they do not apply to Bills which begin in the Lords (and so could not be invoked when the Lords voted down the Criminal Justice (Mode of Trial) Bill),¹¹⁷ or – as we have seen – to secondary legislation (and so could not be invoked when the Lords rejected the Greater London Authority (Election Expenses) Order 2000 – the first time an affirmative order had been rejected by the Lords since 1968).¹¹⁸

These features of the Parliament Acts were acknowledged by the (Wakeham) Royal Commission on House of Lords Reform, as were others: it had been argued that it should be possible for the Commons to amend a Bill before presenting it to the Lords on the second

¹¹³ 1911 Act, s 2(4). The procedure was used in relation to the Bill which became the Trade Union and Labour Relations (Amendment) Act 1976.

¹¹⁴ 1911 Act, s 3.

¹¹⁵ Ch 22.

¹¹⁶ G Ganz (1992) 55 MLR 87.

¹¹⁷ One practical effect of this is that the House of Lords has an absolute veto over Commons amendments to Lords Bills.

¹¹⁸ HL Deb, 22 February 2000, cols 134–82. On the same day the Lords also, for the first time, rejected an instrument subject to an annulment (Greater London Authority Election Rules 2000). See HL Deb, 22 February, cols 182–5.

occasion without the Bill losing the protection of the Parliament Acts; at present the Commons may only ‘suggest’ amendments. But such technical questions were not thought to have given rise to any ‘real difficulty in practice’¹¹⁹ and no amendment to the Act was proposed, although it was proposed that the House of Lords should lose its power to veto secondary legislation, a recommendation accepted by the government.¹²⁰

The Wakeham Commission had also broadly endorsed the present statutory procedures and conventional practices relating to the distribution of powers between the two Houses. But the Commission apparently felt it unnecessary to address the argument that the Parliament Act 1949 is invalid since the Parliament Act procedure was never intended to be used for amending the 1911 Act itself, and since a delegate may not use delegated authority to increase the scope of his or her power.¹²¹ While there are indeed limits on the Bills which may become law under the Parliament Act procedure, the argument that the 1949 Act is invalid depended on the view that measures passed by the Commons and the Crown alone should be regarded as delegated legislation: yet the interpretation of Commonwealth constitutions suggests that a legislature is not subject to the limitations implied by the maxim *delegatus non potest delegare*.¹²²

The issue was considered in *R (Jackson) v Attorney-General*¹²³ where it was argued that the Hunting Act 2004 was invalid because it had been passed by using the Parliament Acts 1911–49, the contention being that the 1949 Act was invalid. But in a unanimous decision, this was rejected as implausible by the House of Lords. According to Lord Bingham, for ‘the past half century, it has been generally, if not universally, believed that the 1949 Act has been validly enacted, as evidenced by the use made of it by governments of different political persuasions’. In his opinion that belief was ‘well-founded’. The unanimous decision of 9 judges in the *Jackson* case tended to confirm the view expressed in earlier editions of this book that arguments about the invalidity of the Parliament Act 1949 are more appropriate for the classroom than the courtroom. It seems unlikely that any court would take this argument seriously.¹²⁴

Quite apart from the problems already identified, there are a number of other problems associated with the Parliament Acts, though these have yet to be confronted. Thus, at what stage has a Bill ‘not been passed’ by the Lords subsequently, once it has been given a second reading? In the event of conflict, it is not clear how such problems could be resolved, given the well-established common law rule that matters of parliamentary procedure are for Parliament alone to decide. Where, however, the source of conflict relates to primary legislation that purports to regulate such procedural matters, it may be thought that it is the courts that would be best placed to resolve such questions. The decision in *Pickin v British Railways Board*¹²⁵ suggests, nevertheless, that the latter solution cannot be taken for granted, though it does seem the most probable.

Salisbury–Addison and other conventions

The supremacy of the House of Commons is not based on legislation alone, and indeed it would be impractical if all Bills had to go through the lengthy process to be found in the

¹¹⁹ Cm 4534, (2000), p 36.

¹²⁰ Ibid, pp 77–8. See p 204 below.

¹²¹ Hood Phillips and Jackson, *Constitutional and Administrative Law*, pp 79–81; Hood Phillips, *Reform of the Constitution*, pp 18–19, 91–3.

¹²² *R v Burah* (1878) 3 App Cas 889; *Hodge v R* (1883) 9 App Cas 117.

¹²³ [2005] UKHL 56, [2006] 1 AC 262.

¹²⁴ Compare Pannick [2012] PL 230.

¹²⁵ [1974] AC 763.

Parliament Acts before being enacted. For much of the interwar period the problem of conflict between the two houses was contained by the fact that the Conservative party was in government for much of the period. In 1945, however, the Labour party won a landslide victory at the general election, standing on a platform of radical reform, including the nationalisation of many industries and the creation of a national health service.

Although the government was poorly represented in the House of Lords, the Conservative leader in the Lords (Lord Salisbury) nevertheless announced that Bills anticipated by the Labour party election manifesto would be accepted by the Lords as having been approved by the people; but that the Conservative peers ‘reserved full liberty of action’ as to measures that had not been in the election manifesto.¹²⁶ This became known as the Salisbury convention, more recently referred to as the Salisbury–Addison convention,¹²⁷ and was designed to avoid direct confrontation between the Lords and the Commons, the general practice of the Lords being to allow a second reading to Bills coming from the Commons. This important convention reflects ‘the status of the House of Commons as the United Kingdom’s pre-eminent political forum’, and the ‘fact that general elections are the most significant expression of the political will of the electorate’.¹²⁸

This convention was reviewed along with others by a joint committee of both Houses in 2006, which had been established at the invitation of the government to ‘consider the practicality of codifying the key conventions on the relationship between the two Houses . . . which affect the consideration of legislation’. The committee saw its main task as being ‘to seek consensus on the conventions applicable [to the legislative process], and to consider the practicality of codifying them’.¹²⁹ The key question was whether the formal position of the Lords as a legislative body had been moderated by conventions reflecting the primacy of the Commons. The evidence showed that, particularly since the exclusion of most hereditary peers in 1999, the House has become more assertive of its authority.

While this was acceptable to opposition parties, the government was not so happy, arguing that the Lords had recently moved too far beyond the limited role of the House under the Salisbury–Addison convention. Although the government wished the convention to be restated in terms supporting this view, the committee found that the Salisbury–Addison convention had changed since 1945, and particularly since 1999. In its current form, the convention required that every ‘manifesto Bill’ should receive a second reading in the Lords; such Bills should not be subject to ‘wrecking amendments’ that departed from the government’s manifesto intention; and they should be passed and sent to the Commons in time for that House to consider the Bill with amendments proposed by the Lords.

In its unanimous report, the committee found that there would be value in the upper House adopting resolutions concerning manifesto Bills and the need to consider government business in reasonable time, on the understanding ‘that conventions as such are flexible and unenforceable, particularly in the self-regulating environment of the House of Lords’. In making these recommendations, the joint committee stated its complete opposition to legislation on such matters. It did not wish conventions to be turned into rules, nor for there to be any scope for judicial review of parliamentary procedures.¹³⁰ The government’s response to

¹²⁶ HL Deb, 4 November 1964, col 66; Griffith and Ryle, pp 708–11; and see HL Deb, 19 May 1993, col 1780.

¹²⁷ See Cm 4534, 2000, pp 39–40 for a discussion of the origins and purpose of the Convention. It is sometimes referred to as the Salisbury–Addison convention, as it is based on an understanding between Viscount Cranborne (the fifth Marquess of Salisbury) and Viscount Addison (the Leader of the Lords): HL Paper 265, HC 1212 (2005–06) (Report of Joint Committee on Convention), para 63.

¹²⁸ *Ibid*, para 72.

¹²⁹ HL Paper 189, HC 1151 (2005–06) (Special Report of Joint Committee on Conventions).

¹³⁰ ‘The courts have no role in adjudicating on possible breaches of parliamentary conventions. Parliament is accountable to the electorate, not to the judiciary’: *ibid*, p 75.

this report insisted that the Commons must maintain its primacy in Parliament, and that the Lords must not exercise its power as a revising chamber in a way that undermines the Commons.¹³¹

The formation of the Coalition government in 2010 has created some uncertainty, on the ground that it may be difficult to argue that any government Bill is a ‘manifesto Bill’. The matter was addressed by the Select Committee on Political and Constitutional Reform, as part of a wide-ranging inquiry on the formation of the new government. In evidence to the inquiry the Opposition leader in the House of Lords (Baroness Royall) claimed that the Salisbury–Addison Convention applies only to Bills that were independently in the manifestos of both parties.¹³² This is unsatisfactory if understandable, and there is much to be said for the view that the Convention should cover all government Bills. The conclusion of the Committee was equally unsatisfactory:

Members of the House of Lords may not feel bound to apply the Salisbury–Addison convention to policies contained in a coalition government’s programme for government.¹³³

Royal assent and post-legislative scrutiny

Parliament cannot legislate without the concurrence of all its parts and therefore the assent of the Queen is required after a Bill has passed through both Houses. The Queen does not attend Parliament to assent in person, since an Act of 1541 authorised the giving of the assent by commissioners in the presence of Lords and Commons and this became the invariable practice. Formerly the business of the Commons was interrupted to enable the Commons to attend the Lords for the purpose. But by the Royal Assent Act 1967, the assent, having been signified by letters patent under the Great Seal signed by the Sovereign, is notified separately to each House by its Speaker.¹³⁴ The traditional procedure has not, however, been abolished. In giving the royal assent ancient forms are used.¹³⁵

A public Bill, unless dealing with finance, as also a private Bill other than one of a personal nature, is accepted by the words ‘*La Reyne le veult*’. A financial Bill is assented to with the words ‘*La Reyne remercie ses bons sujets, accepte leur benevolence et ainsi le veult*’. The formula for the veto was ‘*La Reyne s’avisera*’. The right of veto has not been exercised since the reign of Queen Anne. The veto could now only be exercised on ministerial advice and no government would wish to veto Bills for which it was responsible or for the passage of which it had afforded facilities through Parliament.¹³⁶ The consent of the Queen is requested before legislation which affects any matter relating to the royal prerogative is debated. Although the seeking of such consent may today be no more than an act of courtesy so far as government Bills are concerned, the need for this consent presents a potential obstacle for a private member’s Bill which seeks to abolish one of the Queen’s prerogatives, since it enables the government to prevent the House considering any such proposals.¹³⁷

While the royal assent concludes the formal process by which Bills become law, it would be wrong to assume that the assent also marks the end of the legislative process. The royal

¹³¹ Cm 6997, 2006.

¹³² HC 528-ii (2010–2011), Ev w11, para 22 et seq.

¹³³ HC 528-i (2010–2011), para 54.

¹³⁴ See HL Deb, 2 March 1967, col 1181.

¹³⁵ Erskine May, pp 642–5 for details.

¹³⁶ See ch 10. On the question whether the royal assent could be refused by a monarch in the exercise of his or her human rights (such as the right to freedom of conscience in art 9 of the ECHR), see R Blackburn [2003] PL 205.

¹³⁷ Erskine May, 22nd edn, pp 603–5.

assent may bring the Act into force immediately,¹³⁸ but the operation of all or part of an Act is often suspended by provisions in the Act itself. Thus the Act may specify a later date on which it is to come into force or may give power to the government by Order in Council or to a minister by statutory instrument to specify when the Act, or different parts of it, will operate.¹³⁹ Moreover, many Acts confer powers on the government to regulate in detail topics indicated only in outline in the Acts. Exercise of these powers is primarily a matter for the executive, subject to scrutiny by Parliament.¹⁴⁰ Parliamentary interest in what happens after a Bill becomes law is not confined to delegated legislation, but traditional procedures are not designed for enabling MPs to monitor the operation of legislation.

As far back as 1971, the Select Committee on Procedure recommended that use should be made of ‘post-legislation’ committees. These committees would examine the working of a statute within a short period of its enactment and would consider whether there was a need for early amending legislation to deal with difficulties arising in the administration of the Act.¹⁴¹ Support for such scrutiny was subsequently expressed by other select committees of both Houses as well as by the Law Commission,¹⁴² and in 2008 the Leader of the House issued a cautious statement of government support for scrutiny by Select Committees rather than a dedicated new committee as proposed by the Law Commission.¹⁴³ In the Parliament elected in 2010, the Justice Select Committee undertook a number of post-legislative scrutiny inquiries, including a detailed examination of the Freedom of Information Act 2000.¹⁴⁴

E. Scrutiny of the administration

In chapter 5, the principle of responsible government was discussed. We are now concerned with the procedures within the Commons by which the conduct of the administration may be scrutinised by the House. The financial and legislative procedures of Parliament have strongly influenced the means by which Parliament finds out about the work of government. But certain procedures have an importance related neither to finance nor to legislation. As we saw in the quotation from Mill at the beginning of this chapter, it is an important function of Parliament to ‘watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable; [and] to censure them if found condemnable’.

The financial and legislative procedures already discussed provide an opportunity for these roles to be performed, but they do not provide a full opportunity for MPs to examine the way in which the government carries out its business. For these purpose a number of procedures have emerged to enable Parliament more effectively to hold the government to account. Here we concentrate on the three most important: questions to obtain information and explanation; debates to ventilate concerns and require reasoned responses, and select

¹³⁸ Acts of Parliament (Commencement) Act 1793 and Interpretation Act 1978, s 4: Acts deemed in force at beginning of day on which royal assent given, if no other provision made.

¹³⁹ Even if power to bring an Act into force has not been exercised, existence of the power may prevent the minister from acting under the prerogative to make provision inconsistent with the Act: *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513; and *E Barendt* [1995] PL 357.

¹⁴⁰ Ch 22.

¹⁴¹ HC 538 (1970–71), pp vii–ix; and HC 588–1 (1977–8), p xxvii.

¹⁴² See respectively HC 190 (1997–98) and HC 1097 (2005–06) (Modernisation Committee); HC 558 (2002–03) (Liaison Committee); HL 173 (2003–04) (Constitution Committee); and Law Commission, Cm 7170, 2007 (Law Commission, which had been asked by the government to undertake the inquiry).

¹⁴³ Cm 7320, 2008 (Response to the Law Commission, *ibid*).

¹⁴⁴ HC 96 (2012–13).

committees to penetrate more deeply into the conduct of departments. In considering how effectively Parliament scrutinises the government, we need to recall that the House of Commons also has a duty to sustain the government.

Parliamentary questions¹⁴⁵

According to Erskine May, parliamentary questions ‘should relate to matters for which those Ministers are officially responsible. They may be asked for statements of their policy or intentions on such matters, or for administrative or legislative action’.¹⁴⁶ The regular questioning of the Prime Minister receives much attention in the media and the use of ‘open’ questions to the Prime Minister (for example, asking him to list his engagements for the day) is permitted as a device for enabling a wide range of supplementary questions to be asked. In May 1997, the allocation for questions to the Prime Minister was changed from 15 minutes every Tuesday and Thursday to 30 minutes every Wednesday.

So far as other ministers are concerned, an hour is set aside each day the House is sitting (except Fridays) to enable members to question ministers. Departmental ministers attend for questioning by rota (the Order of Oral Questions), in what has been said to be pre-eminently a device for emphasising the ‘individual responsibility of ministers’.¹⁴⁷ However, many more questions are tabled than can possibly be answered in the time available, so questions are chosen by the Speaker on a random basis. In order to ensure that they can be printed and circulated, and to give the relevant department an opportunity to prepare a response, questions must be tabled at least three days before the question is to be answered. Longer notice is required in the case of oral questions to the Secretaries of State for Northern Ireland, Scotland and Wales.¹⁴⁸

Members may ask questions for written answer at any time, and questions tabled for oral answer which are not taken will also receive a written answer. Written answers are published in Hansard. While ministers customarily answer questions which have been accepted as being in order by the clerks of the House, acting under the Speaker’s direction, it is for the minister to decide whether and how to reply to questions: ‘An answer to a question cannot be insisted upon, if the answer be refused by a minister’.¹⁴⁹ As might be anticipated, there are a number of grounds on which information sought may be withheld: for example, if the cost of obtaining the information would be excessive or if it would be contrary to the public interest for the information to be given (for example, matters relating to Cabinet proceedings or to the security and intelligence services).

Because of the existence of question time, however, matters concerning their constituencies may be raised by members in correspondence with ministers, who know that an unsatisfactory reply may lead to the tabling of a question. Partly for this reason, questions are used more for concentrating public attention on topics of current concern than for securing the redress of individual grievances. Questions may be ruled out of order or refused an answer if they relate to matters for which the ministers are not responsible, including decisions by local authorities, the BBC, courts and tribunals, the universities, trade unions and so on.

In 1996, the Scott report on ‘arms for Iraq’ extensively criticised attitudes within government to the answering of questions.¹⁵⁰ Civil servants are now instructed that in preparing

¹⁴⁵ Chester and Bowring, *Questions in Parliament*; Franklin and Norton (eds), *Parliamentary Questions*; Griffith and Ryle, pp 519–29; HC 859 (2008–09); HC 129 (2009–10); HC 1095 (2012–13), Erskine May, pp 352–40.

¹⁴⁶ Erskine May, p 360.

¹⁴⁷ Chester and Bowring, p 287.

¹⁴⁸ HC SO 22. Longer notice is also required for questions to the Advocate General for Scotland.

¹⁴⁹ Erskine May, p 364.

¹⁵⁰ HC 115 (1995–6), esp vol IV, section K.8.

answers they must be as open as possible with Parliament, although ministers are entitled to present government actions in a positive light; information should not be omitted merely because disclosure could lead to political embarrassment; and answers should be avoided ‘which are literally true but likely to give rise to misleading inferences’.¹⁵¹ When a question to a minister concerns a matter assigned to an executive agency set up under the ‘next steps’ initiative,¹⁵² it is generally answered by a letter to the MP from the agency’s chief executive (the minister may be consulted on what is said).¹⁵³ MPs may require a ministerial response if they are dissatisfied with the chief executive’s reply.

The marked increase in the number of questions asked for written answer in recent years, which is linked with the use by some MPs of research assistants, is not considered to make necessary any limit on the number of questions which MPs may ask.¹⁵⁴ However, the effectiveness of parliamentary questions as a means of securing information which the government does not wish to make available has often been doubted.¹⁵⁵ In addition to oral and written questions, Standing Orders also make provision for urgent questions (known previously as Private Notice Questions).¹⁵⁶ MPs may also use the Freedom of Information Act 2000 to obtain information from government departments, though in principle this ought not to be necessary, and the use of the latter Act by MPs is perhaps an unflattering reflection on the operation of parliamentary questions.¹⁵⁷

Debates

At the end of every day’s public business, when the adjournment of the House is formally moved, half an hour is available for a private member to raise a particular issue and for a ministerial reply. Members periodically ballot for the right to initiate an adjournment debate and advance notice of the subject is given so that the relevant minister may reply. While this gives more time for discussion of an issue than is possible in question time, the minister’s reply, which often consists of a reasoned defence of the department’s decision, may not advance the matter very far. During the debate, incidental reference to the need for legislation may be permitted by the Speaker. These brief debates are not followed by a vote of the House.¹⁵⁸

More substantial debates may be held at short notice under Standing Order 24 for the purpose of discussing a specific and important matter that should have urgent consideration (so-called emergency debates). The Speaker must be satisfied that the matter is proper to be discussed under the urgency procedure and either the request must be supported by at least 40 members or leave for the debate must be given by the House, if necessary upon a division. In deciding whether the matter should be debated, the Speaker considers the extent to which it concerns the administrative responsibilities of ministers or could come within the scope of

¹⁵¹ See HC 671 (1996–7), annex C. See also *Civil Service Code*, para 9. See further ch 11.

¹⁵² Ch 11.

¹⁵³ See P Evans, in Giddings (ed), *Parliamentary Accountability*, ch 7. Also HC 178 (1990–91) and HC 14 (1996–7).

¹⁵⁴ HC 859 (2008–09). According to the Modernisation Committee, ‘The average number of questions appearing on the notice paper each day increased from 414 in 2007 to 434 in 2008, and had reached 514 by March 2009. This is a significant rise from the average figure of about 350 WPQs per day that persisted between 2002 and 2005’ (ibid, para 5).

¹⁵⁵ See B Hough [2003] PL 211. But see HC 859 (2008–09), where it is said by the Procedure Committee that ‘WPQs are highly valued by Members as a means of scrutinising government and obtaining information’ (para 6). On concerns about unsatisfactory answers, see HC 1095 (2012–13).

¹⁵⁶ HC SO 21(2). These must relate to matters of public importance.

¹⁵⁷ See *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin), [2010] QB 98.

¹⁵⁸ See HC SO 9(7); Erskine May, pp 340–42.

ministerial action, but he or she does not give reasons for his or her decision. In recent years, ‘such applications have only rarely been successful’.¹⁵⁹

In recent times a number of other opportunities have been provided for the opposition and for backbenchers wishing to raise matters in debate. In each session 20 days in the whole House are allotted for Opposition business,¹⁶⁰ 17 at the disposal of the Leader of the Opposition and three at the disposal of the leader of the second largest opposition party.¹⁶¹ The existence of Opposition days is thought to be one of the reasons why the emergency debate procedure is not now used more frequently. But although very important, it is also the case that the Opposition days do not necessarily satisfy the needs of backbenchers who are looking for ‘effective ways of bringing a constituency problem or some other topic to the personal attention of Ministers and putting to them a case to which they have both an opportunity and an obligation to make a full reply’.¹⁶²

So far as backbenchers are concerned, in November 2000 a parallel chamber was established in Westminster Hall to help meet backbench demand. As a result of recent changes, the forum is now used for a number of purposes: (a) to consider e-petitions (on which see below) selected by the Backbench Business Committee for debate; (b) to debate issues of concern to members; and (c) to consider Select Committee reports (on which see below). Westminster Hall debates last between three and four-and-a-half hours in total, with debates on several topics in each session,¹⁶³ and are said by the then government to have ‘greatly widened the opportunities for members to raise matters of concern to them’.¹⁶⁴ The Backbench Business Committee plays a key role in selecting matters for debate.¹⁶⁵

But despite these and other opportunities for members to debate the administration of government departments (including debates on the Queen’s Speech), all such debates are limited by the adversary framework in which they are often held, and individual members may have no means of probing behind the statements made by ministers. These limitations continue to give rise to demands for better procedures to enable the House to inform itself more directly of the work of government. The continuing pressure for more backbench time has most recently seen the amendment of the Standing Orders to allow for a minimum of 27 days being allocated each session for the exclusive purpose of backbench business on the floor of the House itself. This is in addition to the Westminster Hall procedure.¹⁶⁶

The government decides when in the course of the parliamentary calendar the debates will be held, but not the subject-matter of the debates. The latter is the responsibility of the Backbench Business Committee, from which ministers are excluded.¹⁶⁷ The Committee meets every week to consider formal requests from members for time to be allocated for a debate on their particular interest, and there are many more requests than there are spaces available. Members may appear in person before the Committee, which sits in public for this purpose; requests are granted having regard to a range of criteria, including the topicality of

¹⁵⁹ Erskine May, p 342. See also Griffith and Ryle, p 378, who claim that the procedure has ‘almost fallen into extinction’ (p 497). For an outstanding example of such a debate, see that on the Westland affair on 27 January 1986. But only nine such debates took place between then and August 2009. See generally HC 337 (2006–07), paras 65–71.

¹⁶⁰ HC SO 14(2).

¹⁶¹ During the period of Coalition government after 2010, these latter three days were shared between the Democratic Unionist Party, the SNP and Plaid Cymru.

¹⁶² HC 194 (1998–9), para 24.

¹⁶³ HC SO 10; Erskine May, pp 322–25.

¹⁶⁴ HC 440 (2001–02) (Memorandum by the Leader of the House), para 8, and HC 337 (2006–07), para 124 respectively.

¹⁶⁵ HC SO 10.

¹⁶⁶ HC SO 14.

¹⁶⁷ HC SO 152J.

the subject matter, the level of interest amongst MPs as a whole, and the possibility of the debate taking place under different parliamentary procedures.

Select committees

Select committees were much used to investigate social and administrative problems in the 19th century. A group of MPs would examine a topic of current concern, with power on behalf of the House to take evidence from witnesses with first-hand knowledge of the issues. Their report, published with the supporting evidence, might convince the House of the need for legislative reforms. The use of select committees declined as departments grew in strength and resources, as the primary initiative for legislation moved to the government, and as the party system established stricter control over backbench MPs.

The experience of the select committee on the Marconi scandal, when Liberal ministers were accused of reaping financial rewards through their prior knowledge of a government contract, showed that a select committee was not appropriate for investigations directly involving the reputation of Cabinet ministers.¹⁶⁸ However, the Public Accounts Committee has since 1861 had the task of reporting to the House on the financial and accounting practices of departments.¹⁶⁹ In the period after 1945, little use was made of committees for scrutinising the administration, apart from specialist committees dealing with government finance, the technical scrutiny of delegated legislation by the committee on statutory instruments,¹⁷⁰ and (from 1956 to 1979) the work of the select committee on nationalised industries.

One obstacle to the development of such committees was the fear that their investigations would interfere with the running of departments and conflict with ministerial responsibility. In 1959 the Select Committee on Procedure rejected a proposal for a committee on colonial affairs, on the ground that this was ‘a radical constitutional innovation’: ‘there is little doubt that the activities of such a committee would be aimed at controlling rather than criticising the policy and actions of the department concerned. It would be usurping a function which the House itself has never attempted to exercise.’¹⁷¹ By the mid-1960s the mood of the Commons had changed. In 1965, the Committee on Procedure declared that lack of knowledge of how the executive worked was the main weakness of the House.¹⁷²

Some limited reforms were made in 1966–8 while Richard Crossman MP was Leader of the House. Two specialised committees were created in 1966, one to consider the activities of a department (the Ministry of Agriculture, Fisheries and Food), the other to consider the subject of science and technology. The latter committee was regularly reappointed, but the Committee on the Ministry of Agriculture survived only for two sessions. Other committees established piecemeal at this time included committees to examine the activities of two departments (Education and Science, and Overseas Development), race relations and immigration and Scottish affairs. During the 1970s, such committees existed alongside the Expenditure Committee and its sub-committees.¹⁷³

In 1978, an influential report by the Select Committee on Procedure recommended a complete reorganisation of the select committees to produce a more rational structure and to provide means by which MPs could regularly scrutinise the activities of the main departments.¹⁷⁴

¹⁶⁸ Donaldson, *The Marconi Scandal*; and ch 11.

¹⁶⁹ The PAC is said to be the ‘doyen’ of select committees: J F McEldowney, in Jowell and Oliver (eds), above (3rd edn), ch 7.

¹⁷⁰ Ch 22.

¹⁷¹ HC 92–1 (1958–9), para 47; Crick, *The Reform of Parliament*, ch 7.

¹⁷² HC 303 (1964–5).

¹⁷³ See Morris (ed.), *The Growth of Parliamentary Scrutiny by Committee*.

¹⁷⁴ HC 588–1 (1977–8), chs 5–7; and see HC Deb, 19 and 20 February 1979, cols 44, 276.

The incoming Conservative government moved with notable speed to adopt these recommendations.¹⁷⁵ Now embodied in the House's standing orders,¹⁷⁶ the system of select committees is directly related to the principal government departments. Select committees are appointed for the life of a Parliament to examine the 'expenditure, administration and policy' of the main departments,¹⁷⁷ though a few – such as the Public Accounts Committee – have a wider remit that cuts across departmental boundaries. Each committee typically has 11 or 14 members, and each may appoint a sub-committee.

As well as examining the work of the principal department specified for the committee, each committee has power to look at 'associated public bodies', that is, executive agencies, public corporations, boards and advisory bodies in the relevant field. There are also a number of joint select committees composed of members drawn from both Houses, in addition to a number of select committees in the House of Lords. The joint committees include the Joint Committee on Human Rights, which examines proposed legislation to consider its compatibility with the United Kingdom's obligations under international human rights law, including in particular the European Convention on Human Rights.

The work of the select committees

Standing Orders provide for 25 Commons select committees. Until 2010, the chairs and members of these committees were appointed by the Committee of Selection, which is dominated by party whips. Perhaps predictably, this gave rise to difficulty, with governments apparently keen to control appointments to these key positions. As long ago as 2001 the House of Commons Modernisation Select Committee concluded that the existing method of filling these positions by the Committee of Selection 'no longer enjoys the confidence of the House'.¹⁷⁸ Proposals for reform were made in the well-received report of a select committee that had been appointed in 2009 specifically to consider House of Commons Reform, as a result of which since 2010 both chairs and members of select committees are elected in a secret ballot by MPs.¹⁷⁹

Only backbench MPs serve on the committees. Each committee has a majority of members from the government side of the House, but some committee chairs are Opposition members. The committees are serviced by House of Commons clerks and they may appoint specialist advisers. Within its subject area, each committee may choose the topics for investigation, subject only to the avoidance of duplication with other committees. The topics investigated by select committees vary widely, ranging from major subjects that may take a year or longer to complete, to the latest departmental estimates and issues of topical concern which a committee may seek to influence by holding public hearings and publishing the evidence with a report and recommendations.

The freedom for a committee to decide for itself what to investigate is very important and no government approval is needed. The reports of select committees would be valueless if they merely reproduced the government's justification of its policies. The committees are

¹⁷⁵ HC Deb, 25 June 1979, col 33. The literature on the select committees includes Drewry (ed.), *The New Select Committees*; Englefield (ed.), *Commons Select Committees*; Griffith and Ryle, ch 11; and N Johnson, in Ryle and Richards (eds), *The Commons under Scrutiny*, ch 9. Also A Kelso, in Flinders *et al.* (eds), *The Oxford Handbook of British Politics*, ch 13.

¹⁷⁶ HC SOs 121–152C.

¹⁷⁷ For an account of the 'core tasks' of select committees, see HC 697 (2012–13).

¹⁷⁸ HC 224 (2001–02), para 6. It was said that the Committee of Selection had 'come to interpret its role as limited to confirming the proposals put to it by the front benches on both sides' (*ibid.*, para 9). See D Oliver [2001] PL 666.

¹⁷⁹ See HC 1573 (2010–12). For background see HC 1117 (2008–09), paras 43–94.

aware that, even though they do not often change government decisions, as all-party committees they exercise an important critical function. Voting on party lines can occur when a committee is deciding the contents of its report, but this is exceptional and not the rule. For criticism of the government to be made, it must have been supported in the committee by one or more MPs from the government side of the House. The committee's report contains only the majority view; but the extent of unity or division is revealed in the minutes of proceedings that are published with the report.

In 1979, some MPs believed that such committees might detract from the adversary quality of parliamentary procedure, might develop consensus politics, might develop too close a relationship with the departments concerned and so on. These fears have not been borne out. The government undertook at an early stage to cooperate fully with the committees,¹⁸⁰ but it lays down the rules by which civil servants may give evidence; these rules seek to protect from investigation the process of decision making within government.¹⁸¹ Some committees have occasionally encountered difficulties in securing evidence, whether from ministers who refused to attend,¹⁸² individuals prohibited by government from attending; or departments that refused to release documents.¹⁸³ But these difficulties are not commonplace, and it is now claimed that:

select committees are seen as a key part of the constitutional framework, successful in influencing both Government and external bodies, and a leading forum for public debate; they also greatly extend the engagement of the public with Parliament in a positive way. Committees' legitimacy in the eyes of the public, their profile in the media, and their self-confidence is growing.¹⁸⁴

This is not to say that the system does not need to be improved, and many proposals to this effect have been made for the best part of 20 years. As long ago as 2001, the Liaison Committee made a number of recommendations in an important report for the committees to be more effective and independent.¹⁸⁵ Concern was expressed about the system for the nomination of members, which was then 'too much under the control of the Whips', with members kept off or removed 'on account of their views'. The committee also recommended that more time should be spent on the floor of the House considering select committee reports. Although Westminster Hall enables debates on committee reports to take place, this was thought not to be a substitute for 'debating time on the floor of the House, on substantive motions'.

Further proposals for reform were made by the Modernisation Committee in 2002, the Committee having expressed concern that the select committees generally were 'much poorer in the resources they can command than in other parliaments and they have a weak record of stability of membership. They also have a much more marginal role in scrutinising legislation, which is the principal function of the parallel committees in some other parliaments.'¹⁸⁶

¹⁸⁰ HC Deb, 25 June 1979, col 45; and 16 January 1981, col 1697.

¹⁸¹ See ch 11 where this matter is more fully explored.

¹⁸² See HL 152, HC 230 (2008–09), esp para 51 where the JCHR reported repeated attempts to request oral evidence from ministers on the question of British government complicity in the torture of terrorist suspects. It is clear from the Committee's reports that such a refusal was rare to the point of being unique, leading the committee to reflect that 'the constitutional significance of the ministers' refusal should not be under-estimated' (ibid).

¹⁸³ HC 321 (2000–01), paras 118–26. Difficulties have also arisen in relation to a witness who refused to answer questions put to him by a Committee: see HC 1044 (2002–03).

¹⁸⁴ HC 697 (2012–13), para 135 (Liaison Committee). See also HC 321 (2000–01), para 2, and HC 224 (2001–02), para 2.

¹⁸⁵ HC 321 (2000–01). See Oliver, *Constitutional Reform in the UK*, ch 9.

¹⁸⁶ HC 224 (2001–02), para 4.

The matter was revisited in *Rebuilding the House*, the important report of the House of Commons Reform Committee, which in 2009 made a number of well-received proposals, these complementing the earlier proposals of the Liaison Committee, renewing the recommendation that select committees should be elected by the House, and not selected by the party whips.

F. Conclusion

The apparently contradictory roles of Parliament in the Westminster system of government identified in the introduction to this chapter create a constant tension between the demands of the government to secure safe passage for its business and the demands of the Opposition that the government's business should be subject to proper scrutiny. It also creates a constant tension for backbenchers, with a responsibility to their party to support or oppose the government as the case may be, but also with a responsibility to the House to exercise independent judgment on the issues of the day. These tensions – felt more keenly by some members than by others – are on display in each of the three areas examined in this chapter, in relation to all of which significant procedural reforms have taken place in recent years. Although dry procedural matters, these reforms are of great constitutional importance, addressing fundamental questions about the legitimacy of government and the effectiveness of Parliament.¹⁸⁷

This is not to deny that a great deal yet needs to be done. Although the battle for the election of select committee chairs and members has now been won, concern has been expressed about the reluctance of the Coalition government to implement other reforms that had been proposed in *Rebuilding the House*, including in particular the establishment of a House Business Committee in which members would play a greater part in determining the order of business, as an assertion of the principle that all time is 'the House's time'.¹⁸⁸ A commitment to such an initiative was made in the Coalition *Programme for Government* but has not been implemented,¹⁸⁹ to the evident disappointment of the Political and Constitutional Reform Select Committee in a valuable report on *Revisiting Rebuilding the House*.¹⁹⁰ The latter report also repeated proposals for the pre-legislative scrutiny of all public Bills and the election of members to public bill committees, following the precedent relating to the select committees.

One final matter to have attracted attention in recent years has been how better to involve the public in the parliamentary process. There is now an e-petition procedure whereby members of the public may petition online on any matter for which the government is responsible.¹⁹¹ If the petition secures 100,000 signatures, it may be considered by the Backbench Business Committee for debate in Westminster Hall, provided an MP can be found to support it.¹⁹² This, however, is very much a procedure in embryo, the operation of which was strongly criticised by the Political and Constitutional Reform Select Committee.¹⁹³ Other

¹⁸⁷ We should not overlook the suggestion that the government's commitment to modernisation of the legislative process (if not to some of the other initiatives discussed in this chapter) 'always owed more to its desire to secure the passage of its business than a desire to improve the effectiveness of parliamentary scrutiny': P Cowley and M Stuart (2001) 54 *Parliamentary Affairs* 238.

¹⁸⁸ HC 1117 (2008–09), para 129.

¹⁸⁹ The Coalition, *Our Programme for Government* (2010), p 27.

¹⁹⁰ HC 1062 (2012–13).

¹⁹¹ See <http://epetitions.direct.gov.uk>. For background, see The Coalition, *Our Programme for Government*, above, p 27.

¹⁹² <http://www.parliament.uk/bbcom> (Backbench Committee website).

¹⁹³ HC 1062 (2012–13). Compare HC 1094 (2012–13) (Liaison Committee).

initiatives are designed to enhance public engagement directly with the legislative process, including a public reading day at the committee stage of public Bills.¹⁹⁴ The Protection of Freedoms Bill 2012 was the pilot for this latter initiative,¹⁹⁵ but it will require more use of the procedure before meaningful conclusions can be drawn about its long-term value.

¹⁹⁴ See The Coalition, *Our Programme for Government*, above, p 27.

¹⁹⁵ On which see Home Office, *Protection of Freedoms Bill – Public Reading Stage Report* (2011).

CHAPTER 9

Privileges of Parliament

Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished.¹

At the height of the revelations about parliamentary expenses in 2009, the term ‘parliamentary privilege’ was likely at best to be greeted with cynicism. In fact, as a joint committee of the two Houses in 1999 emphasised in the above words, parliamentary privilege is part of the framework which enables each House and its members to fulfil their duties. This principle was re-affirmed by another joint committee in 2013, which explained that ‘in brief, [privilege] comprises the right of each House to control its own proceedings and precincts, and the right of those participating in parliamentary proceedings, whether or not they are Members, to speak freely without fear of legal liability or other reprisal.’² The privileges of each House have both external and internal aspects: they protect it against attempts from outside to interfere in its proceedings; and they require its members to refrain from abusing their privileged position.

As a vital part of the law and custom of Parliament, privilege has evolved over centuries in response to changed circumstances. Neither House can by its own resolution create new privileges. When a matter of privilege is disputed, ‘it is for the courts to decide whether a privilege exists and for the House to decide whether such privilege has been infringed.’³

This chapter does not discuss the application of privilege to the Scottish Parliament and the Assemblies for Wales and Northern Ireland. These bodies enjoy rights and immunities enacted by legislation,⁴ but they do not share in Westminster’s privileges.⁵ Emphasis will be placed on the House of Commons, but questions of privilege also arise in relation to the Lords.

A. House of Commons

Certain privileges and immunities have long been attached to the House and its members. At the opening of each Parliament, the Speaker claims for the Commons ‘their ancient and undoubted rights and privileges’ and, in particular, ‘freedom of speech in debate, freedom

¹ Report of joint committee on parliamentary privilege (HL Paper 43-I, HC 214-I, 1998–9), para 3 (cited here as the ‘Nicholls report’). And see Erskine May, chs 12–17; Griffith and Ryle, *Parliament*, ch 3; Horne, Drewry and Oliver (eds), *Parliament and the Law*, chs 1–4.

² Report of joint committee on parliamentary privilege (HL Paper 30, HC 100, 2013–14) (cited here as the ‘Brabazon report’), para 3.

³ *Pepper v Hart* [1993] AC 595, 645 (Lord Browne-Wilkinson).

⁴ See e.g. Scotland Act 1998, ss 22 and Sch 3 (standing orders), ss 23–26 (witnesses and documents), 39 (members’ interests), 41 (defamatory statements), 42 (contempt of court), and 43 (corrupt practices).

⁵ See *Whaley v Lord Watson of Invergowrie* 2000 SLT 475. And C R Munro [2000] PL 347. On the European Parliament, see Protocol on the Privileges and Immunities of the European Union (16 December 2004), arts 7–9; and C-200/07 *Marra v De Gregorio* [2009] 1 CMLR 15.

from arrest, freedom of access to Her Majesty whenever occasion shall require; and that the most favourable construction should be placed upon all their proceedings.’ Two of these freedoms need to be discussed.

Freedom from arrest⁶

The ancient privilege of freedom from *civil* arrest enabled members to attend the House at a time when imprisonment was a common means of enforcing payment of debts. Today, an MP is protected against committal for contempt of court where this is sought to compel performance of a civil obligation.⁷ Members have no immunity from having civil actions brought against them,⁸ but it is a contempt of the House to serve a writ on a member within the precincts of the House.⁹ Members are not protected against bankruptcy proceedings, and are no longer exempt from jury service.¹⁰ In 1999 and again in 2013, it was recommended that any surviving freedom from civil arrest should be abolished.¹¹

As regards *criminal* law, members have no immunity from arrest. In *R v Chaytor*,¹² when former MPs were prosecuted for submitting false claims for expenses, the Supreme Court held that MPs are fully subject to the criminal law, even for conduct in the House of Commons itself when this is not protected by the privilege that attaches to ‘proceedings in Parliament’. The absence of immunity was seen earlier, when Damian Green MP, then Conservative shadow Home Secretary, was arrested at his home in November 2008 while police investigated a series of leaks from the Home Office to the press that had led the Cabinet Office to call in the police. That affair raised many questions, and it was not obvious that the leaks constituted criminal offences at all.¹³ The police made an unprecedented search of Mr Green’s office at Westminster, seizing documents, computers and other materials, on the basis of a consent-form that the police had caused the Serjeant at Arms to sign, which she did without getting the approval of senior House authorities. The Speaker (Michael Martin MP) responded by instructing that no future search of an MP’s office could take place without a warrant, but this itself raised questions about the impact of parliamentary privilege on police powers and the right of the House to resist intrusive police action.¹⁴

Members may be required to give surety to keep the peace or security for good behaviour, and may (except where their freedom of speech protects them) be committed for contempt of court where the contempt has a criminal character.¹⁵ An MP was held in preventive detention under defence regulations during the Second World War.¹⁶ The House insists on receiving immediate information of the imprisonment of a member, with reasons for the detention. While a member awaiting trial may carry out many duties as a constituency representative, a member who is imprisoned after conviction may do so only if granted exceptional concessions under prison rules.¹⁷ A term of imprisonment for more than a year causes the seat to be

⁶ Erskine May, ch 14; Nicholls report, paras 325–8; Brabazon report, paras 254–7.

⁷ As in *Stourton v Stourton* [1963] P 302. Erskine May, pp 246–7.

⁸ *Re Parliamentary Privilege Act 1770* [1958] AC 331.

⁹ HC 221 (1969–70) and HC 144 (1972–3).

¹⁰ Insolvency Act 1986, s 427; Criminal Justice Act 2003, s 9 and Sch 1, pt 3.

¹¹ Note 6 above.

¹² [2010] UKSC 52, [2011] 1 AC 684; and see below, pp 221.

¹³ In view of the Official Secrets Act 1989; ch 19 D.

¹⁴ See HC 157 and HC 1026 (2008–09); also Sir Denis O’Connor, *Review of lessons learned from the Metropolitan Police Service’s investigation* (October 2009). For a full account, see report of the Campbell committee (HC 62, 2009–10); and A W Bradley [2012] PL 396.

¹⁵ Ch 13 C. And see note 6 above.

¹⁶ HC 164 (1939–40) (Captain Ramsay’s case).

¹⁷ HC 185 (1970–1). And see G J Zellick [1977] PL 29.

vacated,¹⁸ but a member who is convicted of a crime involving dishonest or immoral conduct is likely to resign from Parliament whatever the sentence.

Freedom of speech¹⁹

Freedom of speech is the most substantial privilege of the House. Its essence is that no penal or coercive action should be taken against members for what is said or done in Parliament. Claims for the privilege were regularly made by the Speaker from the end of the 16th century. The right of the Commons to criticise the King's government was called in question in 1629 when Eliot, Holles and Valentine were convicted by the Court of King's Bench for seditious words spoken in the Commons and for tumult in the House.²⁰ This judgment was reversed in 1668 by the House of Lords on the ground that words spoken in Parliament could be judged only in Parliament. In art 9 of the Bill of Rights 1689, it was declared 'that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.²¹

The most important consequence of this declaration is that no member may be made liable in the courts for what is said or written in course of parliamentary proceedings. Thus members who speak in the House are immune from the law of defamation.²² Nor can what is said in Parliament be examined by a court for the purpose of deciding whether it supports a cause of action in defamation which has arisen outside Parliament: 'a member must have a complete right of free speech in the House without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter'.²³ Moreover, the courts may not receive in any proceedings 'evidence, questioning or submissions designed to show that a witness in parliamentary proceedings deliberately misled Parliament'.²⁴

Since 1818, leave of the House has been required before officers of the House may give evidence in court of proceedings in the Commons. In 1980, the House relaxed its practice by giving general permission for reference to be made in court to Hansard and to the published evidence and reports of committees.²⁵ This change did not diminish the effect of art 9 of the Bill of Rights, nor did it alter the rule that Hansard could not be used in court as an aid to statutory interpretation. In 1993, the Law Lords changed the latter rule, holding that courts may use ministerial statements in Hansard to resolve ambiguities in legislation; such use does not 'impeach or question' freedom of speech in the Commons.²⁶

More controversially, ministerial statements in Parliament announcing new policies or explaining executive decisions are sometimes used as evidence in judicial review proceedings.²⁷ The justification for this is that such statements may cast light on the motivation for executive action that ministers have taken outside the House, and may show that the action involved the improper exercise of power.²⁸ In 1993, Speaker Boothroyd warned the parties to an application for judicial review of the government's decision to ratify the Treaty on

¹⁸ See Representation of the People Act 1981, s 1; and ch 7 G.

¹⁹ Erskine May, ch 13; Nicholls report, paras 36–134, 189–228; Brabazon report, ch 6.

²⁰ *Eliot's case* (1629) 3 St Tr 294.

²¹ And see *Re Parliamentary Privilege Act 1770*, note 8 above.

²² *Lake v King* (1667) 1 Saunders 131; *Dillon v Balfour* (1887) 20 LR Ir 600. And see *A v UK* (2003) 36 EHRR 917 (MP's immunity from defamation compatible with arts 6(1) and 8, ECHR).

²³ *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, 530 (Browne J).

²⁴ *Hamilton v Al Fayed* [2001] 1 AC 395, 403 (Lord Browne-Wilkinson).

²⁵ HC Deb, 3 December 1979, col 167, and 31 October 1980, col 879; HC 102 (1978–9); and P M Leopold [1981] PL 316.

²⁶ *Pepper v Hart* [1993] AC 593; and ch 1 B.

²⁷ *Ibid.*, 639 (Lord Browne-Wilkinson).

²⁸ *Toussaint v A-G of St Vincent* [2007] UKPC 48, [2008] 1 All ER 1.

European Union that they should respect art 9 of the Bill of Rights; in the event, the court proceedings dealt solely with issues affecting the legality of the decision.²⁹ In 1999, the Nicholls committee concluded that privilege was not a reason for restricting judicial review of executive decisions and that statements in the House could be used even to question the minister's good faith.³⁰ But the Brabazon committee in 2013 disagreed with this, taking the view that it was 'constitutionally inappropriate' for the courts to rely on such material as select committee reports in judicial review cases, since such reliance 'risks having a chilling effect upon parliamentary debate'.³¹ When a court has to decide whether a statute is compatible with rights under the Human Rights Act 1998, it may read Hansard to find out the background to the legislation, the problem at which it was aimed and its likely effect, but not to determine such matters as the proportionality of the statute.³²

The protection of members for words spoken extends to criminal as well as civil liability, even for words that if used outside Westminster could lead the speaker to being prosecuted for such offences as incitement to racial hatred.³³ Disclosures to Parliament may not be made the subject of prosecution under the Official Secrets Acts,³⁴ although the MP concerned may be liable to the disciplinary jurisdiction of the House. Speeches or questions in Parliament may be in breach of the House's *sub judice* rule if they concern pending judicial proceedings, but they may not be held to be in contempt of court.³⁵

In protecting MPs from liability for speaking in Parliament, one indirect effect of the Bill of Rights was to restrict the ability of MPs to sue in defamation. The reason for this was that if an MP sued a newspaper for a defamatory report about his or her conduct, art 9 of the Bill of Rights prevented the newspaper from showing that the report was true by bringing evidence of what had been said or done in Parliament: in the interests of justice, the court would require the case to be stayed.³⁶ In 1996, concern at 'cash for questions' allegations led Parliament hastily to amend the Bill of Rights to enable Neil Hamilton MP to sue *The Guardian*: by s 13 of the Defamation Act 1996, any individual (whether an MP or not) may waive parliamentary privilege so that an action can proceed.³⁷ This was an unsatisfactory change in the law. In 1999, the Nicholls committee recommended that s 13 of the 1996 Act be replaced by the grant of power to each House to waive privilege in court proceedings, subject to safeguards to maintain protection of the Bill of Rights for individuals.³⁸ In 2013, the Brabazon committee went further by simply recommending the repeal of s 13, without any replacement.³⁹

²⁹ HC Deb, 21 July 1993, col 353; R Rawlings [1994] PL 367, 377–81; and *R v Foreign Secretary, ex p Rees-Mogg* [1994] QB 552.

³⁰ Nicholls report, paras 46–55.

³¹ Brabazon report, paras 118–136, endorsing *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin) (Information Tribunal not entitled to rely on interpretation placed on Act by minister or committee in Parliament).

³² *Wilson v First County Trust Ltd* [2003] UKHL 40; [2004] 1 AC 816. And see *R (Age UK) v Business, Innovation and Skills Secretary* [2009] EWHC 2336 (Admin) (court taking into account parliamentary material as background to interpretation of regulations).

³³ See ch 17 D below.

³⁴ *Duncan Sandys* case, HC 101 (1938–9). On liability for criminal conspiracy, see *Ex p Wason* (1869) LR 4 QB 573.

³⁵ E.g. the disclosure of Colonel B's identity on 20 April 1978; HC 667 (1977–8) and 222 (1978–9). And see report of HC Procedure Committee, HC 125 (2004–05) and Brabazon report, paras 158–160.

³⁶ *Prebble v Television New Zealand Ltd*; see ch 17 F below and P M Leopold (1995) 15 LS 204.

³⁷ By using s 13, Mr Hamilton later sued Mr Al Fayed over allegations already examined by a Commons committee: *Hamilton v Al Fayed* [2001] 1 AC 395 (and see A W Bradley [2000] PL 556). See also ch 17 F.

³⁸ Nicholls report, paras 60–82.

³⁹ Brabazon report, para 170.

The meaning of ‘proceedings in Parliament’

We have seen that art 9 of the Bill of Rights protects ‘the freedom of speech and debates or proceedings in Parliament’. It plainly applies to what members say in debates in the House, but how far does this protection extend? And who may decide the extent of protection? In 1939, the House of Commons resolved that it covers asking questions, giving written notice of questions and ‘everything said or done by a member in the exercise of his functions as a member in a committee in either House, as well as everything said or done in either House in the transaction of parliamentary business’.⁴⁰ On this basis, protection extends to officials of the House in performing their duties (for example, when a clerk advises a member on the draft of a question to be asked of a minister), as well as to witnesses giving evidence to committees of the House. But this does not mean that privilege applies to every casual conversation in the corridors or over a drink at Westminster. If the extent of the privilege is disputed, this is a matter for decision by the courts.

Following the scandal in 2009 regarding MPs’ expenses and allowances,⁴¹ several former MPs and a member of the Lords, who had claimed for items such as fictitious mortgage payments and travel expenses, were prosecuted for having made false statements to officials of the House contrary to the Theft Act 1968, s 17. To the indignation of the media, they submitted that (i) the claims for expenses were ‘proceedings in Parliament’ and within article 9 of the Bill of Rights; and (ii) the claims were within the internal proceedings of Parliament, over which each House has sole jurisdiction.⁴²

In *R v Chaytor*,⁴³ a nine-judge Supreme Court unanimously rejected the claim of privilege. It was held that claiming for allowances and expenses did not form part of, nor was incidental to, the core or essential business of Parliament. For MPs to be prosecuted for false claims would not inhibit freedom of speech and debate in Parliament. Lord Rodger found that there was nothing in the charges ‘which relates in any way to the legislative or deliberative processes of the House of Commons, however widely construed’.⁴⁴ Lord Phillips cited the dictum of Stephen J, in *Bradlaugh v Gossett*⁴⁵ that he knew of ‘no authority for the proposition that an *ordinary crime* committed in the . . . Commons would be withdrawn from the ordinary course of criminal justice’ (emphasis supplied).⁴⁶ The defendants argued that to make false claims might be a contempt of the House, but denied that it was an ‘ordinary crime’. But the court held that the making of claims for allowances and expenses was not within the ‘exclusive jurisdiction’ that each House enjoyed over its own procedures.⁴⁷ While the House might take disciplinary proceedings for any contempt, the courts must deal with charges of criminal conduct where these are outside article 9.

The Supreme Court’s decision rejecting the claim of privilege was inevitable given the historical justification for protecting the freedom of ‘speech and debate’ in Parliament. It

⁴⁰ HC 101 (1938–9).

⁴¹ See below, section B.

⁴² Below, p 225.

⁴³ [2010] UKSC 52, [2011] 1 AC 684.

⁴⁴ *Ibid*, para [122].

⁴⁵ See below, p 228.

⁴⁶ (1884) 12 QBD 271, 283. The notion of an ‘ordinary crime’ was not applicable to the alleged conduct of Mr Damian Green MP (above, p 218).

⁴⁷ Findings by the Parliamentary Commissioner for Standards but are not subject to judicial review: *R v Parliamentary Commissioner for Standards, ex p Al Fayed* [1998] 1 All ER 93.

upholds the long-standing rule that MPs at Westminster have no general immunity from the criminal law, unlike their counterparts in many European countries.⁴⁸

The publication of parliamentary proceedings

The courts have long exercised their authority to decide disputes about the extent of parliamentary privilege when claims by the Commons would have an adverse effect on the rights of persons outside the House. In 1839, the question arose as to the authority of the House to publish outside Parliament debates and reports of its committees. A lengthy dispute between the Commons and the courts led to the ruling that at common law the authority of the House was no defence when defamatory material was published outside the House and, more fundamentally, that the House could not create a new privilege by its own resolution.

In *Stockdale v Hansard*,⁴⁹ Hansard printed and sold to the public by order of the Commons a report by the inspectors of prisons which stated that an indecent book published by Stockdale was circulating in Newgate Prison. When Stockdale sued in defamation, the case was decided for Hansard on the ground that the statement in the report was true. When Stockdale sued again, after the report had been republished, Hansard was ordered by the House to plead only that he had acted under an order of the Commons, a body that was superior to any court of law; that each House was the sole judge of its own privileges; and that a resolution of the House declaring its privileges could not be questioned. The court rejected this defence, holding that only the Queen and both Houses of Parliament could make or unmake laws; when it was necessary to decide the rights of persons outside Parliament, the courts must determine the nature and existence of privileges of the Commons; and the House had no privilege to permit publication of defamatory matter outside the House.

In the light of this clearcut decision, legislation by Parliament was necessary. By s 1 of the Parliamentary Papers Act 1840, any civil or criminal proceedings arising out of the publication of papers, reports etc. made by the authority of either House must be stayed on the production of a certificate of such authority from an officer of the House. The Act thus gave the protection of absolute privilege to parliamentary papers. The official report of debates in the House (Hansard) has absolute privilege under the 1840 Act and so have documents (such as committee reports) that are published as *House of Commons papers*.⁵⁰

Section 3 of the 1840 Act protects the publication of ‘any extract from or abstract of’ papers published under the authority of Parliament, but the burden of showing that publication was in good faith and not affected by malice is placed on the defendant (unlike the rule that applies to qualified privilege in the law of defamation). This limited protection has been extended to radio and television,⁵¹ but the 1840 Act does not apply to most media reports of debates, as these are based not on Hansard but on the reporter’s own notes. The 1840 Act needs to be replaced by new legislation, providing for the levels of privilege that are acceptable

⁴⁸ See S Hardt, *Parliamentary Immunity*.

⁴⁹ (1839) 9 A & E 1. For the background, see P and G Ford (eds), *Luke Graves Hansard’s Diary 1814–1841*, and E Stockdale [1990] PL 30.

⁵⁰ But *Command papers* (published by the government) are not protected in this way: see Cmnd 5909, 1975, p 55; P M Leopold [1990] PL 183; Nicholls report, paras 343–54.

⁵¹ Defamation Act 1952, s 9(1); Broadcasting Act 1990, s 203(1) and Sch 20, para 1.

today.⁵² While MPs who speak in the House are protected by art 9 of the Bill of Rights from liability for defamation, they are not so protected if they repeat their remarks outside the House (for example, in a broadcast interview) and even if they simply affirm what was said in the House.⁵³

In the 18th century, the House maintained the right to control publication of its debates outside Parliament, and even declared that any publication in the press of speeches by members was a breach of privilege. In modern times, this declaration bore no relation to reality. On 16 July 1971, the House resolved that in future it would entertain no complaint of contempt or breach of privilege regarding the publication of debates in the House or its committees, except when the House or a committee sat in private session. The House thus retains the power to protect committees and sub-committees that wish to meet in private.⁵⁴ While select committees generally take evidence in public, their deliberations, especially when a draft report is being considered, are in private. Premature reporting of these proceedings may be regarded as a serious breach of privilege,⁵⁵ but the reporting of evidence taken at public sittings of committees is not restricted.⁵⁶

The public interest in reports of parliamentary proceedings has long been recognised in the defence of qualified privilege in the law of defamation that attaches to a fair and accurate report of proceedings in Parliament⁵⁷ Today there is statutory qualified privilege, without explanation or contradiction, for ‘a fair and accurate report of proceedings in public of a legislature anywhere in the world’.⁵⁸

Sound broadcasting of proceedings in both Houses began in 1978. Debates in the Lords were first televised in 1985 and in the Commons in 1989. It is likely that those who broadcast such debates are protected against liability for defamation by the common law defence of qualified privilege and by the Parliamentary Papers Act 1840, s 3 of which was extended to radio broadcasting in 1952 and to television in 1990.⁵⁹ But if the 1840 Act is to be replaced, the new legislation should give absolute privilege to broadcasts by authority of either House and should confirm that ‘broadcasts’ include all electronic forms of communication.⁶⁰

Parliamentary privilege and the functions of members

We have seen that in 1939 the House of Commons took the view that privilege extends to ‘everything said or done by a member in the exercise of his functions,’ whether in either House or in a committee. This is a very broad test and the Supreme Court in *R v Chayter* rejected the argument that to make a claim for expenses or allowances came within privilege. A member’s functions today include the sending of correspondence to ministers and constituents about constituency issues and about other issues of public concern. However, since 1958, such correspondence has been regarded by the Commons as not being a ‘proceeding in Parliament’.

⁵² Brabazon report, paras 195–6.

⁵³ *Buchanan v Jennings* [2004] UKPC 36, [2005] 1 AC 115. But for a member to refer to a speech made in Parliament is not necessary to repeat it: *Makudi v Triesman* [2014] EWCA (Civ) 179.

⁵⁴ HC 34 (1966–7), paras 116–29.

⁵⁵ E.g. HC 357 (1967–8), debated on 24 July 1968; HC 185 (1969–70); HC 180 (1971–2); and HC 22 (1975–6), debated on 16 December 1975.

⁵⁶ HC Deb, 31 October 1980, col 917; and HC SO 136.

⁵⁷ *Wason v Walter* (1868) LR 4 QB 73. Also *Cook v Alexander* [1974] QB 279 (qualified privilege for a ‘parliamentary sketch’).

⁵⁸ Defamation Act 1996, s 15, sch 1, para 1 (and see paras 3, 7 and 9).

⁵⁹ Nicholls report, paras 355–75. Also HC 376 (1981–2) and P M Leopold [1987] PL 524, (1989) 9 LS 53 and [1999] PL 604, 614.

⁶⁰ Brabazon report, para 196.

G R Strauss MP had written to the minister responsible for the electricity industry, complaining of the methods of disposal of scrap cable adopted by the London Electricity Board. When the board heard of the letter, Strauss was threatened with a libel action unless he withdrew and apologised. The Committee of Privileges concluded that the MP's letter to the minister was a 'proceeding in Parliament' and that the threat of a libel action was to 'impeach or question' Strauss's freedom of speech in Parliament. But on 8 July 1958, the House decided by 218 to 213 to disagree with the committee, and resolved that (a) the original letter was not a proceeding in Parliament and (b) nothing in the subsequent correspondence was a breach of privilege.⁶¹ In support of the majority view, it was argued that members should not widen the scope of absolute parliamentary privilege and should rely on the defence of qualified privilege in the law of defamation.

Certainly, a complaint addressed by an MP to a minister on an issue of public concern in which the minister has an interest is protected by qualified privilege.⁶² But qualified privilege may be rebutted by proof of malice, and it might be held to constitute malice if a member forwarded to a minister without making any inquiry a letter from a constituent containing defamatory allegations. The position of an MP is much stronger if he or she can rely on absolute privilege.

Despite the narrowness of the vote in 1958 (and such a decision does not have the force of law), the view that absolute privilege should not be extended to all letters between MPs and ministers was upheld in 1999 by the Nicholls committee, and again in 2013 by the Brabazon committee.⁶³ In the Damian Green affair, the question arose during the investigation whether parliamentary material was in law subject to search and seizure by the police, but the issue did not reach a court. Potential whistle-blowers might feel more secure in approaching an MP if they knew that their letters would be protected by absolute privilege. But where an MP takes up an issue with a minister and intends to raise it in the House, especially when advised on how to proceed by a clerk in the House, the proposed action would by then be likely to have become a 'proceeding in Parliament'. If there were to be a statutory definition of 'proceeding in Parliament', as in Australia,⁶⁴ it would be desirable to clarify when the protection of parliamentary privilege begins to apply to an MP's correspondence.

One common situation on which there is no precedent at Westminster arose in New Zealand, when a civil servant was sued in defamation for briefing a minister on the reply to a parliamentary question: the court applied the test of whether absolute parliamentary privilege was 'necessary' to the working of Parliament, and decided that it was not, holding that the defence of qualified privilege at common law was sufficient.⁶⁵ The decision is not binding on United Kingdom courts, and it has been criticised on the ground that such briefings by officials are necessarily antecedent to proceedings in Parliament.⁶⁶ A decision by an English judge that the register of MPs' interests is not a 'proceeding in Parliament' has been strongly criticised.⁶⁷ By contrast, a decision by the Speaker to withhold facilities from Sinn Fein

⁶¹ HC 305 (1956–7); *Re Parliamentary Privilege Act 1770* [1958] AC 331; HC 227 (1957–8). Also S A de Smith (1958) 21 MLR 465; D Thompson [1959] PL 10.

⁶² See *Beach v Freeson* [1972] 1 QB 14 (MP forwarding complaint about solicitors to the Law Society and Lord Chancellor); and ch 17 F.

⁶³ See Nicholls report, paras 103–112 and Brabazon report, paras 235–242.

⁶⁴ See Parliamentary Privileges (Australia) Act 1987, s 16(2); and Nicholls report, Annex B.

⁶⁵ *A-G v Leigh* [2011] NZSC 106; cf *Canada (House of Commons) v Vaid* [2005] SCC 30.

⁶⁶ Brabazon report, para 248.

⁶⁷ *Rost v Edwards* [1990] 2 QB 460. See *Prebble's case* [1995] 1 AC 321, 337; P M Leopold [1990] PL 475; Nicholls report, paras 122–3; Brabazon report, paras 233–4.

members who refused to take their seats at Westminster was held to be probably a ‘proceeding in Parliament’, but that in any event the decision was within the ‘exclusive cognizance’ of the Commons, and was not subject to judicial review.⁶⁸

An issue not addressed in the Strauss case in 1958 was whether for someone to sue an MP for defamation in respect of a proceeding in Parliament is itself a breach of privilege. One view is that MPs should leave it to the courts to reject such an action as being bound to fail, and that the House should not treat the action itself as a breach of privilege,⁶⁹ but this view would not be shared by many MPs.

Right to control internal proceedings

The House is entitled to control its proceedings and to regulate its internal affairs without interference by the courts. This right to ‘exclusive cognizance’ of its proceedings is one reason why the courts refuse to examine alleged defects of procedure when the validity of an Act of Parliament is challenged on this ground.⁷⁰ For the same reason, the court refused to enforce a contract between two local authorities by which one council had promised not to oppose in Parliament a Bill promoted by the other council;⁷¹ and the courts will not consider whether the report of a Commons committee is invalid because of procedural defects.⁷² However, the MPs charged with making false claims for parliamentary expenses failed in their argument that the House had ‘exclusive cognizance’ over the claims such that they were outside the reach of criminal law.⁷³

The House is also considered, in archaic language, to have the right ‘to provide for its own constitution as established by law’.⁷⁴ This no longer includes the right to decide disputed elections (these are now decided by the courts).⁷⁵ But the House retains the right (a) to order the issue of a warrant by the Speaker for a writ for a by-election;⁷⁶ (b) to determine whether a member is qualified to sit in the House and to declare a seat vacant if she is not so qualified;⁷⁷ and (c) to expel a member whom it considers unfit to continue as a member. Expulsion is the ultimate disciplinary sanction which the House can exercise over its members. In 1947, Mr Allighan MP had published an article that accused MPs of disclosing when drunk or for payment the proceedings of confidential party meetings held in the precincts of the House. The MP failed to substantiate these allegations and his conduct was considered to be a gross contempt of the House justifying expulsion.⁷⁸

By contrast with the position in the United States,⁷⁹ no court in Britain may review the legality of a resolution of the House to exclude or expel a member. One safeguard against abuse of this power is that a constituency may re-elect an expelled member, as in the case of John Wilkes in the 18th century and Charles Bradlaugh a century later. Today, a member

⁶⁸ *Re Guinness’s application* [1997] NI 359.

⁶⁹ S A de Smith (1958) 21 MLR 465, 468–75. Lord Denning’s unpublished dissent in *Re Parliamentary Privilege Act 1770* (above) is at [1985] PL 80.

⁷⁰ *Pickin v British Railways Board* [1974] AC 765. And see Erskine May, pp 227–233.

⁷¹ *Bilston Corpn v Wolverhampton Corpn* [1942] Ch 391.

⁷² *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162.

⁷³ *R v Chayter*, above, note 43.

⁷⁴ Erskine May, pp 216–7.

⁷⁵ Ch 7 E.

⁷⁶ Erskine May, p 25.

⁷⁷ Cf *A-G v Jones* [2000] QB 66 (Speaker asked court to decide whether an MP whose seat was vacated on her conviction for an election offence, reverted to her when she won her appeal against conviction.) This situation will not recur: see Political Parties, Elections and Referendums Act 2000, s 136, and p 266 above.

⁷⁸ HC 138 (1946–7).

⁷⁹ *Powell v McCormack* 395 US 486 (1970).

who commits severe misconduct is more likely to resign or undertake not to stand at the next general election than to be expelled.⁸⁰

This right of the House to regulate its proceedings includes the right to maintain order and discipline during debates. A member guilty of disorderly conduct who refuses to withdraw may, on being named by the Speaker, be suspended from the House either for a specified time or for the remainder of the session.⁸¹ In *Eliot's case*⁸² the question of whether the courts could deal with an assault on the Speaker committed in the House was left open when the judgment was declared illegal by resolutions of both Houses. We have seen that in principle criminal acts in the precincts of Parliament may be dealt with in the ordinary courts, even when they also constitute a contempt of the House. In the case of a statutory offence, the prosecutor must be able to show that the statute applies to the Palace of Westminster.⁸³

Breaches of privilege and contempt of the House

Subject to the limitation that the House may not by its own resolution create a new privilege, the House has inherent power to protect its privileges, though the extent of this power over members of the general public (including the media) is doubtful. The House has power to order the offender to be reprimanded by the Speaker. Moreover, members of the Commons may be suspended or expelled; officers of the House may be dismissed; and non-members such as lobby correspondents, who are granted facilities in the Palace of Westminster, may have those facilities withdrawn.⁸⁴ Although the House has no power to impose a fine, it has an ancient power to commit a person to the custody of its own officers until the end of the session, but this has not been exercised since 1880. Today, arrests for criminal conduct in the House such as an assault are made by the police officers on duty at Westminster.

The term 'breach of privilege' is not synonymous with contempt of the House, and someone could be guilty of contempt who had not infringed any privilege of the House.⁸⁵ Contempt of the House, like contempt of court, is a very wide concept. In Erskine May's words:

any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.⁸⁶

Contempt has been held to include: disorderly conduct within the precincts of the House; interference with the giving of evidence to a committee;⁸⁷ obstruction of a member in coming to and from the House;⁸⁸ uttering lies in a personal statement to the House; molesting a member on account of conduct in the House (for example, when a newspaper invited readers to telephone a member at his home to express their views about a question which he had

⁸⁰ For the case of the disappearing MP, John Stonehouse, who was eventually convicted of fraud and resigned, see HC 273, 357, 373, 414 (1974–5), and HC Deb, 11 June 1975, col 408.

⁸¹ HC SOs 45, 45A.

⁸² Page 219 above.

⁸³ *R v Graham-Campbell, ex p Herbert* [1935] 1 KB 594 (Commons bar not subject to Licensing Acts). Cf Nicholls report, paras 240–51; Brabazon report, paras 226–7.

⁸⁴ Cf HC 22 (1975–6).

⁸⁵ In *Allighan's case*, above, the false reports about party meetings at Westminster involved an affront to the House but not a breach of privilege as such.

⁸⁶ Erskine May, p 251; see HC 34 (1967–8), pp xi–xviii and 95–101; Nicholls report, paras 262–70. For the precedents and full references, see Erskine May, ch 15.

⁸⁷ The House resolved in 1688 that all witnesses summoned to the House should have the privilege of the House 'in coming, staying and returning'; and see the Witnesses (Public Inquiries) Protection Act 1892.

⁸⁸ Cf *Papworth v Coventry* [1967] 2 All ER 41.

tabled),⁸⁹ premature disclosure of the proceedings of a committee,⁹⁰ and secret recording by a journalist of conversations with MPs at Westminster while trying to persuade them to accept cash for asking questions.⁹¹ The hacking of MPs' mobile phones could be a contempt if its effect or motivation was to interfere with their parliamentary duties.⁹² Action by the police or prison officers to prevent a constituent communicating with her MP could also be a contempt, even if the communication would not itself be a 'proceeding in Parliament'.

The fact that certain action may be regarded as a contempt does not mean that the House will take action against the offender. In 1978, it was agreed that the House should use its penal jurisdiction sparingly and only when the House

is satisfied that to do so is essential to provide reasonable protection for the House, its members or its officers, from such improper obstruction or attempt at or threat of obstruction as is causing or is liable to cause, substantial interference with the performance of their respective functions.⁹³

Civil servants are subject to direction by ministers in giving evidence to select committees,⁹⁴ but this does not apply to members of non-departmental public bodies: when a member of one such body (CAFCASS) gave evidence to a Commons committee about its poor administration, other members of CAFCASS and the Lord Chancellor were held to have acted in contempt of the House in taking action against her because she had given that evidence.⁹⁵

Parliamentary privilege, contempt and the courts

Although it is now accepted that the courts have jurisdiction to decide the existence and extent of privileges of the House, it remains a matter for the House to decide what constitutes a contempt and, when there has been a contempt, what action to take. One difficulty is that, apart from the power of the House to impose sanctions (such as suspension or expulsion) on its own members or officials, the sanctions which can be imposed on a non-member (for instance, for refusing to give evidence to a committee) are very uncertain.⁹⁶ The ancient power to detain persons for contempt is effectively obsolete, except for the power to detain briefly anyone who tries to disrupt a sitting of the House. For this reason, we need not here consider whether by seeking habeas corpus someone detained by order of the House could ask the courts to intervene.⁹⁷ Today, the imposition of lesser penal sanctions on members of the public (such as a financial penalty) would be vulnerable to challenge on grounds arising from the European Convention on Human Rights (in particular art 6, the right to a fair hearing by a court before criminal sanctions are imposed).⁹⁸ In 2013, the Brabazon committee concluded that committees should have the powers they need to function effectively, but

⁸⁹ The *Daily Graphic* case, HC 27 (1956–7).

⁹⁰ See note 55 above.

⁹¹ HC 351-1 (1994–5).

⁹² HC 628 (2010–12).

⁹³ HC 34 (1967–8), para 15; HC Deb, 6 February 1978, cols 1155–98.

⁹⁴ See the *Osmotherly Rules* (p 102 above). And see ch 11 D.

⁹⁵ See HC 210, 447 and 1055 (2003–4).

⁹⁶ See Gordon and Street, *Select Committees and Coercive Powers – Clarity or Confusion?* Also P M Leopold [1992] PL 516.

⁹⁷ See *Paty's case* (1704) 2 Lord Raymond 1105; *Burdett v Abbot* (1811) 14 East 1; and *Case of the Sheriff of Middlesex* (1840) 11 A & E 273. In this sequel to *Stockdale v Hansard*, the Commons committed for contempt of the House the sheriffs who were attempting to enforce the judgment given in favour of Stockdale. And see E Stockdale [1990] PL 30.

⁹⁸ Cf *Demicoli v Malta* (1992) 14 EHRR 47.

hoped that, without legislation to criminalise specific contempts, it might be possible to achieve due standards of fairness of procedure.⁹⁹

As we have seen, questions of privilege used to be a source of conflict between the Commons and the courts.¹⁰⁰ Another illustration of the relationship between courts and Parliament is provided by complex events in the 1880s relating to the radical Charles Bradlaugh, an atheist who was elected MP for Northampton but was prevented by the House from taking the oath as required by the existing legislation. In outline, the court first held Bradlaugh subject to penalties payable to a member of the public (common informer) who sued him to enforce the Parliamentary Oaths Act 1866.¹⁰¹ Later, following his re-election to Parliament, the dispute continued and the House resolved that the Serjeant at Arms should exclude Bradlaugh from the House. Bradlaugh challenged this resolution, but in *Bradlaugh v Gossett* it was held that, since this was a matter relating to internal management of the House, the court had no power to interfere. Lord Coleridge CJ said, ‘If injustice has been done, it is injustice for which the courts of law afford no remedy.’¹⁰²

Because of the potential for disputes between the courts and the Commons, it was formerly said that there might at any one time be ‘two doctrines of privilege, the one held by the courts, the other by either House’.¹⁰³ Today, there is much greater regard for inter-institutional comity,¹⁰⁴ and it is accepted that new privileges, for example, the absolute privilege which an MP has in forwarding a citizen’s complaint to the Parliamentary Ombudsman,¹⁰⁵ must be created by statute and not by resolution of the House. However, there is still scope for conflict between the courts and Parliament, or at least between the courts and some parliamentarians. This was evident when some MPs used their freedom of speech in the House to circumvent the effect of court orders, naming individuals whose identity was protected by an injunction: this action would have been in contempt of court if they had been named outside Parliament. This occurred at a time when in sections of the media there was concern that the courts were issuing ‘super-injunctions’ to prevent any disclosure of the fact that an injunction had been obtained.¹⁰⁶ In 2013, a joint committee stressed the importance of freedom of speech in Parliament, urged that MPs should take such action nullifying a court order only when they can show that it is in the public interest to do so, and concluded that it was not necessary for the Houses to create new procedures for preventing members revealing information subject to privacy injunctions.¹⁰⁷

Procedure

When a possible breach of privilege or contempt comes to the notice of a member, he or she must give written notice of it to the Speaker as soon as is reasonably practicable. If the Speaker decides that the complaint should not have precedence over other Commons business, the MP is told this by letter, and it is then up to the member (if he or she can) to find another way of bringing the matter to the House. If the Speaker decides that the complaint should have priority over other business, this decision is announced to the House, and the member may table a motion for the next day proposing that the matter be referred to the

⁹⁹ Brabazon report, ch 3. The Nicholls report in 1999 had recommended legislation to enable the courts to fine non-members for contempt of Parliament (paras 300–314).

¹⁰⁰ Erskine May, ch 17.

¹⁰¹ *Clarke v Bradlaugh* (1881) 7 QBD 38. And see Arnstein, *The Bradlaugh Case*.

¹⁰² (1884) 12 QBD 271, 277.

¹⁰³ Keir and Lawson, *Cases in Constitutional Law*, p 255.

¹⁰⁴ Brabazon report, paras 115–117.

¹⁰⁵ Parliamentary Commissioner Act 1967, s 10(5); ch 23 D.

¹⁰⁶ Joint Committee on Privacy and Injunctions (HL Paper 273, HC 1443, 2010–12).

¹⁰⁷ The same, ch 9; and see Brabazon report, para 160.

Committee on Privileges. The motion is then debated and voted on by the House. In 1995, the examination of complaints of privilege was linked with the enforcement of MPs' standards of conduct (discussed in section B), but in 2013 the two functions were separated. The Committee on Privileges comprises ten members of the House and decides on the procedure for investigating a complaint remitted to it by the House. It is not usual to permit the person complained against to be represented by counsel. After examining witnesses and being advised by the Clerk of the House on relevant precedents, and if necessary by the Attorney General on matters of law, the committee reports to the House and may recommend action by the House. The House need accept neither the conclusions nor the recommendations. The party whips are not applied on privilege issues,¹⁰⁸ but nonetheless voting may be affected by party political considerations.

This procedure has been criticised for providing inadequate procedural safeguards to the individual complained against. In 1999, the Nicholls committee set out what procedural fairness requires, referred to the right to a fair hearing under art 6 ECHR, and urged that the then Committee on Standards and Privileges should devise an appropriate procedure.¹⁰⁹ In 2013, the Brabazon committee rejected the idea of entrusting the courts with jurisdiction over contempts of Parliament and recommended the adoption by the Commons of new resolutions and Standing Orders that would explain the House's contempt powers and the procedures to be adopted on allegations of contempt or breach of privilege.¹¹⁰

B. Financial interests and payment of members

It is one thing to assert the principle that MPs should have complete freedom of speech in Parliament, but another to ensure that they are, in fact, free of undue influence from financial and business interests outside the House and do not abuse their public office for private gain. In this section we examine (a) the regulation by the House of MPs' external financial interests; (b) the dramatic issues exposed by the media in 2009 relating to MPs' expenses and allowances; and (c) the response to those issues since 2009.

Two preliminary points may be made. First, it was in 1911 that MPs who did not hold ministerial office first received a salary. Payment of salaries became essential once the Law Lords had held that the use of trade union funds for political purposes was ultra vires and illegal,¹¹¹ thus preventing unions from paying salaries to the MPs whom they supported. Today, it is accepted that salaries should be paid to MPs, but difficulties have often arisen as to how much they should be paid. With effect from 2012, responsibility for deciding the level of salaries was taken from the House and given to the Independent Parliamentary Standards Authority (IPSA)¹¹² That body is also responsible for determining and providing the expenses and allowances that MPs need to enable them to perform their duties. Secondly, MPs have never been required to give up their existing business or professional interests when they are elected to the House, and some may acquire new sources of income in the world of business or the

¹⁰⁸ In 1996, a junior whip resigned after seeking to exercise improper pressure on the former Committee on Members' Interests: HC 88 (1996–7).

¹⁰⁹ Nicholls report, paras 280–92, citing *Demicoli v Malta* (note 98 above). See HC 403 (2002–3) replying to the report of the Committee on Standards in Public Life (Cm 5663) urging procedural reforms. For earlier recommendations, see HC 34 (1967–8) and HC 417 (1976–7).

¹¹⁰ Brabazon report, Annexes 2 and 3.

¹¹¹ *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87. Under the Trade Union and Labour Relations (Consolidation) Act 1992, unions may contribute to the expenses of parliamentary candidates from separate political funds.

¹¹² For this body, see below, p 234. For the history of members' salaries, see Erskine May, pp 52–4.

media¹¹³ while at Westminster; but for practical reasons many must cut down the time they formerly gave to such interests and others leave their previous employment completely.

Payments and rewards to members of Parliament from external sources

Every MP is expected to take an active interest in questions that directly affect their constituency and their constituents. At the national level, numerous interest groups (professional associations, trade unions, companies and voluntary organisations) seek to influence the government and to win support in Parliament. Many groups consider it worthwhile to obtain advice from MPs and to ensure that opportunities of promoting their cause in Parliament are taken. Where an MP gives time and effort to helping a constituent, no question of additional remuneration arises. But where an MP takes an interest in other matters, may he or she expect to be rewarded for this? And how is a line to be drawn between payments and rewards that are acceptable, and those that are not?

As long ago as 1695, the House resolved that ‘the offer of any money, or other advantage, to any member of Parliament for the promoting of any matter whatsoever depending or to be transacted in Parliament is a high crime and misdemeanour’. In 1858, the House resolved that it was improper for a member to promote or advocate in the House any proceeding or measure in which he was acting for pecuniary reward. In 1945, it was considered that, in accordance with the resolution of 1695, it would be a breach of privilege for money or other advantage to be offered to a member, or to a local party or a charity, to induce him or her to take up a question with a minister.¹¹⁴

By an old rule of the House, no member who has a direct pecuniary interest in a question may vote upon it. But this rule was narrowly interpreted: Speaker Abbot declared in 1811 that the rule applied only where the interest was a ‘direct pecuniary interest and separately belonging to the persons . . . and not in common with the rest of His Majesty’s subjects, or on a matter of state policy’. The rule was applied only to private legislation and never to voting on a public Bill.¹¹⁵ By custom of the House, members had to declare their direct pecuniary interest when speaking in a debate, but this did not apply to question time or to letters sent by a member to a minister.¹¹⁶

There have long been difficulties when members took paid employment outside the House or acted as advisers or consultants to commercial or other bodies, arising from the inevitable lack of transparency when payments from those outside sources related to actions of the member in Parliament, and when the outside body would directly or indirectly expect to see some return for payments made.¹¹⁷ In 1947, after an acrimonious dispute in which a civil service union was dissatisfied with the way their ‘parliamentary general secretary’, W J Brown MP, had dealt in Parliament with questions relating to the union, the House resolved that it was improper for an MP

to enter into any contractual agreement with any outside body, controlling or limiting the Member’s complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament; the duty of a Member being to his constituents and to the country as a whole, rather than to any particular section thereof.¹¹⁸

¹¹³ Such as appearing on *I’m a Celebrity: Get me out of here*: see 4th report of Committee on Standards (HC 806, 2013–14), concerning Ms Nadine Dorries MP.

¹¹⁴ *Henderson’s case*, HC 63 (1944–5). See also *Robinson’s case* HC 85 (1943–4).

¹¹⁵ HC 57 (1969–70), p xii; Griffith and Ryle, *Parliament*, p 97.

¹¹⁶ See *Boothby’s case*, HC 5 (1940–1).

¹¹⁷ See First Report of the (Nolan) Committee on Standards in Public Life, Cm 2850-I (1995); and HC 637 (1994–5).

¹¹⁸ HC Deb, 15 July 1947, col 284.

This was to an extent an important statement of principle, but it left the door wide open for the growth of what came to be called ‘parliamentary consultancies’, a door which in 1995 the Nolan committee said must be closed.¹¹⁹ Further action to compel MPs to disclose their financial and business interests was needed after the collapse in 1972 of the business network associated with the architect, John Poulson. Bankruptcy proceedings revealed that the network had largely been built up through bribing officials in central and local government, police committees and health authorities. Three MPs, including a member of the shadow Cabinet, had used their position to promote Poulson’s business without disclosing benefits which they were receiving from him. The conduct of one of these MPs, who had raised matters in the House for reward, was held to be a contempt of the House.¹²⁰ The duty to disclose private interests became a rule of the House on 25 May 1974, when it was resolved:

That in any debate or proceedings of the House or its committees or transactions or communications which a member may have with other members or with Ministers or servants of the Crown, he shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have.

This resolution governs all parliamentary proceedings, but it does not in its terms apply to dealings which MPs have with local councils, public corporations or foreign governments.

One matter that has had much attention concerns the law relating to an MP who corruptly provides services in Parliament in return for payment. Some serious difficulties have been thought to arise from art 9 of the Bill of Rights in applying to MPs the law of corruption.¹²¹ In the light of *R v Chayter*,¹²² MPs have no immunity from the ‘ordinary’ criminal law, but this does not mean that a court may rely on what was said in Parliament to prove commission of an offence.

Register of members’ financial interests

It will be evident that MPs were very slow to accept the need for a systematic method of making their interests more transparent: another result of the Poulson affair was that in 1975 the House established a compulsory register of members’ financial interests.¹²³ The aim was to publish information of any pecuniary interest or benefit which might affect the conduct of members, or influence their actions, speeches or vote in Parliament. The register was maintained by a senior clerk of the House and supervised by a select committee. In 1990 an MP who failed to register his financial interests was suspended from the House for 20 days.¹²⁴ And in 1995, two MPs were found to have been prepared to accept £1,000 from a *Sunday Times* reporter posing as a businessman, in return for asking a parliamentary question. Although the reporter was held to have committed a contempt of the House by secretly recording his conversations at Westminster with the MPs, the two MPs were suspended from the House, for 10 and 20 days respectively.¹²⁵

This ‘cash for questions’ affair was one reason for the appointment of the Nolan Committee on Standards in Public Life. In its first report,¹²⁶ the committee restated seven

¹¹⁹ Cm 2850-I (1995), pp 24–32.

¹²⁰ See HC 490 (1976–7); HC Deb, 26 July 1977, col 332; and G J Zelic [1978] PL 133.

¹²¹ See Cmnd 6524 (Salmon report); GJ Zelic [1979] PL 31; Nicholls report, paras 135–142; *R v Greenway* (1992, at [1998] PL 356); report of joint committee on draft Bribery Bill (HL Paper 115, HC 430 (2008–9), ch 13. The Bribery Act 2010 made no special provision for the conduct of MPs.

¹²² Above, section A; and see Brabazon report, paras 137–156.

¹²³ See HC 57 (1969–70); and HC 102 (1974–5).

¹²⁴ See HC 135 (1989–90) and HC Deb, 7 March 1990, col 889. Also M Ryle [1990] PL 313; Griffith and Ryle, *Parliament*, pp 80–102.

¹²⁵ HC 351-I (1994–5) and HC Deb, 20 April 1995, col 350.

¹²⁶ Cm 2850-I, 1995. And see ch 12 D.

key principles of conduct in public life (summarising these principles as selflessness, integrity, objectivity, accountability, openness, honesty and leadership). Applying these principles to MPs, the Nolan committee said that MPs should be barred from selling their services to firms engaged in lobbying on behalf of clients, but the committee was against placing the rules of conduct for MPs on a statutory basis. Accordingly, measures adopted by the House in 1995¹²⁷ included appointment of a new officer of the House, the Parliamentary Commissioner for Standards, to maintain the Register of Members' Interests, and to investigate complaints about MPs' conduct.¹²⁸ The Committee on Standards and Privileges was created to oversee the work of the Commissioner, to consider matters relating to the conduct of members referred to it by the Commissioner, and issues of privilege referred to it by the House.¹²⁹ Stricter rules were adopted as to the categories of interests to be registered. The revised rules now include company directorships, employment, profession and vocation; services to clients arising from the member's position as MP; financial sponsorships, whether as a candidate for election or as a member; gifts, benefits and hospitality relating in any way to membership; overseas visits; foreign benefits and gift; land and property of substantial value; shareholdings; family members remunerated through parliamentary allowances; and a residual category of any interest or benefit received which might reasonably be thought by others to influence the member's actions in Parliament.¹³⁰ Where an MP enters into an agreement to provide services as a member, the full agreement must be registered with the Commissioner.

Also in 1995, a code of conduct for members was adopted,¹³¹ and the 1947 resolution¹³² was restated by the House, with addition of the following words:

in particular, no Members . . . shall, in consideration of any remuneration, fee, payment, or reward or benefit in kind, direct or indirect . . .

- (a) advocate or initiate any cause or matter on behalf of any outside body or individual, or
- (b) urge any other Member of either House . . . including Ministers, to do so, by means of any speech, Question, Motion, introduction of a Bill or amendment to a Motion or Bill.¹³³

The Code of Conduct also provides that the acceptance by a member of a bribe to influence his or her conduct as a member is 'contrary to the law of Parliament'.

Between 1997 and 2005, the Committee on Standards and Privileges issued almost 100 reports, many of which concerned failure by MPs to register relevant interests. When a serious failure was shown to have occurred, the Committee recommended that the MPs in question be suspended from the House for a stated period.¹³⁴ The most substantial inquiry made by the first Commissioner, Sir Gordon Downey, upheld allegations that Neil Hamilton MP received undisclosed payments from Mr Al Fayed for lobbying services and undisclosed hospitality, including a stay at the Ritz Hotel in Paris.¹³⁵ In such serious cases of misconduct, an adverse report may cause the MP to resign or to leave Parliament at the next election. In

¹²⁷ HC 637 and 816 (1994–5); HC Deb, 18 May 1995, col 481.

¹²⁸ See HC SO 150.

¹²⁹ See section A above.

¹³⁰ The current register may be read on the Commons website, as may the latest version of *The Code of Conduct, together with the Rules Relating to the Conduct of Members*.

¹³¹ HC 688 (1995–6); and HC Deb, 24 July 1996, col 392.

¹³² See text at note 118 above.

¹³³ HC Deb, 6 November 1995, cols 604, 661.

¹³⁴ See HC 260 (1999–2000) (untruthful denial of connections with offshore companies, intended to deceive Committee); and HC 297 (2001–2) (inadequate replies to questions from Commissioner and Committee).

¹³⁵ See HC 30, 261 (1997–8); and HC Deb, 17 November 1997, cols 81–121. Mr Hamilton later sued Mr Al Fayed for libel without success (see note 37 above).

the light of events in 2009, we may note that the Committee's reports in this period often concerned alleged mistakes or abuse arising from allowances or expenses payable to MPs.¹³⁶

With the aim of strengthening the registration of interests, some changes were made to the House's standing orders in 2003. The Parliamentary Commissioner for Standards was authorised not to report to the Committee a minor failure to register an interest where the matter had been rectified, and provision was made for an investigatory panel to deal with difficult factual disputes. Another change was to protect the Commissioner from being removed from office, except for unfitness or inability to act; and future appointments were to be made for a single period of five years, not renewable.¹³⁷

MPs' expenses and allowances

As well as their salaries, MPs have long been able to claim allowances for their costs in respect of such matters as travel, constituency expenses, and staff to do research and handle dealings with constituents. In 1971, MPs from constituencies outside London became able to claim an 'additional costs allowance' to compensate them for '*expenses wholly, exclusively and necessarily incurred when staying overnight away from their main UK residence . . . for the purposes of performing Parliamentary duties*' (italics supplied). Thereafter the scope of the allowance grew until by 2008, a maximum tax-free payment of £23,083 per year could be charged for such items as interest on a second mortgage, rent, furnishings, home maintenance and a food allowance (£400 per month).¹³⁸ The system was overseen by the Members' Estimate Committee and the Committee on Members' Allowances, the former being chaired by the Speaker and having the same membership as the House of Commons Commission.¹³⁹

When in 2005 the Freedom of Information Act 2000 came into effect, attempts were made to discover details of expenses claimed by leading MPs, but this was resisted by the Commons authorities. In 2008, the Divisional Court agreed with the Information Tribunal that there was a direct public interest in knowledge of the scheme being available: the court referred to 'the absence of a coherent system for the exercise of control' over a 'deeply flawed' scheme.¹⁴⁰ An attempt in Parliament to exempt the Commons from the Freedom of Information Act fortunately did not succeed. In May 2009, in an impressive journalistic coup, the *Daily Telegraph* began publishing details of claims by and payments to every MP.¹⁴¹ These revelations were based on material obtained by the newspaper before the House authorities published the information about allowances they had been required to publish under the Act of 2000.

It was clear from these sensational reports that MPs' claims spanned a very wide range, including claims for non-existent second mortgages and the opportunist 'flipping' of allowances between two homes to get maximum financial advantage, and other claims that were clearly outside the stated aims of the scheme. Knowledge of these payments caused widespread

¹³⁶ See e.g. HC 435, 946, 947 (2002–3), HC 71, 189, 233 (2004–5) and HC 419 (2005–6).

¹³⁷ See Nicholls report, pp 77–8; Cm 5663; HC 403 (2002–3); HC Deb, and cols 1239–58 (26 June 2003). The rules of appointment were changed to prevent a repeat of the unfortunate manner in which the appointment of the second Commissioner (Ms Elizabeth Filkin) was not renewed in 2001.

¹³⁸ Details of the scheme were contained in the *Green Book* issued from time to time to MPs.

¹³⁹ See House of Commons (Administration) Act 1978.

¹⁴⁰ *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC 1084 (Admin); [2009] 3 All ER 403.

¹⁴¹ See the *Daily Telegraph's* booklet, *The Complete Expenses File* (20 June 2009) and P Leyland [2009] PL 675.

public anger. Some ministers resigned over claims they had made, other MPs were disciplined by their parties or decided to leave Parliament, and the Speaker (Michael Martin MP) resigned, mainly because of his weak leadership in the complex wrangling over publication of the expenses. Eventually, as we have seen, the Supreme Court in *R v Chayter* held that parliamentary privilege did not protect from criminal liability those who had made false claims.¹⁴² The government decided that self-regulation of MPs' expenses must end, and asked the Committee of Standards in Public Life to make an urgent review of these matters.¹⁴³

The Parliamentary Standards Act 2009

Legislation was hastily enacted to provide a new structure for salaries and allowances that would be independent of the House. The Parliamentary Standards Act 2009 (as amended within a year) provided a new structure for salaries and allowances. The aim of the Act, which does not apply to the House of Lords (s 2(1)), was to end self-regulation of these matters by the Commons and to create a new regulatory body, the Independent Parliamentary Standards Authority (IPSA) (s 3, and sched 1). The five members of IPSA must include a retired senior judge, an auditor and a member who was formerly an MP, but no serving MPs may be appointed. Members are formally appointed by the Queen on an address from the Commons, having been selected 'on merit on the basis of fair and open competition' by a committee of eight MPs and three other persons chaired by the Speaker (sched 1, para 2; sched 3, as amended). IPSA reports annually to each House, but its independent status means that it is not directly accountable for its decisions to the Commons. IPSA is charged with paying salaries and allowances to MPs in accordance with schemes of salaries and allowances that are adopted by IPSA itself after consultation with interested persons, including all MPs, the Committee on Standards in Public Life and the Review Body on Senior Salaries (ss 4, 5, as amended). Allowances may be paid only when they have been claimed by an MP, and MPs have a right to appeal against decisions made by IPSA, first to a Compliance Officer and then to a tribunal (s 6A).

To ensure that the scheme is properly administered, a Compliance Officer is appointed by IPSA (s 3(3) and sched 2, as amended). The Officer serves for one term of not more than five years, may not be re-appointed, and may be removed from office only for unfitness or inability to carry out his duties. If the Compliance Officer discovers that an MP was wrongly paid an allowance, the over-payment may be recovered from the recipient. A civil penalty may be imposed on an MP who fails to comply with the Compliance Officer's requirements. It is a criminal offence for an MP to provide false or misleading information when making a claim for an allowance (s 10). These measures exist alongside the disciplinary powers of the House's Committee on Standards. IPSA and the Compliance Officer must prepare a scheme for co-operating with the Parliamentary Commissioner for Standards, the Director of Public Prosecutions and the police (s 10A).

The 2009 Act includes a declaration (s 1) that the Act shall not affect the protection for proceedings in Parliament given by the Bill of Rights, art 9. Despite its constitutional significance, the Act was enacted in great haste.¹⁴⁴ Many provisions of the Act were amended by the Constitutional Reform and Governance Act 2010, which restored power to the House to determine the code of conduct on MPs' financial interests, but removed from the House the power to determine MPs' salaries. Some critics of the 2009 Act feared that it would lead to judicial review of decisions made in the House of Commons. However, it is not the first time

¹⁴² Above, note 43.

¹⁴³ See Cm 7274 (the Kelly report), November 2009.

¹⁴⁴ HL Committee on the Constitution, HL Papers 130 and 134 (2008–9). For the committee's criticism of high-speed legislation in general, see HL Paper 116, 2008–9.

that Parliament has conferred one of its historic functions on an independent body.¹⁴⁵ While the practical operation of IPSA is unpopular with some MPs, the legislation created a more acceptable and transparent regime for MPs' expenses than the scheme that brought the House into such low repute in 2009.¹⁴⁶

C. House of Lords

By comparison with the Commons, questions of privilege seldom arise in the Lords, but events in 2009 showed that the House needs disciplinary powers equivalent to those of the Commons, and that the payment of allowances to members for attending at Westminster needed to be revised. The ancient privileges of the House to freedom from civil arrest and freedom of speech are in essence the same as those of the Commons and are not discussed again here. Three House of Lords Standing Orders referring to obsolete privileges were repealed in 2013.¹⁴⁷ The House itself decides, through the Committee for Privileges, the right of newly created peers to sit and vote. Claims to disputed hereditary peerages formerly came before that committee,¹⁴⁸ but such questions are of little importance today.

The power of the House to commit a person for a definite term has not been exercised in modern times, and in the past the House claimed a power to impose fines. In 2009, the question arose as to the sanctions that the House could apply in case of misconduct by its members. It was alleged by the *Sunday Times* that some peers had told journalists that parliamentary services to commercial interests could be provided by them in return for payment. The Committee for Privileges found that two peers had breached the House's code of conduct, and the conduct of two other peers was criticised.¹⁴⁹ The committee reported that the House has always had power to discipline its members: the House (unlike the Commons) may not expel a member, but it has an inherent power to suspend a member for a period not exceeding the life of the current Parliament.¹⁵⁰ This was considered an appropriate sanction to be exercised today, unlike the power of the House to detain or to fine someone who had breached privileges of the House. Two peers were suspended for the rest of the session for their misconduct, and two apologised to the House. Several peers who made false or exaggerated claims for allowances have been suspended, for periods of up to 18 months.¹⁵¹

Financial interests of peers

The House of Lords has not always been under the same pressure as the Commons concerning disclosure of interests. At one time the view was held that peers ought not to have to account publicly for their interests in the same manner as elected MPs. Yet peers can influence the legislative process and many have access to government; they cannot expect to

¹⁴⁵ Disputes over election results used to be decided by the Commons, but since 1868 they have been decided by the Election Court (see ch 7 E).

¹⁴⁶ Separate schemes exist in the devolved parliaments: see the Members' Expenses Scheme for the Scottish Parliament, administered by the Scottish Parliamentary Corporate Body; and the National Assembly for Wales Remuneration Board, Determination on Members' Pay and Allowances, July 2013.

¹⁴⁷ See Cm 8318, paras 328–342; HL Procedure Committee, 5th report, HL Paper 150, 2012–13, paras 8–17; Brabazon report, para 228.

¹⁴⁸ See e.g. *The Ampthill Peerage* [1977] AC 547.

¹⁴⁹ HL Committee for Privileges (2nd report, HL Paper 88, 2008–9).

¹⁵⁰ See HL Committee for Privileges, *The Powers of the House of Lords in respect of its Members* (1st report, HL Paper 87, 2008–9).

¹⁵¹ Brabazon report, annex 1, para 8.

observe lower standards of conduct than MPs. In 1995, the House resolved that its members should act always on their personal honour and should never accept a financial benefit in return for exercising parliamentary influence; peers with a direct interest in lobbying ought not to speak, vote or otherwise use their office on behalf of clients. The House created a register of peers' consultancies and similar interests in lobbying for clients, but this was of much narrower scope than the Commons register.¹⁵² In 2000, the Committee on Standards in Public Life recommended that the House should adopt a Code of Conduct, extending the registration and declaration of a wider range of interests. The Code first came into effect in 2002.¹⁵³ Complaints of failure to register an interest were heard by a sub-committee on registration of interests, with an appeal to the House's Committee for Privileges.

Events in 2009 caused the House to return to the matter and in November 2009 a new Code of Conduct was adopted that requires the registration of all relevant interests and bars peers from undertaking 'parliamentary consultancies' and receiving payment for advice on lobbying.¹⁵⁴ In June 2010 the House appointed a retired chief constable as House of Lords Commissioner for Standards, who investigates complaints of alleged breaches of the Code and reports on investigations to a sub-committee on Lords' Conduct of the House's Committee for Privileges and Standards.

Peers receive no salary, but they are entitled to an allowance for each day on which they attend the House and undertake parliamentary work, and they may claim travelling and overnight expenses and for secretarial assistance. The increased openness in publication of MPs' allowances and expenses led in 2009 to publication of the payments made to every peer. Although the Parliamentary Standards Act 2009 does not apply to the Lords, the House decided in December 2009 to approve a new scheme for providing members with financial support that would ensure greater accountability and openness.¹⁵⁵

¹⁵² See HL 90 and 98 (1994–5); HL Deb, 1 November 1995, col 1428, and 7 November 1995, col 1631.

¹⁵³ Cm 4903, 2000; HL 68 (2000–01); HL Deb, 2 July 2001, col 630 and 24 July 2001, col 1849.

¹⁵⁴ See *Code of Conduct for Members of the House of Lords and Guide to the Code of Conduct* (2nd edn, 2011).

¹⁵⁵ See report of HL House Committee (HL Paper 12, 2009–10) and Senior Salaries Review Body, *Review of Financial Support for Members of the House of Lords*. Also HL Deb (14 Dec 2009), col 1317 ff. In May 2014, Lord Hanningfield was suspended from the House for the rest of the session for having repeatedly claimed the daily allowance while performing no parliamentary duties: see HL Privileges and Conduct Committee, 14th report, HL Paper 181 (2013–14).

CHAPTER 10

The Crown and royal prerogative

It is still formally the case that executive power in the United Kingdom is vested in the Crown, however little this may reflect the reality of modern government. The Queen may reign, but it is the Prime Minister and other ministers who rule. Yet within the executive in Britain, it is not possible to dismiss the position of the monarch as an anachronism since the monarch as head of state performs some essential functions. The fact that central government is carried on in the name of the Crown has left its mark on the law, which has never developed a notion of ‘the state’.

Although it is common to speak of state schools, state regulation and so on, until recently legislation rarely referred to the state as such.¹ Instead, the ‘Crown’ developed as ‘a convenient symbol for the State’,² though it is unclear whether the two terms can always be used as synonyms.³ One distinction refers to ‘the Sovereign’ in matters concerning the personal conduct or decisions of the monarch (though that too is misleading in a country where legal sovereignty is acknowledged to rest with Parliament),⁴ and to ‘the Crown’ as the collective entity which in law may stand for central government.

A. The monarchy⁵

Most advanced liberal democracies have moved to a republican system of government, sometimes with an elected president as head of state, the best known examples being France and the United States. But Britain is by no means alone in having a hereditary monarch as head of state, an institution which is to be found in other G7 countries (notably Canada, which shares the same monarch) as well as other European Union countries (notably Sweden and Spain).

If there was a written constitution for the United Kingdom, the role and functions of the monarch as head of state would be set down, as they are in Spain. There the constitution provides by art 54 that the King’s role is largely symbolic and representative – he is the symbol of unity and permanence, and assumes the highest representation of the state in international relations.

In the United Kingdom the role of the monarchy has evolved over many years, and we can say that it has a number of symbolic and ceremonial duties which bring dignity and solemnity to constitutional government. But the monarchy also has representative and

¹ See now Constitutional Reform and Governance Act 2010, part 1. See discussion in *Chandler v DPP* [1964] AC 763 (on Official Secrets Act 1911, s 1).

² G Sawyer’s phrase, quoted in Hogg, *Liability of the Crown* (1st edn), p 10; and see Marshall, *Constitutional Theory*, ch 2.

³ See Commissioners for Revenue and Customs Act 2005, which provides for the appointment of Commissioners to act on behalf of the Crown (s 1(4)) but to serve in the civil service of the State (s 1(5)).

⁴ See ch 3 above.

⁵ For a fuller account of the law relating to the monarchy (dealing with styles and titles, royal marriages, accession and coronation, minority and incapacity and illness and incapacity), see the 12th edn of this work, pp 255–8. On regency, see J Jaconelli [2002] PL 449.

practical duties to perform which in the latter case may be desirable for the continuity and stability of constitutional government. As the experience of other countries demonstrates, these different roles need not be performed by a hereditary monarch, with those other countries relying on other symbols or institutions.

Title to the Crown

In 1689, the Convention Parliament (summoned by Prince William of Orange at the request of an improvised assembly of notables) filled the constitutional vacuum which arose on the departure of James II by declaring the throne vacant and inviting William of Orange and his wife Mary jointly to accept the throne.⁶ These events finally confirmed the power of Parliament to regulate the succession to the Crown as it should think fit.⁷ Today title to the Crown is derived from the Act of Settlement 1700, subsequently extended to Scotland in 1707 and to Ireland in 1800 by the Acts of Union. By the Act of Settlement, the Crown shall 'be remain and continue to the said most excellent Princess Sophia' (the Electress of Hanover, granddaughter of James I) 'and the heirs of her body being Protestant'.⁸

The limitation to the heirs of the body, which has been described as a parliamentary entail, means that the Crown descends in principle as did real property under the law of inheritance before 1926.⁹ The latter *inter alia* gave preference to males over females and recognised the right of primogeniture. However, the position is to be altered by the Succession to the Crown Act 2013, which removes the preference for males over females in determining the succession to the Crown, providing that 'the gender of a person born after 28 October 2011 does not give that person, or that person's descendants, precedence over any other person (whenever born)'.¹⁰ It may take some time for this provision to be fully implemented, as it will require equivalent provisions to be introduced simultaneously in the other countries where the British monarch is also Head of State.

The Act of Settlement disqualifies from the succession Roman Catholics and those who marry Roman Catholics; the Sovereign must swear to maintain the Churches of England and Scotland and must join in communion with the former Church. This is a restriction that has been questioned in recent years as being not easily justifiable in an increasingly multicultural and secular society. Under the Succession to the Crown Act 2013, however, a person is no longer disqualified 'from succeeding to the Crown or from possessing it as a result of marrying a person of the Roman Catholic faith'.¹¹ This applies in relation to marriages that took place before the Act came into force, as well as those that take place afterwards. The 2013 Act does not, however, alter the restriction on persons of the Roman Catholic faith from succeeding to the Throne, or the duty of the monarch to join in communion with the Church of England.¹²

Since 1714, when the Hanoverian succession took effect under the Act of Settlement, the line of hereditary succession has been altered only once: it was provided by His Majesty's Declaration of Abdication Act 1936 that the declaration of abdication by Edward VIII should have effect; that the member of the royal family then next in succession to the throne should

⁶ Maitland, *Constitutional History*, pp 283–5; Taswell-Langmead, *English Constitutional History*, pp 443–8.

⁷ Taswell-Langmead, p 504.

⁸ See *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, for construction of Princess Sophia Naturalization Act 1705 (repealed by British Nationality Act 1948) which entitled to British nationality all non-Catholic lineal descendants of Princess Sophia.

⁹ On which, see C d'O Farran (1953) 16 MLR 140.

¹⁰ Succession to the Crown Act 2013, s 1.

¹¹ *Ibid*, s 2(3).

¹² For background, see A Twomey [2011] PL 378.

succeed (thus Edward VIII's brother became King George VI); and that Edward VIII, his issue, if any, and the descendants of that issue should not thereafter have any right to the succession. The eldest son of a reigning monarch was traditionally heir apparent to the throne; he is Duke of Cornwall by inheritance and is invariably created Prince of Wales.¹³

Financing the monarchy¹⁴

In the 17th century, when the monarch personally carried out the functions of government, the revenue from the taxes which Parliament authorised was paid over to the monarch and merged with the hereditary revenues already available to him. Today a separation is made between the expenses of government and the expenses of maintaining the monarchy. Since the time of George III, it has been customary at the beginning of each reign for the monarch to surrender to Parliament for his or her life the ancient hereditary revenues of the Crown, including the income from Crown lands.¹⁵ Provision is then made by Parliament for meeting the salaries and other expenses of the royal household.

The Sovereign Grant Act 2011 introduces a new regime for financing the monarchy. The first of two key features of the replaced regime is that it was 'reign specific', in the sense that provision was made for the monarch at the beginning of his or her reign that would continue until death. The other is that the support consisted of separate allowances, notably the civil list to meet the salaries and other expenses of the royal household,¹⁶ and the grants in aid for the purposes of royal travel (from the budget of the Department of Transport), and the maintenance of the royal palaces (from the budget of the Department of Culture, Media and Sport). According to the Explanatory Notes accompanying it, the Sovereign Grant Act 2011, 'develops a new streamlined system of support for Royal Household expenditure'.

The Sovereign Grant was set at £31 million for the year 2012–2013,¹⁷ with the amount in subsequent years to be determined by the royal trustees in accordance with a formula set out in the Sovereign Grant Act 2011, s 6. The Sovereign Grant is paid from money provided by Parliament,¹⁸ and there are now formal statutory obligations on the Royal Household to keep proper accounting records, which must be examined annually by the Comptroller and Auditor General, with a copy of the latter's report on the accounts (together with a statement of the accounts) to be submitted to Parliament by the Treasury.¹⁹ A Reserve Fund has been created, into which the Grant may be carried forward if unspent, and conversely from which any overspending can be drawn. There is no parliamentary annuity for the Prince of Wales.

The monarch also holds property in a personal capacity and derives income from this. The extent of this private wealth is unknown, though it is sometimes emphasised that there is a need to distinguish private wealth from that held in trust by the Queen as Sovereign and Head of State and not as an individual. Unlike other members of the royal family, the Queen benefits from the principle that the Crown is not liable to pay taxes unless Parliament says so either expressly or by necessary implication.²⁰ In 1992, however, it was announced that the

¹³ On the constitutional role of the Prince of Wales, see R Brazier [1995] PL 401. See also Blackburn, *King and Country: Monarchy and the Future King Charles III*.

¹⁴ For a good account, see Bogdanor, *The Monarchy and the Constitution*, ch 7.

¹⁵ Under the Crown Estate Act 1961, the Crown Estate Commissioners are responsible for administering the Crown Estate; for the history, see HC 29 (1971–2), app 18. The Commissioners have wide powers under the Act. See *Walford v Crown Estate Commissioners* 1988 SLT 377.

¹⁶ Civil List Act 1952, amended by Civil List Act 1972.

¹⁷ Sovereign Grant Act 2011, s 1(3).

¹⁸ *Ibid*, s 1(6).

¹⁹ *Ibid*, s 2.

²⁰ HC 29 (1971–2), app 12; and ch 8.

Queen had undertaken to pay tax on her private income with effect from 1993,²¹ but this does not extend to inheritance tax. The Prince of Wales has also agreed on a voluntary basis to pay tax on income derived from the Duchy of Cornwall.²²

Duties of the monarch

It would be difficult to list the full duties that fall to the Queen to perform in person.²³ Many formal acts of government require her participation. Many state documents require her signature, and she receives copies of all major government papers, including reports from ambassadors abroad and their instructions from the Foreign Office, as well as minutes of Cabinet meetings and other Cabinet papers. ‘There is therefore a continuing burden of unseen work involving some hours reading of papers each day in addition to Her Majesty’s more public duties.’²⁴ She gives frequent audiences to the Prime Minister and visiting ministers from the Commonwealth, receives foreign diplomatic representatives, holds investitures and personally confers honours and decorations. She receives visits to this country by the heads of foreign states and makes state visits overseas. She attends numerous state occasions, for example to deliver the Queen’s Speech at the opening of each session of Parliament. Her formal consent is needed for appointments made by the Crown on the advice of the Prime Minister, the Lord Chancellor and other ministers.

A catalogue of official duties does not reveal what influence, if any, the monarch has on the political direction of the country’s affairs. In general, the monarch is bound to act on the advice of the Prime Minister or other appropriate minister, for example, the Home Secretary in respect of the prerogative of mercy. The monarch cannot reject the final advice that ministers offer to her without the probable consequence of bringing about their resignation and their replacement by other ministers, thereby bringing the future of the monarchy into controversy. But to what extent may the Queen offer them guidance from her own fund of experience in public affairs? Bagehot described the monarch’s rights as being the right to be consulted, the right to encourage and the right to warn.²⁵ While this may entitle the monarch to express personal views on political events to the Prime Minister, these views may have little influence over the whole range of the government’s work.²⁶ However, both Mr Major and Mr Blair have each paid tribute to the advice received from the Queen during their time as Prime Minister.²⁷

Much light was thrown upon the role of the monarch in the 20th century by Sir Harold Nicolson’s biography of George V and by Sir John Wheeler-Bennett’s biography of George VI. Thus it appears that the monarch, even before the days when Cabinet conclusions were regularly recorded by the Cabinet secretariat, could insist on the advice of the Cabinet being given in written form, if he felt that it was dangerous or opposed to the wishes of the people. This was so that the King could record in writing the misgivings and reluctance with which he followed the advice of his Cabinet.²⁸ The clear impression is given in these two biographies that the monarch is far from being a mere mouthpiece of his constitutional advisers.

²¹ HC Deb, 26 November 1992, col 982.

²² HC 464 (1992–3). See also HC 313 (2004–5).

²³ See HC 29 (1971–2), paras 16–17 and evidence by the Queen’s Private Secretary, pp 30–41 and app 13. See also generally Pimlott, *The Queen: A Biography of Elizabeth II*.

²⁴ HC 29 (1971–2), para 17.

²⁵ *The English Constitution*, p 111. See also Brazier, *Constitutional Practice*, p 185.

²⁶ Although it has been said as a result that ‘the Sovereign may have a marginal but beneficial influence on governmental decisions’ (Brazier, *ibid*, p 185).

²⁷ R Blackburn [2004] PL 546, at p 558, note 40.

²⁸ Nicolson, *George V*, p 115.

In more recent times, the advice of Queen Elizabeth II was said to be particularly valuable in relation to Commonwealth affairs where she was considered by Mr Major to have an ‘encyclopaedic knowledge’.²⁹ But it would be wrong to suppose that the right to be consulted, to encourage and to warn applies to all areas of policy-making, in many of which the monarch will have had no relevant experience.

The Private Secretary to the Queen plays a significant role in conducting communications between the monarch and her ministers and, in exceptional circumstances where this is constitutionally proper, between the monarch and other political leaders. Occasionally, the Queen’s Private Secretary may be drawn into public controversies. In 1986, Sir William Heseltine, the Queen’s Private Secretary, wrote to *The Times* following alleged disagreements between the Prime Minister (Mrs Thatcher) and the Queen on policy matters. Sir William made three points which he considered axiomatic:

- 1 The Queen has the right – indeed the duty – to counsel, encourage and warn her government. She is thus entitled to have opinions on government policy and to express them to her chief minister.
- 2 Whatever personal opinions the Queen may hold or may have expressed to her government, she is bound to accept and act on the advice of her ministers.
- 3 The Queen is obliged to treat her communications with the Prime Minister as entirely confidential between the two of them.³⁰

Sir William asserted that it was preposterous to suggest that the Queen would suddenly depart from these principles.

Reform of the monarchy

Unlike many of the other parts of the constitution, the monarchy has largely survived the reforming and modernising zeal of the 1990s. Indeed, in its election manifesto of 1997, which was the basis of much of the constitutional reform in the modern era, the Labour party announced: ‘We have no plans to replace the monarchy.’³¹ Although this ‘fell considerably short of a ringing endorsement of the institution of monarchy’,³² it remains the case that there has been little serious debate about the desirability of retaining a hereditary monarch as head of state in a modern democracy. In the 1990s, the monarchy weathered a lot of unwanted publicity about the private lives and business activities of some of its senior figures, and was subject to public criticism following the premature death of the Princess of Wales in 1997.³³

Greater public exposure and a less deferential media have at most ignited concerns for a more responsive monarchy, not its replacement. The difficulties of reform of the latter kind were highlighted by the referendum in Australia in 1999 where the people voted to retain the monarchy when given the option of a republic instead. So the Queen remains the Head of State in Australia and indeed in a number of other prominent Commonwealth countries. One of the problems facing the republican campaigners in Australia was the division among the anti-monarchists about how the head of state in a republic should be chosen. Those who favoured a directly elected president (on the Irish model) were unhappy with the choice in the referendum between retaining the monarchy or moving to a president elected by Parliament.³⁴

²⁹ Major, *The Autobiography*, p 508.

³⁰ *The Times*, 29 July 1986. See G Marshall [1986] PL 505.

³¹ Labour Party, *New Labour: Because Britain Deserves Better* (1997), p 33.

³² Blackburn and Plant (eds), *Constitutional Reform*, p 139.

³³ On which see Barnett, *This Time: Our Constitutional Revolution*.

³⁴ See C Munro [2000] PL 3. Also J Uhr [2000] 11 *Public Law Review* 7.

B. Personal prerogatives of the monarch

It is commonplace to distinguish between prerogative powers that are exercised by the monarch, and those that are exercised by ministers in her name. The former are referred to as personal prerogatives, and the latter as the ‘prerogative powers of ministers’.³⁵ The existence of personal prerogatives – as they were referred to by Jennings – implies an element of personal discretion on the part of the monarch in the exercise of these powers.

This approach, however, has been disputed as being contrary to political reality and constitutional sense. It has been claimed that these prerogatives should be understood ‘not as personal discretionary powers of the monarch, nor as matters over which the monarch has any independent personal rights’, but as ‘clearly circumscribed constitutional duties to be carried out on the advice of the Prime Minister’. The removal of the residue of personal and unaccountable power from a hereditary head of state is thought by some to be important to maintain the political neutrality of the monarchy, which in turn must be the ‘golden rule’ for its continuity.³⁶

Appointment of Prime Minister³⁷

In appointing a Prime Minister the monarch must appoint that person who is in the best position to command the support of the majority in the House of Commons. This does not involve the monarch in making a personal assessment of leading politicians, since no major party could fight a general election or govern without a recognised leader. There are, however, two circumstances where the monarch may have to intervene in the choice of Prime Minister: after an election, especially if the result is inconclusive; and during the life-time of a Parliament if the incumbent Prime Minister resigns or dies in office.

1. After an election

Where an election produces an absolute majority in the Commons for one party, the leader of that party will be invited to become Prime Minister or, if already Prime Minister, he or she will continue in office. In these circumstances, the Queen ‘has no choice whom he or she should appoint as Prime Minister, and it is obvious who should be called to the Palace’.³⁸ By modern practice, a defeated Prime Minister resigns from office as soon as a decisive result of the election is known.

Where after an election no one party has an absolute majority (as in 1923, 1929, February 1974, and 2010), the Prime Minister in office may decide to wait until Parliament resumes to see whether he or she can obtain a majority in the new House with support from another party (as Baldwin did after the 1923 election, only to find that he could not), or he may resign without waiting for Parliament to meet (as did Baldwin in 1929, Heath in 1974, and Brown in 2010). When he or she has resigned, the Queen will send for the leader of the party with the largest number of seats (as in 1929, 1974 and 2010) or with the next largest number of seats (as in January 1924 after Baldwin had been defeated by combined Labour and Liberal votes).³⁹

The inconclusive general election in 2010 gave rise to much discussion of these practices, and to a post-mortem about the right of the incumbent Prime Minister to remain in office,

³⁵ HC 422 (2003–4), para 1.

³⁶ R Blackburn [2004] PL 546; also (in reply) R Brazier [2005] PL 45.

³⁷ See Jennings, *Cabinet Government*, ch 2; Brazier, chs 2, 3; and Bogdanor, ch 6.

³⁸ Bogdanor, p 84.

³⁹ The precedents thus showed a preference for ‘minority government’ rather than ‘majority coalition’ (Bogdanor, p 253).

as well as his or her duty to do so until a new government can be formed.⁴⁰ An attempt to crystallise practice in the interests of clarity in the *Cabinet Manual* proved to be controversial,⁴¹ the latter taking a view which is different and perhaps less prescriptive than the foregoing. According to the latter, a special responsibility falls on the Prime Minister as ‘the Crown’s principal adviser’, who ‘at the time of his or her resignation may also be asked by the Sovereign for a recommendation on who can best command the confidence of the House of Commons in his or her place’.⁴²

However, there is no sense in which such advice can be binding, the view having been expressed from another quarter that ‘the established convention seems to be that the Monarch is not obliged to take the advice of the outgoing Prime Minister, and may take advice from other sources’.⁴³ Any such advice and any decision based on that advice should be based in turn on the precedents referred to above, consistently with a less contentious passage in the *Cabinet Manual* that emphasises ‘the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons’.⁴⁴

Thus, where an election produces a clear majority for one party, the Queen has no discretion to exercise. Even where the election fails to produce a clear result, it will usually be very clear who should be appointed Prime Minister. Although Mr Brown was entitled to see if another Labour-led administration could be formed in 2010, the idea that he could have remained as Prime Minister was implausible. It would only be where an election failed to produce a clear or conclusive result that the Queen would have any discretion, in which case she would have to initiate discussions with and between the parties to discover, for example, whether a government could be formed by a politician who was not a party leader, or whether a coalition government could be formed.⁴⁵

Even then, as the *Cabinet Manual* now makes clear, it would be the responsibility of the politicians to save the Queen from any embarrassment.⁴⁶

2. Resignation or death of a Prime Minister

Where a Prime Minister resigns because of ill-health or old age or dies while in office, a new leader of the governing party must be found and a new Prime Minister appointed. In the case of the Liberal and Conservative parties, at one time this was a situation in which the monarch was required to exercise a discretion, to invite a person to be Prime Minister who would command general support within the governing party, as happened in 1957 and 1963. The parties now choose their own leader in accordance with their own rules. It was initially the case that the leader of the Conservative party was chosen by the party’s MPs. It was under these rules that Mr Major replaced Mrs Thatcher as leader of the party in 1990,⁴⁷ following which Mrs Thatcher resigned as Prime Minister.⁴⁸

⁴⁰ See HC 528, 734 (2010–12).

⁴¹ On *The Cabinet Manual*, see below, p 275. On this point, see *The Cabinet Manual* (2011), paras 2.12–2.17. For consideration of the provisions relating to the formation of government after a general election, see HC 734 (2010–12), paras 64–79.

⁴² *The Cabinet Manual*, *ibid*, para 2.9.

⁴³ HC 528 (2010–12), para 28.

⁴⁴ *The Cabinet Manual*, above, para 2.9.

⁴⁵ See Brazier, ch 3; Butler, *Governing without a Majority*, ch 5; and Bogdanor, *Multi-party Politics and the Constitution*, chs 5, 6.

⁴⁶ *The Cabinet Manual*, above, para 2.10.

⁴⁷ See R K Alderman [1992] PL 30.

⁴⁸ Major, *The Autobiography*, p 199.

The current leadership rules of the Conservative party provide for the leader to be elected by the members of the party in a postal ballot.⁴⁹ The rules provide, however, that the candidates for election are to be chosen by the 1922 Committee, which is a committee of Conservative MPs. It is also provided that ‘the procedure by which the 1922 Committee selects candidates for submission for election shall be determined by the Executive Committee of the 1922 Committee’. It was under these procedures that Mr David Cameron was elected Conservative party leader in 2005. There were several candidates at that election, and under the applicable procedures Conservative MPs took part in several votes to reduce the number of candidates to two – Mr Cameron and Mr Davis – before party members were able to vote.

In the case of the Labour party, the right to vote in the election of leader was formerly confined to Labour MPs, but in 1981 the party changed its constitution and standing orders to provide for the leader and deputy leader to be elected at a party conference.⁵⁰ The electoral college for leadership elections is in three sections, Labour MPs and constituency parties each having one-third of the votes and affiliated organisations also having one-third (mainly trade unions, who ballot their members for this purpose). Successive ballots are held until one candidate has more than half the votes so apportioned. When Labour is in opposition, an election shall be held at each annual conference, though this is now a rather meaningless formality. When Labour is in government and the party leader is Prime Minister, in contrast, an election takes place only if required by a majority of the conference.

New ground was broken in the operation of these rules in 1976, again in 1990, and yet again in 1995. In 1976, when Harold Wilson announced his intention of resigning as Prime Minister, he remained in office until (under the party’s former rules) Labour MPs elected their new leader. Mr Wilson then resigned and Mr Callaghan became Prime Minister. In 1990, the Conservative party removed Mrs Thatcher as party leader against her wishes while she was also Prime Minister, her replacement by Mr Major in 1990 representing the first occasion in modern times that a serving peacetime Prime Minister has been forcibly removed from office. And in 1995, Mr Major resigned as leader of the Conservative party, thereby forcing an election for party leader, in which he was a candidate. He did not resign as Prime Minister, though presumably he would have done so had he not succeeded in being re-elected as party leader.

While therefore under stable political conditions the Queen will not need to exercise a personal discretion in selecting a Prime Minister (as again when Mr Brown succeeded Mr Blair in 2007), circumstances could arise in which it might become necessary for her to do so.⁵¹ First, since the election of a new leader may take some weeks, the appointment of an acting Prime Minister might well be needed if, unlike the position in 1976, the outgoing Prime Minister had died or was too ill to continue in office. Presumably a senior member of the Cabinet would be so appointed.⁵² Moreover, there could well be circumstances in which reliance on normal party procedures would not produce an immediate solution: for example, where a party holding office broke up after serious internal dissensions; or where no party had a majority in the House and there was a deadlock between the parties as to who should form a government; or where a coalition agreement had broken down.⁵³

⁴⁹ For background, see K Alderman (1999) 52 *Parliamentary Affairs* 260.

⁵⁰ The rules were revised again in 1993: see R K Alderman [1994] PL 24.

⁵¹ Cf R Blackburn [2004] PL 546, at p 552. The position is very different in Scotland in relation to the First Minister under the Scotland Act 1998, s 45. See Himsworth and O’Neill, *Scotland’s Constitution: Law and Practice* where it is said that the Queen has ‘only the formal role of accepting the recommendations made to her. It would be unconstitutional for her to do otherwise’ (p 166).

⁵² Cf Brazier, p 17. Under the Labour party rules, when the party is in government and the leader becomes ‘permanently unavailable’, ‘the Cabinet shall in consultation with the National Executive Committee appoint one of its members to serve as party leader until a ballot . . . can be carried out’.

⁵³ See R Brazier [1986] PL 387.

In such situations, the Queen could not avoid taking initiatives to enable a new government to be formed, for example by initiating inter-party discussions. Perhaps the closest we have come to unstable political circumstances of this kind was in 1931, when Ramsay MacDonald and the Labour Cabinet resigned because of serious disagreement within the Cabinet over the steps that should be taken to deal with the financial crisis. After consulting with Conservative and Liberal leaders, George V invited MacDonald to form a ‘National Government’ with Liberal and Conservative support. The extreme bitterness which MacDonald’s defection caused in the Labour party led to criticism of George V’s conduct as unconstitutional. Although such criticism seems unjustified,⁵⁴ the National Government was not a great success and was politically damaging for many of those involved.

Dissolution of Parliament⁵⁵

The prerogative power to dissolve Parliament has been transformed by the Fixed-term Parliaments Act 2011, introduced to cement the Coalition between the Conservatives and the Liberal Democrats after the general election in 2010. In order fully to understand the 2011 Act, it is necessary to explain the arrangements that it replaced, while it is also the case that the exercise of the prerogative power in relation to dissolution is constrained rather than removed by the 2011 Act. Notwithstanding the latter Act, there are circumstances whereby Parliament could be dissolved without serving a full term.

1. Prerogative power

Before the Fixed-term Parliaments Act 2011 introduced a fixed term for the life of Parliament, the Queen could in principle dissolve Parliament by prerogative, and cause a general election to be held at any time in the five-year life of a Parliament. In practice, however, the Queen acted on the advice of the Prime Minister and granted a dissolution when requested. Since 1918, it had become established practice that a Cabinet decision was not necessary before the Prime Minister could seek a dissolution, although members of the Cabinet might be consulted before the Prime Minister made a decision.⁵⁶ Are there circumstances in which the Sovereign could have been justified in refusing a dissolution, or was automatic that the Sovereign should grant a dissolution when requested?

It is doubtful whether there could be grounds for the refusal of a dissolution to a Prime Minister who commanded a clear majority in the Commons.⁵⁷ Political practice accepted that a Prime Minister could choose the time for a general election within the five-year life of Parliament prescribed by the Parliament Act 1911. If the Queen did refuse dissolution to a Prime Minister who commanded a majority in the House and the Prime Minister then resigned from office with the other ministers, any other politician invited to be Prime Minister (for example, the Leader of the Opposition) would presumably have had no prospect of a majority at Westminster until an election had been held. The Queen would therefore have been faced with an early request for a dissolution from the new Prime Minister and with inevitable criticism of political bias if the request were granted.

⁵⁴ A full account is in Bassett, *1931: Political Crisis*. See also Mackintosh, *British Cabinet*, pp 419–20 and Middlemas and Barnes, *Baldwin*, ch 23.

⁵⁵ Forsey, *The Royal Power of Dissolution in the British Commonwealth*; Markesinis, *The Theory and Practice of Dissolution of Parliament*; Marshall, *Constitutional Conventions*, ch 3; R Blackburn [2009] PL 760.

⁵⁶ Jennings, pp 417–19; Mackintosh, pp 453–5; Markesinis, ch 5 A.

⁵⁷ Markesinis, pp 84–6; Forsey, p 269. If an opportunist Prime Minister decided to take advantage of the death of the Leader of the Opposition to seek an immediate dissolution, knowing that the rules of the opposition party required the election of a new leader to take a month, could the Queen insist on delaying the election so that the parties could campaign on more equal terms?

Where a minority government held office, the position would have been more complicated but here again it is likely that the Prime Minister could choose the time for an election. Much may have depended on the circumstances in which the minority government had come about and on how recently a general election had been held. Thus a Prime Minister who had been granted one dissolution and failed to get a majority at the ensuing election may not necessarily have been able to insist on a second dissolution immediately. Indeed, it might have been argued that there would be a duty to resign and to give the leader of another party the opportunity of forming a government. Where a Prime Minister had been in office for a considerable period (for example, some months) since the previous election and was then defeated on an issue of confidence in the House, he or she would then have a choice between resigning or, as MacDonald did in 1924, seeking a dissolution.

The issue arose in 1950, during discussion of the problems caused by the Labour government's small majority after the election of that year. Sir Alan Lascelles, Private Secretary to George VI, wrote to *The Times*, under a pseudonym, to outline the circumstances in which he believed the monarch could properly refuse a dissolution when requested by the Prime Minister. According to Sir Alan, the monarch could properly refuse a dissolution if he were satisfied that (a) the existing Parliament was still 'vital, viable, and capable of doing its job', (b) a general election would be detrimental to the national economy, and (c) he could rely on finding another Prime Minister who could carry on his government for a reasonable period with a working majority.⁵⁸ It will be seldom that all these conditions can be satisfied and it might even be argued that these are eminently matters for the Prime Minister in office to decide.

In the last 100 years there are no instances of the monarch having refused a dissolution in the United Kingdom. However, the controversy between the 'automatic' and 'discretionary' views of the prerogative of dissolution arose afresh in 1974. After the election in February of that year, when no party had an absolute majority, questions were asked in Parliament whether Mr Wilson as Prime Minister was entitled to a dissolution if his government were defeated by a combined opposition vote. In reply, the Lord President of the Council, Mr Edward Short, told them: 'Constitutional lawyers of the highest authority are of the clear opinion that the Sovereign is not in all circumstances bound to grant a Prime Minister's request for dissolution'; it was impossible to define in advance the circumstances in which the Queen's discretion to refuse a request for a dissolution might be exercised.⁵⁹

The matter was left unresolved, the government refusing to allow the matter to be debated in the Commons. Indeed the resolution of such a question in any particular case would have depended on the political circumstances of the time. In the event, when Mr Wilson sought a dissolution in September 1974, this was granted without question by the Queen. That the monarch should not refuse a Prime Minister's request for dissolution except for very strong reasons is obvious. In practice, the political significance of the Prime Minister's power to decide when Parliament should be dissolved was much greater than the possibility of the Queen's refusal of a dissolution. But the view that the monarch's reserve power could serve to restrain a Prime Minister who otherwise might be tempted to abuse his or her position was an argument for maintaining the reserve power as a potential weapon, not for abolishing it.⁶⁰

2. Fixed-term Parliaments Act 2011

As we have seen, the Conservative party and the Liberal Democrats made an agreement for government and negotiated a programme for government in the aftermath of the inconclusive general election in 2010.⁶¹ At the heart of that agreement and programme was an

⁵⁸ For this pseudonymous letter to *The Times*, see Markesinis, pp 87–8 and app 4.

⁵⁹ *The Times*, 11 May 1974.

⁶⁰ For a robust defence of the reserve power, see G Marshall [2002] PL 4.

⁶¹ H M Government, *The Coalition: Our Programme for Government* (2010).

unusual – if not unique – undertaking that the newly elected Parliament would serve a full parliamentary term of five years. This would prevent either party from collapsing the coalition at a time that seemed politically opportunistic, and would require both sides to enter into a constructive long-term relationship. This agreement led to the Fixed-term Parliaments Act 2011,⁶² which not only declared that the date of the next general election is to be 7 May 2015 (s 1(2)), but also that all future general elections are to be held at fixed five yearly intervals thereafter (s 1(3)).

This is an important provision that removes the right of the Prime Minister to determine the date of the general election: that has now been determined by the Coalition partners and is enshrined in law. However, it does not mean that there cannot be an early general election. In the first place, the Act provides that an election may be held following a House of Commons motion that there should be an early election if the motion is carried with the support of two thirds of MPs (s 2(1),(2)). This effectively means that an early election can be held if both parties to the Coalition agree. Otherwise, an early election can be held when the government loses a confidence motion in the House of Commons (s 2(3), (4)).⁶³ This would be on the basis of a simple majority of those voting, and in practice could only be carried in the event of the Coalition breaking up and the Liberal Democrats then joining forces with Labour to bring the government down.

At first sight, the Fixed-term Parliaments Act 2011 appears to be an important constitutional innovation, in which a parliamentary decision requires a special majority to be effective. Although unprecedented, the possibility of something like this being done has been canvassed by constitutional scholars in the past.⁶⁴ It is important to point out, however, that the Fixed-term Parliaments Act 2011 is an ordinary Act of Parliament that can be repealed in the same way as any other Act of Parliament. As a result, the 2011 Act imposes a limit on the power of an incumbent Prime Minister only so long as incumbents in the future are prepared to accept this limitation, provided of course they have a parliamentary majority to repeal the Act should they wish to do so. There is no suggestion of a special majority being required before the 2011 Act can be repealed, though it is in any event unlikely that such a restriction could be legally effective.

So the Fixed-term Parliaments Act 2011 appears to be little more than a legal device to cement the Coalition, in which the leader of the largest party has effectively conceded the right to call a general election when it suits the interests of his party. As such, it is a major negotiating achievement of the Liberal Democrats and their leader Nick Clegg, who became Deputy Prime Minister in the Coalition. However, the Fixed-term Parliaments Act 2011 is not binding on future Parliaments, by which it may be repealed.⁶⁵ Although it may be difficult politically for a future government to bring forward a Bill to repeal the 2011 Act, it would always be possible to do so on the ground that the Act was addressed to a particular commitment in a private agreement between two party leaders,⁶⁶ to overcome a unique political problem which they each faced. But more importantly, the 2011 Act does not stop the Parliament elected in 2010 from removing the government if it loses the confidence of a majority of MPs.

One likely effect of the Fixed-term Parliaments Act 2011 is to remove the disputed reserve power of the monarch to require a dissolution and a general election to provide a clear mandate for a particularly controversial government proposal. The last known example of a

⁶² See M Ryan [2012] PL 213.

⁶³ As in 1979 when the Callaghan government resigned following a vote of no confidence.

⁶⁴ See W I Jennings, *The Law and the Constitution* (5th edn, 1959), pp 145, 153, 161.

⁶⁵ By virtue of the doctrine of parliamentary sovereignty, it is generally accepted that no Parliament can bind its successors: see ch 3.

⁶⁶ That is to say, the private agreement in question being the Coalition Agreement referred to above.

British monarch requiring a general election is in 1910, when George V insisted that a general election be held on the Liberal proposal to remove the veto of the House of Lords, before he would create enough new Liberal peers to pass the Parliament Bill through the Lords against Conservative opposition; this decision was accepted by the Prime Minister, Asquith. Such a demand could now be made only with the consent of a special majority in the House of Commons under the 2011 Act, which might thus be seen not only as a restraint on the power of the Prime Minister, but also on the power of the monarch, though it must be conceded that the 1910 incident is an unlikely precedent for the modern era.

C. The Queen in Council

The Tudor monarchs governed mainly through the Privy Council, a select group of royal officials and advisers, having recourse to Parliament only when legislative authority was considered necessary for matters of taxation or to give effect to royal policies. The Privy Council survived the 17th-century conflicts, although its judicial arm, the Court of Star Chamber, was abolished in 1641. But in the 50 years after the restoration of the monarchy in 1660, the Privy Council lost its position as the main political executive and its numbers grew, many becoming members because of other offices which they held.

As the Cabinet system developed, so did the English Privy Council lose its policy-making and deliberative role.⁶⁷ Soon after the union of England and Scotland in 1707, the Scottish Privy Council was abolished and its functions were assumed by the Privy Council for Great Britain.⁶⁸ In a formal sense the Council remained at the centre of the administrative machinery of government, but despite an attempt by Parliament in the Act of Settlement to insist that the Privy Council should exercise its former functions, the Council had lost its political authority. Significantly, politicians began to remain members of the Council after they had ceased to be ministers, a practice which has continued until today.

Privy Counsellors and Orders in Council

Membership of the Privy Council is now a titular honour. Appointments are made by the Queen on ministerial advice. By convention all Cabinet ministers become Privy Counsellors. Members of the royal family and holders of certain high offices of a non-political character, such as archbishops and Lord Justices of Appeal, are appointed members of the Council. So in recent years have the leaders of the opposition parties ‘so that they can be given classified information on “Privy Counsellor terms” should the need arise on a matter affecting national security’. In the 1970s, Len Murray, general secretary of the TUC, was made a Privy Counsellor to facilitate consultation on government policy,⁶⁹ though this was in a very different era.

The office is a recognised reward for public and political service., members entitled to the prefix, ‘Right Honourable’. They take an oath on appointment which binds them not to disclose anything said or done ‘in Council’ without the consent of the Sovereign. As all members of the Cabinet are also Privy Counsellors, it has been considered that it is this oath which, in addition to their obligations under the Official Secrets Acts 1911–89, binds to secrecy all present and past Cabinet ministers, who may disclose Cabinet proceedings and other confidential discussions only if so authorised by the Sovereign; but little reliance was

⁶⁷ For the history of this period, see Mackintosh, ch 2.

⁶⁸ See Devine, *The Scottish Nation*, pp 18, 21.

⁶⁹ Hennessy, *Whitehall*, pp 350–1.

placed on this oath in the *Crossman Diaries* case⁷⁰ and its wording does not seem apt to include Cabinet proceedings. Aliens are disqualified, but on naturalisation an alien becomes qualified for membership.⁷¹

Despite the many powers conferred by statutes on individual ministers, the Order in Council remains an important method of giving the force of law to acts of the government, especially the more significant executive orders. A royal proclamation is issued when it is desired to give wide publicity to the action of the Queen in Council, as for the purpose of dissolving a Parliament and summoning its successor. Orders in Council are approved by the Queen at a meeting of the Council to which only four members are normally summoned. No discussion of substance on the merits of an instrument takes place at these meetings, and the acts of the Council are mainly formal.

Orders in Council are made either under the prerogative, as for the dissolution of Parliament, or under an Act of Parliament, as for example, orders that make regulations under the Civil Contingencies Act 2004.⁷² Prerogative orders are treated as equivalent to primary legislation, and are regarded as such for the purposes of the Human Rights Act 1998 (but not for the purposes of the Civil Contingencies Act 2004), while statutory Orders in Council are generally subject to the Statutory Instruments Act 1946.⁷³ Legislation made in the Channel Islands must be sanctioned by Order in Council before it comes into force.

Judicial and other functions

In 1833, the Judicial Committee of the Privy Council was set up by statute to exercise the jurisdiction of the Council in deciding appeals from colonial, ecclesiastical and admiralty courts.⁷⁴ In the heyday of the British Empire, the Judicial Committee was indeed an imperial court exercising what was potentially a vast jurisdiction over much of the globe. Today, its role as an appeal court within the Commonwealth has much declined, as leading members, such as Australia, Canada, India, Pakistan and South Africa, no longer – or do not – permit appeals to the Privy Council. Nevertheless, a steady flow of cases continues to be heard from other Commonwealth countries,⁷⁵ while the Privy Council remains the final court of appeal from British Overseas Territories (such as Gibraltar) and Crown dependencies (such as the Channel Islands and the Isle of Man).⁷⁶

A matter may also be referred to the Privy Council by the Crown for an advisory opinion, an interesting but infrequently used procedure established by s 4 of the Judicial Committee Act 1833,⁷⁷ which has survived the creation of the Supreme Court of the United Kingdom. The devolution legislation extended the Privy Council's jurisdiction by providing initially for it to be the final court of appeal on the powers of the devolved Parliament and assemblies. But this was short-lived, with jurisdiction being transferred to the Supreme Court of the United Kingdom when it was established in 2009. The composition of the Judicial Committee is governed by the 1833 Act: cases are usually heard by three or five Supreme Court justices or other senior judges in what is a 'strictly judicial proceeding'.⁷⁸

⁷⁰ *A-G v Jonathan Cape Ltd* [1976] QB 752.

⁷¹ *R v Speyer* [1916] 2KB 858.

⁷² Ch 20.

⁷³ Ch 14.

⁷⁴ Judicial Committee Act 1833.

⁷⁵ For the background, see L P Beth [1975] PL 219. See also Swinfen, *Imperial Appeal*.

⁷⁶ On the nature of this jurisdiction, see *Chief Justice of Cayman Islands v Governor of Cayman Islands* [2012] UKPC 39, [2013] 3 WLR 457; J Restano [2013] PL 477.

⁷⁷ See *Re MacManaway* [1951] AC 161; *Re Parliamentary Privilege Act 1770* [1958] AC 331. For a rare recent example, see *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43.

⁷⁸ *Hull v McKenna* [1926] IR 402.

So far as other functions are concerned, issues of constitutional importance are sometimes referred to ad hoc committees of the Privy Council, as, for example, the legal basis of the practice of telephone tapping and matters affecting state security.⁷⁹ Similarly, a committee of five Privy Counsellors was appointed to review the collection, assessment and use of intelligence prior to the invasion of Iraq in 2003.⁸⁰ In 2009, a committee under the chairmanship of Sir John Chilcot was established to examine the circumstances surrounding the more recent invasion of Iraq and its aftermath, though by 2014 it had yet to report. Unusually and controversially, in 2013 the Privy Council was charged with the responsibility of developing a Royal Charter for regulating the newspaper industry, after a high-profile investigation of the latter by Sir Brian Leveson had revealed poor ethical standards.⁸¹

The functions of the Privy Council are quite distinct from those of the Cabinet. The first gives legal form to certain decisions of the government; the second exercises the policy-making function of the executive in major matters. There is, however, an overlap between the Cabinet and the Privy Council: decisions of the latter are normally taken by ministerial members, while the Lord President of the Council is usually a senior member of the Cabinet. He or she in the past has acted as chairman of Cabinet committees and the position may be held with the office of Leader of the House of Commons or Leader of the House of Lords. Under the Coalition government, the position was combined with the office of Deputy Prime Minister. Much of the work of the Privy Council is spent dealing with institutions and companies established by Royal Charter, of which there are just under 1,000.

D. The royal prerogative

Both the monarch, as head of state, and the government, as personified for many purposes by the Crown, need powers to be able to perform their constitutional functions. The rule of law requires that these powers are grounded in law and are not outside or above the system of law which the courts administer.

In Britain, the powers of the monarch and the Crown must either be derived from Act of Parliament or must be recognised as a matter of common law, for there is no written constitution to confer powers on the executive. In the 17th-century constitutional settlement, it was established that the powers of the Crown were subject to law and that there were no powers of the Crown which could not be taken away or controlled by statute. Once that position had been achieved against the claims of the Stuarts, the courts thereafter accepted that the monarch and the Crown enjoyed certain powers, rights, immunities and privileges which were necessary to the maintenance of government and which were not shared with private citizens.

Acknowledged to be ‘a notoriously difficult concept to define adequately’,⁸² the term prerogative is used as a collective description of these matters. Blackstone referred to prerogative as ‘that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity’.⁸³ A modern definition would stress that the prerogative has been maintained not for the benefit of the monarch but to enable the government to function, and that prerogative is a matter of common law and does not derive from statute. Thus Parliament may not create a new prerogative, although it may confer on the Crown new rights or powers which may be very similar in character to prerogative power.

⁷⁹ Ch 16.

⁸⁰ HC 898 (2003–04).

⁸¹ HC 780 (2012–13).

⁸² HC 422 (2003–4), para 3.

⁸³ Blackstone, *Commentaries*, I, p 239. Cf Wade, *Constitutional Fundamentals*, pp 45–53.

History of the prerogative⁸⁴

The medieval King was both feudal lord and head of the kingdom. He thus had all the rights of a feudal lord and certain exceptional rights above those of other lords. Like other lords, the King could not be sued in his own courts; as there was no lord superior to the King, there was no court in which the King could be sued. In addition, the King had powers accounted for by the need to preserve the realm against external foes and an ‘undefined residue of power which he might use for the public good’.⁸⁵ We have already seen that medieval lawyers did not regard the King as being above the law.⁸⁶ Moreover certain royal functions could be exercised only in certain ways. The common law courts were the King’s courts and only through them could the King decide questions of title to land and punish felonies. Yet the King possessed a residual power of doing justice through his Council where the courts of common law were inadequate.

In the 17th century, the main disputes arose over the undefined residue of prerogative power claimed by the Stuart kings.⁸⁷ Those common lawyers who allied with Parliament in resisting the Stuart claims asserted that there was a fundamental distinction between what was called the ordinary as opposed to the absolute prerogative. The ordinary prerogative meant those royal functions which could only be exercised in defined ways and involved no element of royal discretion. Thus the King could not himself act as a judge; he must dispense justice through his judges. In 1607 James, who had by then also become King James I of England, claimed the right in England to determine judicially a dispute between the common law courts and the ecclesiastical courts. In the case of *Prohibitions del Roy*, it was decided by all the common law judges, headed by Coke, that the right of the King to administer justice no longer existed.⁸⁸

By contrast, the absolute or extraordinary prerogative meant those powers which the King could exercise in his discretion. They included not only such powers as the right to pardon a criminal or grant a peerage, but also the King’s undoubted powers to exercise discretion in the interest of the realm, especially in times of emergency. It was these powers on which Charles I relied in seeking to govern without Parliament. The conflict was resolved only after the execution of one King and the expulsion of another. But the particular disputes often gave rise to cases in the courts, in which the rival political theories were expressed in legal argument. Where the judges accepted the Crown’s more extreme claims, their decisions had subsequently to be reversed by Parliament.

As well as the cases on taxation and the dispensing power,⁸⁹ another outstanding case was *Darnel's or The Five Knights' case*,⁹⁰ where it was held that it was a sufficient answer to a writ of habeas corpus to state that a prisoner was detained *per speciale mandatum regis* (by special order of the King). Thus the King was entrusted with a power of preventive arrest which could not be questioned by the courts and which in *Darnel's case* was used to enforce taxation levied without the consent of Parliament. This arbitrary power of committal was declared illegal by the Petition of Right 1628 and in 1640 the subject’s right to habeas corpus against the King and his Council was guaranteed by statute.⁹¹

⁸⁴ A valuable account is in Keir and Lawson, *Cases in Constitutional Law*, part II. See also Heuston, *Essays*, ch 3, and more recently, Tomkins, *Our Republican Constitution*, ch 3.

⁸⁵ Keir and Lawson, p 70.

⁸⁶ Ch 3.

⁸⁷ *Ibid.*

⁸⁸ (1607) 12 Co Rep 63. See also *Case of Proclamations* (1611) 12 Co Rep 74, ch 3.

⁸⁹ Ch 3.

⁹⁰ (1627) 3 St Tr 1.

⁹¹ Habeas Corpus Act 1640.

The problem of the prerogative was confronted in two stages. The first was that of the seventeenth-century struggle culminating in the Bill of Rights 1689, which declared illegal certain specific uses and abuses of the prerogative.⁹² The second stage was the growth of responsible government and the establishment of a constitutional monarchy.⁹³ It became established that prerogative powers could be exercised only through and on the advice of ministers responsible to Parliament. Nonetheless, the ability of ministers to rely on prerogative powers gives rise to continuing problems of accountability.

The prerogative today

Today the greater part of government depends on statute. But certain powers, rights, immunities and privileges of the monarch and of the Crown, which vary widely in importance, continue to have their legal source in the common law. Where these powers or rights are common to all persons, including the Crown (for example, the power to own property or enter into contracts), they are not described as matters of prerogative;⁹⁴ but the term royal prerogative is properly applied to those legal attributes of the Crown which the common law recognises as differing significantly from those of private persons.

Except in those special instances where prerogative powers involve the personal discretion of the Queen, prerogative powers are exercised by or on behalf of the government of the day. For their exercise, just as for the use of statutory powers, ministers are responsible to Parliament. Thus questions may be asked of ministers about the exercise of prerogative power. Where a matter does not fall within the province of a departmental minister, questions may be addressed to the Prime Minister. To this rule there are certain exceptions: for example, the Prime Minister may not be questioned in the Commons as to the advice that may have been given to the Queen regarding the grant of honours or the ecclesiastical patronage of the Crown.⁹⁵ Although an Act of Parliament may abolish or curtail the prerogative, the prior authority of Parliament has traditionally not been required for the exercise of a prerogative power.

That said, certain prerogative powers could be exercised only if the government was confident that it would thereafter have the support of Parliament should this be necessary. Although signing or ratifying a treaty did not formally require parliamentary approval, the treaty would have no domestic legal effects until enacted in legislation. Similarly, where the government proposed to engage in military conflict, it would have had to be confident that Parliament would vote the supply necessary to meet the costs of the conflict. Nevertheless, growing pressure for better parliamentary scrutiny of the exercise of prerogative powers has led in recent years to a number of important changes, including the emergence of a convention – considered more fully below – that Parliament should be consulted about proposed military operations. There is, however, little prospect of the prerogative being abolished, as was proposed by one former senior Cabinet minister shortly before he joined the government.⁹⁶

That said, steps were taken under the last Labour government to place at least some prerogative powers on a statutory footing, as with the regulation of civil servants. Before the

⁹² Ch 3.

⁹³ Chapters 3 and 5.

⁹⁴ And see B V Harris (1992) 108 LQR 626.

⁹⁵ Erskine May, *Parliamentary Practice*, p 360.

⁹⁶ Jack Straw, MP, 'Abolish the Royal Prerogative' in A. Barnett (ed.), *Power and the Throne: The Monarchy Debate* (1994): '[t]he royal prerogative has no place in a modern western democracy . . . [The prerogative] has been used as a smoke-screen by Ministers to obfuscate the use of power for which they are insufficiently accountable' (p 129).

Constitutional Reform and Governance Act 2010, the legal relationship between the Crown and Crown servants was an aspect of the prerogative, which differed markedly from the normal contractual relationship between employer and employee, though the tendency in recent years has been to move civil service employment more closely in line with the standard employment model. The other notable initiative of the last Labour government was to put in place statutory procedures to be followed before the prerogative power was exercised. Thus, the Constitutional Reform and Governance Act 2010 in some cases requires treaties to be laid before Parliament before being ratified, the legislation substantially replacing a convention to similar effect.

The extent of the prerogative today

Because of the diverse subjects covered by prerogative and because of the uncertainty of the law in many instances where an ancient power has not been used in modern times, it is not possible to give a comprehensive catalogue of prerogative powers.⁹⁷ Instead the main areas in which the prerogative is used today will be mentioned briefly; most of these are discussed more fully in other chapters.

1. Powers relating to the legislature

By virtue of the prerogative the Queen summons, prorogues and dissolves Parliament. The prerogative power to create hereditary peers has been diminished in practice, first by the Life Peerages Act 1958 and then by the House of Lords Act 1999. But it is presumably possible in principle for the Queen to confer hereditary titles on her subjects (presumably also on the advice of her Prime Minister), who would not as a result be entitled to membership of the House of Lords,⁹⁸ though this is a power that seems likely to fall into abeyance as inappropriate in modern times. It is under the prerogative that the Queen assents to Bills.

The Crown retains certain powers to legislate under the prerogative by Order in Council or by letters patent. Described as an ‘anachronistic survival’,⁹⁹ this power remains in use for the surviving overseas territories,¹⁰⁰ and the Channel Islands. While the Crown may not create new criminal offences or impose new obligations upon citizens,¹⁰¹ it may under the prerogative create schemes for conferring benefits upon citizens provided that Parliament appropriates the necessary money to pay for these benefits; thus concerning the Criminal Injuries Compensation scheme, set up by means of a non-statutory document noticed to Parliament, Diplock LJ said:

It may be a novel development in constitutional practice to govern by public statement of intention made by the executive government instead of by legislation. This is no more, however, than a reversion to the ancient practice of government by royal proclamation, although it is now subject to the limitations imposed on that practice by the development of constitutional law in the 17th century.¹⁰²

⁹⁷ For a review of the scope of the prerogative, see HC Deb, 21 April 1993, col 490. See also HC 422 (2003–4) (Memorandum by Treasury Solicitor’s Department).

⁹⁸ House of Lords Act 1999, s 1.

⁹⁹ *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61, [2009] 1 AC 453, at para [69] (Lord Bingham).

¹⁰⁰ Roberts-Wray, *Commonwealth and Colonial Law*, ch 5. And see *R (Bancoult) v Foreign Secretary*, above.

¹⁰¹ *Case of Proclamations* (1611) 12 Co Rep 74.

¹⁰² *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, 886; cf Wade, pp 47–8. See also *R v Home Secretary, ex p Harrison* [1988] 3 All ER 86, and *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513.

2. Powers relating to the judicial system¹⁰³

The Crown can no longer by the prerogative create courts to administer any system of law other than the common law.¹⁰⁴ This restriction had its roots in the common lawyers' distrust of the prerogative courts of the Star Chamber and the High Commission. Its effect today is that new courts and tribunals may be created only by Act of Parliament, but this does not prevent the Crown under prerogative from establishing a body to administer a scheme for conferring financial benefits on individuals.¹⁰⁵ The Crown also exercises many functions in relation to criminal justice.

In England and Wales prosecutions on indictment may be stopped by the Attorney General entering a *nolle prosequi*,¹⁰⁶ a power exercisable even in the case of those prosecutions over which he or she has no power of superintendence, as in the case of prosecutions by HM Revenue and Customs.¹⁰⁷ It has been explained that 'a *nolle prosequi* acts as a stay upon the proceedings', and 'puts an end to a prosecution but does not operate as a bar or discharge or acquittal on the merits', which means in principle that the accused could be re-indicted. The power is rarely used, and the last Labour government proposed its abolition. A *nolle prosequi* application will normally be made to the Attorney General by the defendant, and the power is most likely to be used 'when the defendant cannot attend court for plea or attend trial because of physical or mental incapacity, which is expected to be permanent'.¹⁰⁸

The Crown may also pardon convicted offenders,¹⁰⁹ though under the Criminal Appeal Act 1995 the Home Secretary may seek the advice of the Criminal Cases Review Commission.¹¹⁰ Pardons may take three forms – as a special remission granted after a prisoner has been released early by mistake, as a conditional pardon to commute a sentence (such as the death penalty to life imprisonment), or as a free pardon to address a miscarriage of justice.¹¹¹ In civil matters the Attorney General represents the Crown as *parens patriae* to enforce matters of public right.¹¹² In this capacity he or she has the power to seek an injunction to restrain a breach of the criminal law, but cannot be required to exercise the power if he or she chooses not to do so.¹¹³ In 1991, the Court of Appeal held that the Crown, unlike ministers and servants of the Crown, was not subject to the contempt jurisdiction vested in the courts.¹¹⁴

3. Powers relating to foreign affairs

The conduct of foreign affairs by the government is carried on mainly by reliance on the prerogative. The prerogative includes power to acquire additional territory; thus by royal warrant in 1955, the Crown took possession of the island of Rockall, subsequently incorporated into the United Kingdom as part of Scotland by the Island of Rockall Act 1972. It is doubtful whether the Crown may by treaty cede British territory without the authority of

¹⁰³ Ch 13.

¹⁰⁴ *Re Lord Bishop of Natal* (1864) 3 Moo PC (NS) 115.

¹⁰⁵ *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864.

¹⁰⁶ On which see *Allen* (1862) 1 B&S 850.

¹⁰⁷ HC 115 (1995–6) (Scott Report), para C 3.10.

¹⁰⁸ HC Deb, 5 March 2004, col 1202 W.

¹⁰⁹ *R v Home Secretary, ex p Bentley* [1994] QB 349; *R (Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin), [2010] QB 150.

¹¹⁰ 1995 Act, s 16.

¹¹¹ For a good discussion, see Ministry of Justice, *Review of the Executive Royal Prerogative Powers – Final Report* (2009), pp 15–18.

¹¹² *Gouriet v Union of Post Office Workers* [1978] AC 435.

¹¹³ Criminal Appeal Act 1995, s 16.

¹¹⁴ *M v Home Office* [1992] QB 270. The House of Lords held the same, for other reasons: [1994] 1 AC 377.

Parliament and modern practice is to secure parliamentary approval,¹¹⁵ but it seems that the prerogative includes power to declare or to alter the limits of British territorial waters.¹¹⁶

The phrase ‘act of state’ is often used to refer to acts of the Crown in foreign affairs: while these acts would often fall within the scope of the prerogative, the concept of the prerogative is best confined to powers of the Crown exercised in relation to its own subjects, and ‘act of state’ should apply only to a limited plea to the jurisdiction of the British courts, in respect of acts of the Crown performed in foreign territory in relation to aliens.¹¹⁷ There is no prerogative power to expel British subjects or forcibly to remove them to another part of the country for the purposes of internal exile, though the position may be different under the prerogative in relation to an overseas territory.¹¹⁸ By means of the writ *ne exeat regno*, the Crown could restrain a person from leaving the realm when the interests of state so demanded, but it is doubtful whether the power would today be exercised.

In time of war the Crown may possibly under the prerogative restrain a British subject from leaving the realm or recall him or her from abroad, but during modern wars entry and exit have been controlled by statutory powers. Although the Crown has power under the prerogative to restrain aliens from entering the United Kingdom, it is uncertain whether it has a prerogative power to expel aliens who have been permitted to reside here. Today, powers over aliens are exercised under the Immigration Act 1971, although that Act expressly reserves such prerogative powers as the Crown may have (s 33(5)).¹¹⁹ The issue of passports to citizens is based on the prerogative, as are the conditions under which such passports are held.

4. Powers relating to treaties

As we have seen, the making of treaties is done under the authority of the prerogative. In the United States the constitution vests the treaty making power in the President ‘by and with the advice of the Senate’. Ratification of a treaty requires the concurrence of two thirds of the Senate, following which a treaty will have a status equal to that of domestic law. In both of these respects, the position in the United Kingdom under the prerogative has been very different: no parliamentary approval has been required before a treaty may be ratified, and no treaty may be enforced in the domestic courts until formally implemented by legislation. The latter principle reflects the nature of the treaty making process: it is an act of the executive, not an act of Parliament.

As suggested above, however, in recent years there has been growing pressure for greater parliamentary involvement in the making of treaties. It was already the case that under the so-called Ponsonby rule,¹²⁰ treaties once signed by ministers must be laid before Parliament for 21 days before being ratified (except in cases of urgency). Dating from the first Labour government in 1924, this convention was designed both to inform Parliament and to provide it with an opportunity to debate the treaty.¹²¹ That convention was given statutory force

¹¹⁵ Anson, *Law and Custom of the Constitution*, II, ii, pp 137–42; and Roberts-Wray, ch 4. The Hong Kong Act 1985 provides that ‘As from 1st July 1997 Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong’ (s 1(1)).

¹¹⁶ *R v Kent JJ, ex p Lye* [1967] 2 QB 153; cf *W R Edson* (1973) 89 LQR 364.

¹¹⁷ See the varying opinions on the application of prerogative abroad in *Nissan v A-G* [1970] AC 179. There may now also be issues under the Human Rights Act – see ch 14.

¹¹⁸ See *Bancoult*, note 99 above. See also Sibley and Jeffries, *The Shameful Deportation of a Trade Union Leader* (on the removal of trade union leader Albert Fava from Gibraltar to England after the Second World War).

¹¹⁹ See *R (Munir) v Home Secretary* [2012] UKSC 32: prerogative power applies only to aliens but not to Commonwealth citizens.

¹²⁰ HC Deb, 1 April 1924, cols 2001–4.

¹²¹ Some international obligations require treaties to be laid before Parliament, even though the treaties have not yet been signed by the government: ILO Constitution (1919), art 19.

by the Constitutional Reform and Governance Act 2010, which provides the House of Commons with a veto over the government's treaty-making powers in some circumstances. According to the latter, 'a treaty is not to be ratified' unless it has been laid before Parliament for at least 21 days, and neither House has resolved during that time that the treaty in question should not be ratified (s 20).

Where the House of Commons does so resolve, the minister in question may explain why in his or her view the treaty nevertheless should be ratified (s 20(4)). The House must then be given another opportunity to consider it, and may resolve again that the treaty ought not to be ratified. The House of Lords has no comparable veto: although it may resolve that a treaty may not be ratified, this may be over-ruled by the government unless the House of Commons has passed a similar resolution (s 20(8)). It is expressly provided, however, that the foregoing provisions do not apply where the minister takes the view that 'exceptionally, the treaty should be ratified without the requirements of [section 20] being met' (s 22). In these cases, the minister must lay the treaty before Parliament, with an explanation of the exceptional circumstances (s 20(3)). There are also exceptions for certain EU treaties for which separate requirements of parliamentary approval already exist.¹²²

The 2010 Act does not affect the principle that a ratified treaty is unenforceable in domestic law without an Act of Parliament.

5. Powers relating to war and the armed forces

It is under the prerogative that the government may declare war, said by some to be 'the most significant of the prerogative powers'.¹²³ In modern times, however, it has not been the practice to make a formal declaration of war before commencing military activity, as in the case of the invasion of Iraq in 2003, or the military operations in Afghanistan. Such military activity is also authorised by the prerogative.

Both by prerogative and by statute the Queen is commander-in-chief of the armed forces of the Crown. The Bill of Rights 1689 prohibited the keeping of a standing army within the realm in time of peace without the consent of Parliament; thus the authority of Parliament is required for the maintenance of the army, the Royal Air Force and other forces serving on land. It has been pointed out that while the army and the RAF are now governed by statute 'the Royal Navy is still maintained by virtue of the prerogative'.¹²⁴ Although many matters regarding the armed forces are thus regulated by statute, their control, organisation and disposition are within the prerogative and cannot be questioned in a court.¹²⁵

In 2006 the House of Lords Committee on the Constitution proposed a new convention to determine the role of Parliament before British troops were deployed for the purposes of armed conflict outside the United Kingdom.¹²⁶ The government made a similar proposal in 2008 in the White Paper *Constitutional Renewal*, and it was suggested most recently that the armed forces should not be deployed overseas without Parliament being given an opportunity to debate and vote on the matter.¹²⁷ The invasion of Iraq in 2003 was preceded by such a

¹²² Constitutional Reform and Governance Act 2010, s 23, as amended by the European Union Act 2011, s 14. On EU treaties, see ch 6.

¹²³ HC 422 (2003–4), para 18.

¹²⁴ *Ibid*, para 9. See now Armed Forces Act 2006.

¹²⁵ *China Navigation Co Ltd v A-G* [1932] 2 KB 197; *Chandler v DPP* [1964] AC 763; Crown Proceedings Act 1947, s 11. But see pp 281–3 below.

¹²⁶ HL Paper 35, 2005–06.

¹²⁷ HL Paper 46, 2013–14, para 63.

vote,¹²⁸ while military operations in Libya in 2011 were also approved overwhelmingly by a Commons resolution.¹²⁹ The crystallisation of the convention appeared to be complete when in August 2013 the Coalition government felt compelled to withdraw support for military operations in Syria following a defeat in the House of Commons.¹³⁰

6. Patronage, appointments and honours¹³¹

On the advice of the Prime Minister or other ministers, the Queen appoints ministers, judges and many other holders of public office, including the members of royal commissions to inquire into matters of controversy.¹³² The Queen is the sole fountain of honour and alone can create peers, confer honours and decorations,¹³³ grant arms and regulate matters of precedence.¹³⁴ Honours are generally conferred by the Queen on the advice of the Prime Minister. In the case of peerages, the formal position is that the House of Lords Appointments Commission advises the Prime Minister about the non-political nominations and the Prime Minister passes these on to the Queen.¹³⁵

The Commission also advises the Prime Minister about party political nominees, performing a task previously performed by the Political Honours Scrutiny Committee, which is to vet all nominations to ensure the highest levels of propriety. The Political Honours Scrutiny Committee (a committee of three Privy Counsellors), which also advised on the suitability of those who are recommended for other political honours (such as knighthoods and the like), has been abolished.¹³⁶ Certain honours, namely the Order of the Garter, the Order of the Thistle, the Royal Victoria Order (for personal services to the Queen) and the Order of Merit are in the personal gift of the Queen.

7. Immunities and privileges

It is a principle of interpretation that statutes do not bind the Crown except by express statement or necessary implication.

In *Lord Advocate v Dumbarton Council*, the Ministry of Defence decided to erect an improved security fence at its submarine base at Faslane, Dunbartonshire. Part of the fence ran alongside the A814 road and when the roads authority (Strathclyde Council) discovered that the Ministry intended to place temporary works on part of the road, they notified the Ministry that it would require their consent under the Roads (Scotland) Act 1984. The Ministry replied that these provisions did not bind the Crown and contractors took possession of a one-mile stretch of part of the road by erecting a temporary fence.

Thereupon the roads authority (Strathclyde) and the planning authority (Dumbarton) gave various notices under statutes to stop the work. The Lord Advocate sought judicial

¹²⁸ HC Deb, 18 March 2003, cols 760–911. The House of Commons voted by 412 to 149 to support a detailed government motion that authorised the ‘use of all means necessary’ to ensure the disarmament of Iraq’s weapons of mass destruction. No such weapons have ever been found.

¹²⁹ HC Deb, 21 March 2011, cols 700–802.

¹³⁰ HC Deb, 29 August 2013, cols 1425–51.

¹³¹ Jennings, ch 14; Richards, *Patronage in British Government*, ch 10; Walker, *The Queen has been Pleased*.

¹³² On judicial appointments, see ch 13.

¹³³ On which see for example Cm 6936, 2006 (Iraq medal).

¹³⁴ A Wagner and G D Squibb (1973) 80 LQR 352.

¹³⁵ See ch 7.

¹³⁶ See Cmd 1789, 1922; and Cm 4057-1, 1998. It is an offence to trade in honours: Honours (Prevention of Abuses) Act 1925.

review of the councils' conduct, alleging that the statutes in question did not bind the Crown. Although the Crown's immunity was restricted by the Inner House of the Court of Session, the wider immunity was restored by the House of Lords. In the view of Lord Keith, 'the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect. The Crown can be bound only by express words or necessary implication.' At the same time, Lord Keith rejected as no longer tenable the view that 'the Crown is in terms bound by general words in a statute but that the prerogative enables it to override the statute'.¹³⁷

Tax is not payable on income received by the monarch as such, neither in respect of Crown property, nor on income received on behalf of the Crown by a servant of the Crown in the course of official duties.¹³⁸ But as we have seen, the Queen has undertaken to pay tax on her private income since 1993 and it is claimed on the official royal website that her private income is taxable 'as for any taxpayer'.¹³⁹ Many of the immunities of the Crown in civil litigation were removed by the Crown Proceedings Act 1947, but the Crown and government departments still have certain privileges.

The 1947 Act preserved the personal immunity of the Sovereign from being sued.¹⁴⁰ The question has arisen whether the Crown enjoys immunity from criminal liability. During the Spycatcher affair in the mid-1980s, a retired MI5 officer, Mr Peter Wright, alleged that members of the Security Service had been engaged in surveillance operations which included burgling premises in London. The Home Secretary announced that the government had never asserted that actions 'could lawfully be done under the prerogative when they would otherwise be criminal offences'.¹⁴¹

8. The prerogative in time of emergency

The extent of the prerogative in times of grave emergency cannot be precisely stated. That prerogative powers were wide was admitted by Hampden's counsel in the *Case of Ship Money*. Save in regard to taxation, they were not abridged by the Bill of Rights. In 1964, Lord Reid said: 'The prerogative certainly covers doing all those things in an emergency which are necessary for the conduct of war'; but he added that there was difficulty in relating the prerogative to modern conditions since no modern war had been waged without statutory powers:

The mobilisation of the industrial and financial resources of the country could not be done without statutory emergency powers. The prerogative is really a relic of a past age, not lost by disuse but only available for a case not covered by statute.¹⁴²

According to the old law, in time of sudden invasion or insurrection, the King might demand personal service within the realm.¹⁴³ Either the Crown or a subject might invade the land of another to erect fortifications for the defence of the realm.¹⁴⁴ But it is not certain whether this should be regarded as an aspect of the prerogative since it was a duty shared by

¹³⁷ [1990] 2 AC 580; and ch 26.

¹³⁸ *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584.

¹³⁹ See also on royal finances, pp 239–40 above.

¹⁴⁰ Ch 26.

¹⁴¹ HC Deb, 29 January 1988, col 397 (WA). Cf *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 190. See now Intelligence Services Act 1994, s 7.

¹⁴² *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 101.

¹⁴³ Chitty, p 49.

¹⁴⁴ *Case of the King's Prerogative in Saltpetre* (1607) 12 Co Rep 12.

the Crown with all its subjects. Extensive emergency powers have now been granted by Parliament, and these confer authority on ministers to make regulations that provide for the confiscation of private property, with or without compensation.¹⁴⁵ But if, for example, an emergency arose in which it was necessary for the armed forces to take immediate steps against terrorist action within the United Kingdom, it is possible both that private property needed for this purpose could be occupied under prerogative, and (as will be considered below) that compensation would at common law be payable to the owners.

9. Miscellaneous prerogatives

Other historic prerogative powers concerning matters which are today largely regulated by statute relate to: the creation of corporations by royal charter;¹⁴⁶ the right to mine precious metals; coinage; the grant of franchises, for example, markets, ferries and fisheries;¹⁴⁷ the right to treasure trove;¹⁴⁸ the sole right of printing or licensing others to print the Authorised Version of the Bible,¹⁴⁹ the Book of Common Prayer and state papers;¹⁵⁰ and the guardianship of infants (a prerogative jurisdiction of the Crown said to be delegated to the courts).¹⁵¹ The courts may interfere ‘for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*’.¹⁵²

Although potentially wide in scope,¹⁵³ this latter jurisdiction is, however, ‘carefully and cautiously applied by judges in circumstances in which the welfare of those to whom the inherent jurisdiction applies positively require its exercise for their protection’.¹⁵⁴ When a court is exercising this paternal jurisdiction, it is empowered to exclude the public from the hearing of the case where it is necessary to do so.¹⁵⁵ In *R v Central Television plc*,¹⁵⁶ however, it was held that the power could not be invoked to obscure the pictures of a man in a television programme imprisoned for indecency with young boys, on the ground that his identification would cause harm to his child: the programme had nothing to do with the care or upbringing of the child.

E. The royal prerogative and the courts

Some prerogative acts are unlikely to give rise to the possibility of challenge in the courts, for example the conferment of an honour or the dissolution of Parliament. But where an act

¹⁴⁵ Civil Contingencies Act 2004, ss 18–22.

¹⁴⁶ On the BBC, see Ministry of Justice, *Review of the Executive Royal Prerogative Powers – Final Report*, above, p 23, and ch 17 below.

¹⁴⁷ Cf *Spook Erection Ltd v Environment Secretary* [1989] QB 300 (beneficiary of market franchise not entitled to Crown’s exemption from planning control).

¹⁴⁸ Treasure trove, i.e. gold or silver objects that have been hidden and of which no owner can be traced, is the property of the Crown: *A-G of Duchy of Lancaster v G E Overton (Farms) Ltd* [1982] Ch 277. See now Treasure Act 1996.

¹⁴⁹ *Universities of Oxford and Cambridge v Eyre & Spottiswoode Ltd* [1964] Ch 736 (royal prerogative did not extend to New English Bible).

¹⁵⁰ Copyright, Designs and Patents Act 1988, s 163.

¹⁵¹ *Butler v Freeman* (1756) Amb 302; and *Wellesley v Duke of Beaufort* (1827) 2 Russ 1.

¹⁵² *In re Spence* (1847) 2 Ph 247 (Lord Cottenham, LC), cited with approval by Lord Denning (*In re L (An Infant)*) [1968] P 119), cited with approval in turn by Dame Elizabeth Butler-Sloss (*In re a Local Authority* [2003] EWHC 2746 (Fam), [2004] Fam 96).

¹⁵³ See from Australia, *Re Beth* [2013] VSC 189.

¹⁵⁴ *In re a Local Authority*, above, para 61. And see *Re T* [2001] NI Fam 4.

¹⁵⁵ *Scott v Scott* [1913] AC 417.

¹⁵⁶ [1994] Fam 192.

purporting to be done under the prerogative directly affects the rights of an individual, the courts may be asked to determine a number of issues.

The existence and extent of a prerogative power

In principle the courts will not recognise the existence of new prerogative powers. In *Entick v Carrington*, in which the court held that the mere plea of state necessity would not protect anyone accused of an unlawful act, Lord Camden CJ said, 'If it is law, it will be found in our books. If it is not to be found there, it is not law.'¹⁵⁷ And in 1964 Diplock LJ said,

It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension.¹⁵⁸

But some prerogative powers are very wide and difficulties arise when the courts are asked to decide whether an ancient power applies in a new situation; for example, whether the Crown's power to act in situations of grave national emergency justifies action to deal with a wholly new form of terrorist activity which threatens the nation; or whether the prerogative right to intercept postal communications justifies the tapping of telephones.¹⁵⁹

In these situations, it may be difficult to distinguish between creating a new prerogative and applying an old prerogative to new circumstances.

In *R v Home Secretary, ex p Northumbria Police Authority*,¹⁶⁰ the Home Secretary made available CS gas and baton rounds to the police to deal with situations of serious public disorder, notwithstanding the objections of the local police authority. The police authority sought a declaration that the Home Secretary had no power to provide the equipment without their consent, save in a situation of grave emergency. The Court of Appeal held that the provision of the equipment was authorised by the Police Act 1964, but also by the royal prerogative. In so concluding, the court had first to determine that there did in fact exist a 'prerogative to enforce the keeping of what is popularly called the Queen's peace within the realm'. Although the court had difficulty in finding authority for such a power, Croom-Johnson LJ nevertheless concluded that such a general power is bound up with the Crown's 'undoubted right to see that crime is prevented and justice administered'. The supply of baton rounds and CS gas was held to fall within the scope of the prerogative, since it is open to the Home Secretary 'to supply equipment reasonably required by police forces to discharge their functions'.

A related question is whether the courts have power to rule that an ancient prerogative has become so unsuited to modern conditions that it can no longer be relied on by the Crown. In general, rules of common law do not lapse through desuetude.¹⁶¹ But it is difficult to see why

¹⁵⁷ (1765) 19 State Tr 1029, 1066: ch 16. *Entick's* case was distinguished in *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (no evidence of unlawful act in tapping telephones); ch 16.

¹⁵⁸ *BBC v Johns* [1965] Ch 32, 79.

¹⁵⁹ Cf Cmd 283, 1957. In *Malone's* case, no claim of prerogative power was made.

¹⁶⁰ [1989] QB 26, criticised by A W Bradley [1988] PL 297.

¹⁶¹ Maitland, *Constitutional History*, p 418; cf *Nyali Ltd v A-G* [1956] 1 QB 1, and *McKendrick v Sinclair* 1972 SC (HL) 25, at pp 60–1.

a court should be required to give new life to an archaic power which offends modern constitutional principles, merely because its existence had been recognised several centuries ago.

The difficulty of applying the old common law in contemporary circumstances was evident in *Burmah Oil Company v Lord Advocate*.¹⁶²

In 1942 extensive oil installations were destroyed by British troops in Rangoon, not accidentally as a result of fighting but deliberately so as to prevent the installations falling into enemy hands. One day later, the Japanese army entered Rangoon. After receiving some £4 million from the British government as an *ex gratia* payment, the company sued the Lord Advocate representing the Crown in Scotland for over £31 million. It was agreed that the destruction had not been ordered under statutory authority and the company claimed compensation for the lawful exercise of prerogative power. The House of Lords held (a) that, as a general rule, compensation was payable by the Crown to the subject who was deprived of property for the benefit of the state, by prerogative act in relation to war, and (b) that the destruction of the refineries did not fall within the 'battle damage' exception to the general rule. But the House left open the basis on which compensation should be assessed.

This decision established that where private property was taken under the prerogative, the owner was entitled at common law to compensation from the Crown; but the War Damage Act 1965 retrospectively provided that no person should be entitled at common law to receive compensation in respect of damage to or destruction of property caused by lawful acts of the Crown 'during, or in contemplation of the outbreak of, a war in which the Sovereign is or was engaged'. This Act prevented the *Burmah Oil Company's* claim from succeeding but its effect was limited to acts of the Crown which destroyed property during or in contemplation of a war; the principle that the Crown is obliged to pay compensation for property taken under the prerogative for use of the armed forces otherwise still seems to apply.¹⁶³ Thus the Crown may under prerogative requisition British ships in time of urgent national necessity, but compensation is payable, as it was in 1982 when British ships were requisitioned for use in the recapture of the Falkland Islands.¹⁶⁴ By the right of angary, the Crown may in time of war appropriate the property of a neutral which is within the realm where necessity requires, but compensation must be paid.¹⁶⁵ In both world wars, statutory powers of requisitioning property have been conferred on the Crown and compensation has been paid.

The effect of statutes upon prerogative powers

Parliament may abolish or restrict prerogative powers expressly or by necessary implication, whether or not coupling this with the grant of statutory powers in the same area of government. But often Parliament has not expressly abolished prerogative powers and has merely created a statutory scheme dealing with the same subject. Where this is the case, as a general principle must the Crown proceed under the statutory powers or may it rely instead upon the prerogative?

¹⁶² [1965] AC 75, discussed by A L Goodhart (1966) 82 LQR 97; T C Daintith (1965) 14 ICLQ 1000; and (1966) 79 Harv LR 614.

¹⁶³ E.g. *Nissan v A-G* [1970] AC 179, 229 (Lord Pearce).

¹⁶⁴ Requisitioning of Ships Order 1982. And see *Crown of Leon v Admiralty Commissioners* [1921] 1 KB 595; W S Holdsworth (1919) 35 LQR 12.

¹⁶⁵ *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271. And see W I Jennings (1927) 3 CLJ 1.

In *Attorney-General v De Keyser's Royal Hotel*¹⁶⁶ a hotel was required for housing the administrative staff of the Royal Flying Corps during the First World War. The Army Council offered to hire the hotel at a rent but, negotiations having broken down, a letter was sent on the instruction of the Army Council stating that possession was being taken under the Defence of the Realm Acts and Regulations. A petition of right was later brought against the Crown claiming compensation as of right for the use of the hotel by the authorities.

It was argued for the Crown that there was a prerogative power to take the land of the subject in case of emergency in time of war; that no compensation was payable as of right for land so taken; and that this power could be exercised, notwithstanding provisions of the Defence Act 1842 which had been incorporated into the Defence of the Realm Acts and provided for statutory compensation as of right to the owners. The argument for the owners of the hotel was that the Crown had taken possession under the statutes and so could not fall back on the prerogative.

The House of Lords rejected the argument of the Crown, holding that on the facts the Crown had taken possession under statutory powers. The House also held that the prerogative had been superseded for the time being by the statute. The Crown could not revert to prerogative powers when the legislature had given to the Crown statutory powers which covered all that could be necessary for the defence of the nation, and which were accompanied by important safeguards to the individual. Thus for the duration of the statutory powers, the prerogative was in abeyance. The House therefore did not have to decide whether the Crown had a prerogative power to requisition land in time of war without paying compensation, but serious doubts were expressed about this claim.¹⁶⁷

The principle in this case, that the 'executive cannot exercise the prerogative in a way which would derogate from the due fulfilment of a statutory duty',¹⁶⁸ is subject to a number of refinements. First, it applies only when Parliament has not given an express indication of its intention. Thus the Immigration Act 1971 provided that the powers which it conferred should be additional to any prerogative powers (s 33(5)), as did the Emergency Powers (Defence) Act 1939.¹⁶⁹ Second, there are suggestions that it may apply only where the statute confers rights or benefits on the citizen which would be undermined were the Crown to retain the right to use the prerogative power. In the *Northumbria Police* case, the Court of Appeal held that the supply of baton rounds and CS gas was authorised by the Police Act 1964, s 41, but also by the prerogative power to maintain the peace. Was the prerogative power displaced by the statute or could both exist and operate simultaneously?

In opting for the latter position, Purchas LJ said:

It is well established that the courts will intervene to prevent executive action under prerogative powers in violation of property or other rights of the individual where this is inconsistent with statutory provisions providing for the same executive action. Where the executive action is directed towards the benefit or protection of the individual, it is unlikely that its use will attract the intervention of the courts . . . [B]efore the courts will hold that such executive action

¹⁶⁶ [1920] AC 508.

¹⁶⁷ See subsequently the *Burmah Oil* case, p 261 above. See also *CO Williams Construction Ltd v Blackman* [1995] 1 WLR 102, at p 108; *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513; and *Attorney-General v Blake* [2001] AC 268. For a modern consideration of *De Keyser*, see *R (Alvi) v Home Secretary* [2012] UKSC 33, [2012] 1 WLR 2208.

¹⁶⁸ *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513.

¹⁶⁹ Ch 20.

is contrary to legislation, express and unequivocal terms must be found in the statute which deprive the individual from receiving the benefit or protection intended by the exercise of prerogative power.¹⁷⁰

In the *Northumbria Police* case, even if the statute had not provided the necessary authority, the court was unable to find ‘an express and unequivocal inhibition sufficient to abridge the prerogative powers, otherwise available to the Secretary of State, to do all that is reasonably necessary to preserve the peace of the realm’. Third, where the statute restricting the prerogative is repealed, ‘the prerogative power would apparently re-emerge as it existed before the statute’.¹⁷¹ This is subject to ‘words in the repealing statute which make it clear that the prerogative power is not intended by Parliament to be revived or again brought into use’.¹⁷²

The manner of exercise of a prerogative power

Although the courts have long had the power to determine the existence and extent of a prerogative power, traditionally they have had no power to regulate the manner of its exercise. This contrasts with statutory powers of the executive, which the courts have held must generally be exercised in accordance with the rules of natural justice and in accordance with the so-called *Wednesbury* principles.¹⁷³ Thus, the courts have held that the courts cannot question whether the Crown has wisely exercised its discretionary power regarding the disposition of the armed forces;¹⁷⁴ nor could the courts say whether the government should enter into a particular treaty;¹⁷⁵ nor whether the Home Secretary had properly advised the Queen regarding the prerogative of mercy.¹⁷⁶ In *Gouriet v Union of Post Office Workers*¹⁷⁷ the House of Lords held that the exercise of the Attorney General’s discretion in giving consent to the bringing of relator actions could not be reviewed by the courts.

But when this last decision was made, there were already some indications of a more flexible approach by the courts.¹⁷⁸ Although it may not have been fully appreciated at the time,¹⁷⁹ *R v Criminal Injuries Compensation Board, ex p Lain*¹⁸⁰ was to prove an important breakthrough, where it was held that the High Court had the power to review the activities of the board, a body set up under the royal prerogative to administer benefits for the victims of criminal injury. Lord Parker CJ could see no reason why a body set up by prerogative rather than by statute should be any less amenable to judicial review for that reason alone.¹⁸¹ The position is now governed by the landmark decision of the House of Lords in *Council of Civil Service Unions v Minister of State for Civil Service*.¹⁸²

¹⁷⁰ [1989] QB 26, at p 53.

¹⁷¹ *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, Lord Pearce at p 143.

¹⁷² *R v Foreign Secretary, ex p CCSU* [1984] IRLR 309, at 321 (Glidewell J).

¹⁷³ See ch 24 A on the latter.

¹⁷⁴ *China Navigation Co Ltd v A-G* [1932] 2 KB 197; *Chandler v DPP* [1964] AC 763; Crown Proceedings Act 1947, s 11.

¹⁷⁵ *Blackburn v A-G* [1971] 2 All ER 1380. Also *R v Foreign Secretary, ex p Rees-Mogg* [1994] QB 552.

¹⁷⁶ *Hanratty v Lord Butler* (1971) 115 SJ 386, discussed by A T H Smith [1983] PL 398, 432. Cf *B V Harris* [1991] PL 386. But see *R v Home Secretary, ex p Bentley* (note 185 below).

¹⁷⁷ [1978] AC 435.

¹⁷⁸ See *Chandler v DPP* [1964] AC 763, 810 (Lord Devlin).

¹⁷⁹ See C P Walker [1987] PL 62.

¹⁸⁰ [1967] 2 QB 864.

¹⁸¹ See also *Laker Airways Ltd v Department of Trade and Industry* [1977] QB 643 (Lord Denning).

¹⁸² [1985] AC 374. See H W R Wade (1985) 101 LQR 180.

In January 1984, the Foreign Secretary announced the government's decision to exclude trade unions from Government Communications' Headquarters (GCHQ). This would be done under an Order in Council of 1982 authorising the Minister for the Civil Service to give instructions regulating the terms and conditions of civil service employment. The instructions given directed that staff at GCHQ would no longer be permitted to be members of the civil service unions, but only to join an officially approved staff association. These steps had been taken because of earlier industrial action at GCHQ.

In deciding whether the government's decision was reviewable by the courts, a majority in the House of Lords held that the courts could review the manner of exercise of discretionary powers conferred by the prerogative just as they could review the manner of exercise of discretionary powers conferred by statute. Lord Diplock could 'see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review'. It does not follow, however, that all prerogative powers would be subject to review in this way. According to the House of Lords, it depends on the nature of the power, and in particular whether the power in question is justiciable, ie whether it gives rise to questions which are capable of adjudication in a court of law.

It was not clear which powers are justiciable, though Lord Roskill gave many examples of those which are not, including the making of treaties, the disposition of the armed forces, the granting of honours and the dissolution of Parliament. Litigation arising from the events in Iraq in 2003 was a sobering reminder that despite the *CCSU* decision, by no means all decisions under the prerogative are subject to judicial review. In a challenge to the legality of British involvement in the hostilities brought by CND, it was argued that the action was being taken without a clear UN mandate. But this was unsuccessful, with the Divisional Court (of three members) applying the *CCSU* decision to hold that such matters were not justiciable.¹⁸³ Indeed, it is difficult to see how a court could realistically be expected to challenge such intensely political decisions in such circumstances.

Nevertheless, one effect of the *CCSU* decision was that the prerogative power to regulate terms of employment in the civil service was now subject to judicial review, though the power in question has since been displaced by statute following the enactment of the Constitutional Reform and Governance Act 2010. Otherwise, it was quickly accepted that the power to issue a passport is subject to judicial review,¹⁸⁴ and also that 'some aspects of the exercise of the Royal Prerogative [of mercy] are amenable to the judicial process'.¹⁸⁵ In *R v Home Secretary, ex p Fire Brigades Union*,¹⁸⁶ it was held to be an 'abuse of the prerogative' when the Home Secretary failed to implement a statutory scheme to compensate the victims of crime and chose instead to reintroduce a less favourable scheme by relying on common law powers.¹⁸⁷ It does not follow, however, that because a power is amenable to judicial process the courts will therefore be willing to intervene.

¹⁸³ *CND v Prime Minister* [2002] EWHC 2759 (QB), *The Times*, 27 December 2002.

¹⁸⁴ *R v Foreign Secretary, ex p Everett* [1989] QB 811.

¹⁸⁵ *R v Home Secretary, ex p Bentley* [1994] QB 349. See subsequently, *R v Bentley* (2001) 1 Cr App Rep 307. Compare *Hanratty v Lord Butler* (1971) 115 SJ 386, and *de Freitas v Benny* [1976] AC 239.

¹⁸⁶ [1995] 2 AC 513; T R S Allan [1995] CLJ 489.

¹⁸⁷ The case was thought not to involve an application of the *De Keyser* principle (above, p 262), because the statutory provisions (Criminal Justice Act 1988) had not been brought into force and thus had 'no legal significance of any kind'.

Thus, in *R (Bancoult) v Foreign Secretary (No 2)* the House of Lords went further than in *CCSU* by holding that the making of an Order in Council could be reviewed, as well as the manner of exercise of the power it conferred (the *CCSU* case being concerned only with the latter).¹⁸⁸ On the facts of that case, however, an Order in Council preventing displaced Chagos Islanders from returning home was upheld, the House of Lords (by a majority) accepting government arguments based on cost and security. On a different matter, the Foreign Office has a policy for providing support for British citizens facing capital punishment abroad, the policy expressly excluding the provision of legal representation. Unlike in the case of discretionary powers conferred by statute (which cannot be fettered by a rigid rule),¹⁸⁹ there is no obligation on the part of the government to consider departing from its established practice under the prerogative to meet the justice of a particular case.¹⁹⁰ Explaining the distinction, Lord Dyson said that

there is no rule of law which requires the decision-maker to consider the facts of every case with a view to deciding whether, exceptionally, to depart from the policy in a particular case. This is because 'it is within the power of the decision-maker to decide on the extent to which the power is to be exercised in, for example, setting up a scheme. He can decide on broad and clear criteria and either that there are no exceptions to the criteria in the scheme or, if there are exceptions in the scheme, what they should be'.¹⁹¹

Questions relating to treaties

The decision to enter into the treaty is not justiciable.¹⁹² Nor can the treaty be enforced in the domestic courts until enacted in legislation.¹⁹³ As already explained, 'the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action'.¹⁹⁴ Further, 'except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts . . . have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual'.¹⁹⁵ The manner in which this is done will vary, and exceptionally Parliament may refer directly to the treaty in a statute, as in the case of the Refugee Convention,¹⁹⁶ though more usually Parliament will seek to translate the terms of the treaty into more recognisable statutory language. The danger with the latter course is that some distance will inadvertently emerge between the treaty and the statute.

Notwithstanding these rules, however, once made, a treaty may have legal consequences in at least two circumstances. First, the courts increasingly will refer to treaties in the interpretation of domestic law.¹⁹⁷ This is a process that may have been encouraged by the Human Rights Act and the duty to have regard to Strasbourg jurisprudence.¹⁹⁸ It is certainly the case

¹⁸⁸ [2008] UKHL 61, [2009] 1 AC 453.

¹⁸⁹ See ch 24 below.

¹⁹⁰ *R (Sandiford) v Foreign Secretary* [2013] EWCA Civ 581, [2013] 1 WLR 2938.

¹⁹¹ Lord Dyson was here citing *R (Elias) v Defence Secretary* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at para 191.

¹⁹² *Blackburn v Attorney General* [1971] 1 WLR 1037.

¹⁹³ *R v Home Secretary, ex p Brind* [1991] 1 AC 696. But see *Minister of State for Immigration v Teoh* (1995) 128 ALR 353 (High Court of Australia held that a treaty could give rise to a legitimate expectation that the executive would act in accordance with the treaty).

¹⁹⁴ *Attorney General for Canada v Attorney General for Ontario* [1937] AC 325, 347 (Lord Atkin).

¹⁹⁵ *Rayner (Mincing Lane) Ltd v Department of Trade* [1990] 2 AC 418, 477 (Lord Templeman); *Littrell v USA (No 2)* [1994] 4 All ER 203.

¹⁹⁶ Note Asylum and Immigration Appeals Act 1993, s 2. See *Al-Sirri v Home Secretary* [2012] UKSC 15, [2013] 1 All ER 1267.

¹⁹⁷ See *R (Adams) v Justice Secretary* [2011] UKSC 18, [2012] 1 AC 48.

¹⁹⁸ Human Rights Act 1998, s 2. See ch 14.

that the ECtHR freely refers to a wide range of international sources in the construction of Convention rights, arguing that it has a duty under the Vienna Convention on the Law of Treaties to ‘take into account any relevant rules and principles of international law’.¹⁹⁹ That this is rubbing off on the domestic courts is vividly illustrated by *RMT v Serco*,²⁰⁰ where the Court of Appeal was presented with the task of construing legislation consistently with Convention rights. In the course of doing so, Elias LJ took into account the relevant provisions of the Council of Europe’s Social Charter of 1961, as well as ILO Conventions 98 and 151.

Secondly, although a treaty (or other international agreements) itself is not enforceable in domestic law, it may nevertheless give rise to rights and obligations that are so enforceable. The principle is illustrated well by the important decision in *Rahmatullah v Foreign Secretary*,²⁰¹ even though on the facts the application failed. In the latter case, British forces had detained the applicant in Iran in 2004. He was handed over to the Americans and taken to Afghanistan where he had been detained ever since. Habeas corpus proceedings were brought on his behalf in the English courts,²⁰² a central element in the case being a Memorandum of Understanding (MOU) concluded between the Australian, British and US governments relating to the transfer of prisoners. This provided for the treatment of prisoners in accordance with the Geneva Conventions, and the return of British prisoners such as Rahmatullah by the US ‘without delay upon request’ by the UK.

The seven judges in the Supreme Court held unanimously that there was prima facie evidence that Rahmatullah had been illegally detained and that, even though the respondents did not have physical control over him, there were grounds under the MOU whereby they could assert control with a reasonable prospect of producing him to the court. A major concern for the Supreme Court, however, was whether they were being drawn into the ‘forbidden territory’ of diplomatic affairs and foreign policy. But in dismissing this concern, Lord Kerr said that

the Secretaries of State were not required to make any particular diplomatic move. Because they appeared [by virtue of the MOU] to have the means of securing Mr Rahmatullah’s production on foot of the writ of habeas corpus, they were required to bring that about or to give an account of why it was not possible.²⁰³

Having thus established that the MOU provided the basis for the action, a majority (5:2) held (in the face of a strong dissent) that the government had done enough to answer the application, in the light of US insistence that Rahmatullah was lawfully detained under US law, and the absence of any indication from the US authorities ‘that there would be any opportunity for discussion of that question’.²⁰⁴

The prerogative and the Human Rights Act

The growing willingness of the courts to review the exercise of prerogative powers is reinforced by the Human Rights Act 1998 which gives the courts even greater powers of review. Under the Human Rights Act, Orders in Council made under the authority of the royal prerogative are deemed to be primary legislation²⁰⁵ and must be read and given effect to in a

¹⁹⁹ *Demir v Turkey* [2008] ECHR 1345, (2009) 48 EHRR 54, para 67.

²⁰⁰ [2011] EWCA Civ 226, [2011] ICR 848.

²⁰¹ [2012] UKSC 48, [2013] 1 All ER 574.

²⁰² On habeas corpus, see ch 25 below.

²⁰³ *Rahmatullah*, para 68.

²⁰⁴ *Ibid*, para 84.

²⁰⁵ On which see P Billings and B Pontin [2001] PL 21.

way compatible with Convention rights (s 3).²⁰⁶ Where the terms of such an Order in Council breach Convention rights, the courts are empowered to declare the Order in Council incompatible with Convention rights, although they are bound to continue to apply it until it is revoked or revised (s 4).

A more likely source of challenge to the exercise of prerogative powers arises as a result of s 6 of the Human Rights Act 1998, which provides that it is unlawful for a public authority to act in a way that is incompatible with Convention rights. The right to enforce Convention rights against an exercise of prerogative power does not formally depend on the power in question being justiciable. But in view of the fact that many prerogative powers deal with issues such as defence of the realm and national security, it may be expected that the courts would exercise caution in response to any claim under the Act.²⁰⁷

So much is confirmed by *R (Abbasi) v Foreign Secretary*²⁰⁸ which was concerned with the detention of British citizens by the US government in Guantanamo Bay in circumstances described by Lord Steyn extra-judicially as being a ‘legal black hole’.²⁰⁹ Arguing that the detention violated their Convention rights, the claimants sought to require the British government to take all reasonable steps to require the US government to release them. But the action failed, with the Court of Appeal holding that the British government is not under a duty to take positive action to prevent violations of human rights that occur outside the jurisdiction and for which it has no responsibility.

Similarly, in *R (Gentle) v Prime Minister*²¹⁰ it was held that the mothers of two soldiers killed in Iraq had no right under article 2 of the ECHR (which protects the right to life) to require the government to establish a public inquiry to consider whether the decision to go to war in 2003 was consistent with international law. The House of Lords concluded that article 2 imposes no duty to ensure that the country does not go to war contrary to international law. It could not therefore be said that there was ‘an independent duty to use reasonable care to ascertain whether the war would be contrary to [international law] or not’.²¹¹

F. Conclusion

For many years the law relating to the prerogative was fairly stable. The prerogative gave great power to government across a number of important areas of activity and in the exercise of that power the government was largely unencumbered by the need for parliamentary approval or the fear of judicial review. But as should be clear from the foregoing pages of this chapter much is changing, with the law relating to the prerogative being swept up with other aspects of constitutional and administrative law in the fast pace of reform that is now taking place generally.

So far as the prerogative is concerned, there are three major developments to note. The first of these has been the removal of civil service employment from regulation by prerogative to regulation by statute, though the legislation in question continues to give extremely wide powers to the government. Given that the prerogative power relating to the civil service was in any event already subject to judicial review, this important initiative from the perspective

²⁰⁶ For a full account of the Act, see ch 14 below.

²⁰⁷ See generally R Moosavian [2012] PL 124.

²⁰⁸ [2002] EWCA Civ 1598, [2002] All ER (D) 70. Also *R(al Ramli) v Foreign Secretary* [2006] EWCA Civ 1279; [2008] QB 289.

²⁰⁹ Lord Steyn (2004) 53 ICLQ 1. See also *Abbasi*, *ibid*, at para 66.

²¹⁰ [2008] UKHL 20, [2008] 1 AC 1346.

²¹¹ *Ibid*, para 16 (Lord Hoffmann).

of principle may be of limited practical significance. This is a matter considered more fully in chapter 11 below.

Secondly, steps have been taken by statute and other means to displace both personal and governmental prerogative power, though in no case has the prerogative power been removed altogether. The power of dissolution of Parliament has been largely displaced by the Fixed-term Parliaments Act 2011, while the exercise of the treaty – making power is now the subject of parliamentary approval by virtue of the Constitutional Reform and Governance Act 2010. This is in addition to the emergence of a convention (of indeterminate scope) requiring parliamentary approval before the authorisation of military operations.

Thirdly, at the same time, we see an increase in the willingness of lawyers to try to develop means of holding government to account in the courts for the exercise of prerogative powers. These initiatives have been taken partly as a result of controversial military intervention in Iraq and Afghanistan and they serve to shine a bright light on the human costs of these campaigns. But although the courts continue to be reluctant to second-guess certain government decisions taken under the authority of the prerogative, it seems unlikely that these initiatives by lawyers will cease, as efforts continue to be made to create new and wider exceptions to existing rules.

CHAPTER 11

Cabinet, government departments and civil service

As organs of government, the Cabinet and the office of Prime Minister have evolved together since the 18th century. Their existence is recognised in occasional statutes (for example, the Ministerial and other Salaries Act 1975) but their powers of government derive neither from statute nor from common law administered in the courts. Parliament could confer powers directly on the Prime Minister or on the Cabinet. In practice this does not often happen, statutory powers being conferred either on specific ministers or on the Queen in Council. Yet the Prime Minister and the Cabinet occupy key places at the heart of the political and governmental system.¹

As the Prime Minister provides the individual leadership of the majority party in the House of Commons, so the Cabinet provides the collective leadership of that party.² If national affairs are to be directed in any systematic way, and if deliberate choices in government between competing political priorities are to be made, these decisions can be made only by the Prime Minister and the Cabinet. In the past, descriptions of the British system of government often labelled it Cabinet government. As L S Amery wrote:

The central directing instrument of government, in legislation as well as in administration, is the Cabinet. It is in Cabinet that administrative action is co-ordinated and that legislative proposals are sanctioned. It is the Cabinet which controls Parliament and governs the country.³

In recent years, more emphasis has been placed on the role of the Prime Minister and less on the Cabinet itself. In 1963, when he had not yet served as a Cabinet minister, Richard Crossman wrote: 'The post-war epoch has seen the final transformation of Cabinet government into Prime Ministerial government', arguing that the Cabinet had joined the Crown and the House of Lords as one of the 'dignified' elements in the constitution.⁴ This judgment appears to have been reinforced in the 1980s when it is claimed that 'members of Mrs Thatcher's Cabinets had allowed the usual forms of Cabinet government to be displaced by imperious prime ministerial rule'.⁵

A 'presidential' style of government is also associated with Mr Blair,⁶ it being suggested that the role of Cabinet as a forum for the discussion of policy had been significantly reduced: meetings were shortened and major decisions were taken by the Prime Minister in consultation

¹ Bagehot's celebrated description of the Cabinet in *The English Constitution*, pp 65–9, must still be read, though his definition of the Cabinet as 'a committee of the legislative body selected to be the executive body' is misleading. For general accounts, see Jennings, *Cabinet Government*; Mackintosh, *The British Cabinet*; Gordon Walker, *The Cabinet*; Wilson, *The Governance of Britain*; Hennessy, *Cabinet*; Hennessy, *The Prime Minister*; and James, *British Cabinet Government*.

² Gordon Walker, p 56.

³ *Thoughts on the Constitution*, p 70. This orthodoxy is reproduced today in the *Ministerial Code*, which provides that 'the business of the Cabinet and Ministerial Committees consists in the main of (a) questions which significantly engage the collective responsibility of the Government because they raise major issues of policy or because they are of critical importance to the public; and (b) questions on which there is an unresolved argument between departments': *Ministerial Code* (2010 edn), para 2.2.

⁴ Introduction to Bagehot, pp 51, 54. See also Berkeley, *The Power of the Prime Minister* and Mackintosh, ch 24; cf A H Brown [1968] PL 28, 96.

⁵ R Brazier (1991) 54 MLR 471, 476.

⁶ See Foley, *The Rise of the British Presidency*.

with a small group of senior colleagues.⁷ There seems little doubt that the grip of the Prime Minister tightened after 1997,⁸ but it is also the case that Mr Blair was blessed with a very large parliamentary majority, a well-disciplined government and a relatively united party. Gordon Brown was not so fortunate. Although sometimes credited with having restored the formality of Cabinet government, Mr Brown's authority as Prime Minister was diminished from the start by a series of personal miscalculations and political crises.

A. The Prime Minister⁹

The nature of the office

Like the Cabinet, the office of Prime Minister has evolved as a matter of political expediency and constitutional practice rather than of law. Although he did not recognise the title, Robert Walpole is now regarded as having been the first Prime Minister when he was First Lord of the Treasury, from 1721 to 1742. William Pitt the Younger did much to create the modern office of Prime Minister in the years after 1784. In fact the post acquired its present form only with the advent of the modern party system and the creation of the present machinery of government.

For most of its history, the office of Prime Minister has been held along with a recognised post, usually that of First Lord of the Treasury. Between 1895 and 1900 Lord Salisbury was both Prime Minister and Foreign Secretary, and between 1900 and 1902 he was Prime Minister and Lord Privy Seal; during these years A J Balfour was First Lord of the Treasury and Leader of the Commons. Since 1902, the offices of Prime Minister and First Lord of the Treasury have always been held together by a member of the Commons.

In 1905, by act of the prerogative, the Prime Minister was given precedence next after the Archbishop of York,¹⁰ and as already mentioned the existence of the office is recognised increasingly by statute.¹¹ Since 1937 statutory provision of a salary and a pension has assumed that the Prime Minister is also First Lord of the Treasury. In the latter capacity, the Prime Minister is one of the Treasury ministers, although the financial and economic duties of the Treasury are borne primarily by the Chancellor of the Exchequer.

Exceptionally, the Prime Minister may decide also to hold another office: Ramsay MacDonald was both Prime Minister and Foreign Secretary in the first Labour government in 1924. During the Second World War, Churchill assumed the title of Minister of Defence, although without a separate ministry and without his duties being defined. The Prime Minister is also minister for the civil service,¹² though there is now also a Minister for the Cabinet Office (of Cabinet rank) who has day-to-day responsibility for civil service matters.

The Prime Minister is responsible for the appointment of commissioners to oversee the interception of communications and the work of the intelligence services.¹³ The approval of the Prime Minister is also required for appointment of the most senior civil servants.

⁷ See Lord Butler (Chair), Review of Intelligence on Weapons of Mass Destruction: Report of a Committee of Privy Counsellors (HC 898, 2004), paras 606–11.

⁸ Foster, *British Government in Crisis*, esp [part] 4.

⁹ For a good account of the office and recent incumbents, see Hennessy, *The Prime Minister*.

¹⁰ *London Gazette*, 5 December 1905.

¹¹ Eg Chequers Estate Act 1917; Chevening Estate Act 1959; Ministerial and other Pensions and Salaries Act 1991; Regulation of Investigatory Powers Act 2000; Political Parties, Elections and Referendums Act 2000; and Constitutional Reform Act 2005.

¹² See *CCSU v Minister for the Civil Service* [1985] AC 374.

¹³ Regulation of Investigatory Powers Act 2000, ss 57, 59. For details, see ch 16.

Important Crown appointments are filled on his or her nomination, for example, the senior judges, the bishops, the chairman of the BBC and the Parliamentary Ombudsman. The Prime Minister also still advises the Queen on new peerages,¹⁴ on appointments to the Privy Council and the grant of honours¹⁵ and the filling of those university chairs which are in the gift of the Crown.

In these appointments, the Prime Minister's freedom of action may to a greater or lesser extent be restricted by conventions requiring prior consultation with the interests affected, or by the Public Appointments Order in Council 2013.¹⁶ In the case of peerages, some nominations are now made by the House of Lords Appointments Commission, which also considers the Prime Minister's nominations;¹⁷ in the case of judges, appointments to the new Supreme Court of the United Kingdom are determined largely by ad hoc Supreme Court Selection Commissions.¹⁸ Nonetheless, the Prime Minister's extensive patronage continues to give rise at least to the possibility that non-political appointments could be used for political purposes.¹⁹

Powers of the Prime Minister in relation to the Cabinet

Although each Prime Minister must adopt his or her own style of leadership, he or she is in a position to exercise a dominant influence over the Cabinet, having powers that other ministers do not have, however senior and experienced they may be. This is not to say that the Prime Minister has unlimited power, with his or her position contingent on retaining the confidence of both the Cabinet and his or her parliamentary party, as the downfall of Mrs Thatcher spectacularly revealed.²⁰ The rare cases until now of minority or coalition government will impose additional restraints on the power of the Prime Minister, as the experience of Mr Cameron makes clear. But minority and coalition government aside, the following considerations have tended to reinforce prime ministerial power in the post-war era:

1 The Prime Minister effectively makes all appointments to ministerial office, whether within or outside the Cabinet. He or she may ask ministers to resign, recommend the Queen to dismiss them or, with their consent, move them to other offices. The Prime Minister settles the order of precedence in the Cabinet, and may name one of the Cabinet to be Deputy Prime Minister,²¹ or First Secretary of State. In forming his or her first Cabinet, a new Prime Minister will be expected to appoint from the senior members of the party; and a leading politician may be able to stipulate the Cabinet post which he or she is prepared to accept.

In the case of the Labour party, the standing orders of the parliamentary party provide that on taking office as Prime Minister, the leader must appoint as members of his or her Cabinet those who were elected members of the Shadow Cabinet before the general election, provided that they have retained their seats in the new Parliament. Although there are no similar constraints on Conservative leaders, they too will normally rely on an established team when assuming the responsibilities of office.²² But as the tenure of the Prime Minister

¹⁴ See ch 7.

¹⁵ Some honours are granted on the advice of other ministers, eg the Foreign Secretary and the Defence Secretary. Some appointments are made on the recommendation of other bodies such as the House of Lords Appointments Commission (some life peers).

¹⁶ See ch 12 below.

¹⁷ Ch 7.

¹⁸ Ch 13.

¹⁹ Cf T Benn (1980) 33 *Parl Affairs* 7.

²⁰ R Brazier (1991) 54 *MLR* 471, 477. For an assessment of the relationship between Prime Ministers and their Cabinets, see S James (1994) 47 *Parl Affairs* 613, and Hennessy, *The Prime Minister*.

²¹ In 1951, George VI refused to appoint Eden to this 'non-existent' office: Wheeler-Bennett, *King George VI*, p 797. But see Brazier *Constitutional Practice*, pp 78–81.

²² See Brazier, *ibid*, pp 61–7.

extends, constraints of this kind will begin to wane: only nine members of Mr Blair's first Cabinet (including Mr Blair himself) were still Cabinet ministers in 2001; by 2005 that had fallen to seven.

2 The Prime Minister controls the machinery of central government in that he or she decides how the tasks of government should be allocated to departments and whether departments should be created, amalgamated or abolished. In 2009 further reorganisation consolidated changes Mr Brown had made in 2007 on assuming office, when the large Department for Business, Innovation and Skills was created, with 10 ministers, three of whom may attend Cabinet. The Prime Minister may take an interest in different areas of government from time to time and may indeed carry out policy in close cooperation with a minister whom he or she has appointed.

Most Prime Ministers must take a special interest in foreign affairs, the economy and defence. He or she is also likely to take the lead on major issues, such as the national and international response to the global economic crisis in 2008 and 2009. In consultation with individual ministers, the Prime Minister may take decisions or authorise them to be taken without waiting for a Cabinet meeting. According to a Committee of Privy Counsellors in 2004, in the period before the invasion of Iraq in 2003 it was a 'small number of key Ministers, officials and military officers most closely involved' who 'provided the framework of discussion and decision-making within Government'.²³

3 As head of government, the Prime Minister is able to determine and present the priorities of his or her government, with government policy being directed from No 10, which houses both the Prime Minister's Private Office and the No 10 Policy Unit, the latter having expanded in recent years to form a Prime Minister's Department in all but name. It appears increasingly to be the case that the Prime Minister and his or her close colleagues determine policy, with departments being responsible principally for its implementation.

At a more mechanical level, control of the machinery of government also means that the Prime Minister presides at Cabinet meetings. This enables him or her to dominate Cabinet discussions and the process of decision-making, by settling the order of business, deciding which items are to be discussed,²⁴ and by taking the sense of the meeting rather than by counting the votes of Cabinet members. While the Cabinet Secretariat provides services for the whole Cabinet, it owes a special responsibility to the Prime Minister.

4 The doctrine of collective responsibility helps to reinforce the powers of the Prime Minister. The effect of the doctrine is that ministers must not criticise government policy in public and if necessary must be prepared to defend it. This means that if the firm hand of the Prime Minister is guiding that policy, there will be no public criticism from the most influential and informed people in the government. The importance of the doctrine for silencing potential criticism is underlined by the fact that – as we have seen – many decisions of government are not taken by the Cabinet as a whole, but by the Prime Minister in consultation with a few key colleagues.

This was true, for example, of an important decision such as transferring to the Bank of England in 1997 the responsibility for the setting of interest rates.²⁵ On one interpretation of the events, it was the attempt to control Cabinet colleagues by the doctrine of collective responsibility for decisions not been taken by the Cabinet that led to Mr Heseltine's resignation

²³ Lord Butler (Chair), Review of Intelligence on Weapons of Mass Destruction: Report of a Committee of Privy Counsellors, above, para 610.

²⁴ Mackintosh, p 449, asserts that the Prime Minister can keep any item off the agenda indefinitely but the examples he gives do not support this. Cf Wilson, p 47.

²⁵ See Hennessy, *The Prime Minister*, pp 480–1.

as Secretary of State for Defence in January 1986. The influence of this convention during the lifetime of a coalition government is clearly much less strong, where the reality may be that in such circumstances conventions may be set aside.²⁶

5 Compared to other ministers, the Prime Minister has a more regular opportunity to present and defend the government's policies in Parliament and elsewhere.²⁷ He or she is available for questioning in the Commons on Wednesdays (admittedly not always an unmixed blessing for a Prime Minister whose political authority is waning), and he or she may choose when to intervene in debates.²⁸ The Prime Minister is also in a position to dominate if not control the government's communications to the press, and to disclose information about government decisions and Cabinet business.²⁹

Alone among Cabinet ministers, the Prime Minister has regular meetings with the Queen and is responsible for keeping the Queen informed of the Cabinet's handling of affairs. However, the Prime Minister is no longer in a position to recommend to the Queen that a general election be held, with election dates now settled by the Fixed-term Parliaments Act 2011. It was sometimes suggested that the power to request a dissolution was a source of significant Prime Ministerial power and a way of enforcing discipline on colleagues. But this was never a convincing argument indicating prime ministerial power.

As already suggested, the foregoing considerations are most likely to be most relevant in the context of stable government where one party holds a majority of seats and governs on its own, the typical outcome of general elections since 1945. Different considerations may apply in the context of coalition, which in the case of the government formed in 2010 led to seven Cabinet seats being allocated to the Liberal Democrats as Coalition partners with the Conservatives, to an agreement being negotiated between Mr Cameron and the leader of the Liberal Democrats about a programme for government, and to an acknowledgement that on a number of issues where the parties were divided it would be necessary to waive collective responsibility to enable ministers publicly to disagree with each other. At the same time as maintaining an inter-party agreement, the Prime Minister must also be sensitive to *intra*-party matters and in particular the views of backbenchers who may feel neglected by the exigencies of Coalition government with which they have little sympathy.

B. The Cabinet

Composition of the Cabinet

A modern Cabinet usually consists of 22 or 23 members (including the Prime Minister). No statute regulates the composition of the Cabinet, but there are both administrative and political constraints on the Prime Minister's freedom of choice. Thus in peacetime it is impossible to exclude certain offices, such as the Home Secretary, the Foreign Secretary, the Lord Chancellor and the Chancellor of the Exchequer.

In addition to those attending as full Cabinet members, a number of other ministers may attend Cabinet meetings, although not formally members of the Cabinet. In the Coalition government there are ten ministers in this position, including the Leader of the House of

²⁶ See ch 5 B.

²⁷ But see P Dunleavy, G W Jones *et al.* (1993) 23 *British Journal of Political Science* 267 on the declining accountability of the Prime Minister to Parliament. This is a process that has continued since 1997.

²⁸ On Prime Minister's question time, see R K Alderman (1992) 45 *Parl Affairs* 66.

²⁹ See Margach, *The Abuse of Power*.

Commons and the Chief Whip. Since 1951 the government chief whip in the Commons, whose formal title is Parliamentary Secretary to the Treasury, has regularly attended Cabinet. The Law Officers of the Crown³⁰ are not appointed to the Cabinet but, like other ministers outside the Cabinet, the Attorney General may attend Cabinet meetings for particular matters.

The increasing number of ministers attending Cabinet without being members may be because the number of salaried Cabinet posts is limited by statute: apart from the Prime Minister and the Lord Chancellor, not more than 20 salaries may be paid to Cabinet ministers at one time.³¹ Political necessity requires all members of the Cabinet to be members of the Commons or the Lords, unless a minister is actively seeking election to the Commons at a by-election or is to be created a life peer.³²

It is no longer necessary for the Lord Chancellor to be a member of the House of Lords, but it is normal for at least some ministers to be drawn from the upper House, though it would be undesirable for many senior positions to be held by peers. Under the Coalition government, only one member of the House of Lords (the Leader of the House) was a member of the Cabinet, though another attended Cabinet meetings. The amalgamation of departments to form larger departments which took place during the 1960s³³ meant that all major departments were placed under the supervision of a Cabinet minister and this continues to be the case.

Cabinet committees³⁴

The increase in the scale of government since 1900 has not been matched by a corresponding increase in the size of the Cabinet. The government could not have kept abreast of its work had there not developed under its umbrella a complicated structure of committees, which are now acknowledged to reduce the burden on government by enabling collective decisions to be taken by a smaller group of ministers. Although once secret and controversial, the Cabinet committee system is now transparent and necessary.

The composition and terms of reference of Cabinet committees are matters for the Prime Minister, though under the Coalition government appointed in 2010, these are decisions taken in consultation with the Deputy Prime Minister. Reflecting the fact of Coalition government, each Cabinet committee has both a chair and a vice chair, with the Conservatives occupying one position in each committee and the Liberal Democrats the other. As explained in the *Ministerial Code*, decisions reached by Cabinet committees are ‘binding on all members of the Government’.

The committee structure may vary from government to government, and it appears to be the case that some of the Committees established by the Brown government have been abolished. There were 27 Cabinet committees and sub-committees operating under the Coalition government, one of which was the Coalition committee co-chaired by the Prime Minister and the Deputy Prime Minister, with terms of reference that included the management of ‘the business and priorities of the Government and the implementation and operation of the Coalition agreement’.

Other notable Cabinet committees under the Coalition included the National Security Council (responsible for National Security, Foreign Policy, Defence, and International

³⁰ Ch 13.

³¹ Ministerial and other Salaries Act 1975. See ch 7.

³² Ch 5.

³³ Section C below.

³⁴ Jennings, pp 255–61; Mackintosh, pp 521–9; Gordon Walker, pp 38–47; Wilson, pp 62–8; Hennessy, *The Prime Minister*, pp 482–3.

Relations), the European Affairs committee (responsible for matters relating to the EU), and the Home Affairs committee (responsible for constitutional and political reform, and home affairs – including migration, health, schools and welfare). The membership of some committees is as large as the Cabinet itself.

Cabinet Secretary³⁵

In 1917, to enable the War Cabinet and its system of committees to function efficiently, a Secretary to the Cabinet was appointed to be present at meetings of the Cabinet and its committees, to circulate minutes of the conclusions reached, to communicate decisions rapidly to those who had to act on them and also to circulate papers before meetings. The conclusions prepared by the Secretary to the Cabinet and circulated to the Queen and Cabinet ministers continue to be the only official record of Cabinet meetings. This account is designed to record agreement and not controversy.

Differences of opinion in discussion are not attributed to individuals, although the arguments for and against a decision may be summarised: ‘behind many of the decisions lay tensions and influences which are not reflected in the official records’.³⁶ However, if a minister expressly wishes his or her dissent to be recorded, then this will be done.³⁷ An important recent initiative of the Cabinet Secretary was the production of the *Cabinet Manual*, which sets out the rules and procedures by which the government operates, an initiative that provoked lively parliamentary interest and some mild controversy.

Today, the Cabinet Secretary is based in the Cabinet Office, which plays a key role at the heart of government. The primary responsibility of the Cabinet Office is to support the Prime Minister and Deputy Prime Minister, and ensure the effective running of government. To this end, the Cabinet Office has a number of duties, including the development, coordination and implementation of government policy; and the promotion of ‘efficiency’ in government, which in the present economic climate generally means making savings on procurement, and operating with fewer civil servants.

The Cabinet Office also supports the National Security Council and the Joint Intelligence Organisation, as well as having responsibility for constitutional and political reform. Largely because of political differences between the two parties, the Coalition government has been unable to make much progress on the latter, with plans for electoral reform and House of Lords reform both having failed. The day-to-day direction of the Cabinet Office is the responsibility of the Minister for the Cabinet Office (who attends but is not a member of the Cabinet).

Cabinet secrecy

The operation of the Cabinet system is surrounded by considerable secrecy.³⁸ It is the ‘working assumption’ of government that most Cabinet papers are protected from disclosure under the Freedom of Information Act 2000,³⁹ only to be made available as historical records

³⁵ Jennings, pp 242–5; Gordon Walker, pp 47–55; Mosley, *The Story of the Cabinet Office*; Wilson, *The Cabinet Office to 1945*.

³⁶ Wilson, *The Cabinet Office to 1945*, p 4. At p 142 are printed instructions on minute-taking current in 1936. Crossman’s comment 30 years later was that the minutes ‘do not pretend to be an account of what actually takes place in the Cabinet’ (p 198).

³⁷ It was the alleged failure to follow this convention that added to the drama surrounding the resignation of Mr Michael Heseltine in the so-called Westland affair in 1986.

³⁸ Williams, *Not in the Public Interest*, ch 2; Gordon Walker, pp 26–33, 164–8; Report on Section 2 of Official Secrets Act 1911, Cmnd 5104, 1972, ch 11; Report on Ministerial Memoirs, Cmnd 6386, 1976.

³⁹ See Section F below.

for public inspection in the National Archives after 30 years.⁴⁰ Many Cabinet decisions are notified to Parliament or otherwise made public, but the doctrine of collective responsibility throws a heavy veil over decision-making in Cabinet. That veil is only rarely pierced, as when Lord Hutton laid bare the internal workings of the Cabinet in his report on the circumstances surrounding the death of Dr David Kelly, a senior civil servant who took his own life in 2003.⁴¹

One justification for Cabinet secrecy is the view that anything which damages the collective unity and integrity of the Cabinet damages the good government of the country.⁴² Certainly the public interest in national security requires that some information about defence and external relations must be kept secret by those in government. But the ‘good government’ argument goes very much further than national security since it seeks to preserve the process of decision-making within government from scrutiny by those outside. Some critics argue, on the contrary, that ‘good government’ in a democracy requires that more light be thrown on political decision-making and that government be more open.

One important practice is that the ministers in one government do not have access to the papers of an earlier government of a different political party. On a change of government, the outgoing Prime Minister issues special instructions about the disposal of the Cabinet papers of his or her administration. The practice applies to papers of the Cabinet and ministerial committees, as well as departmental papers that contain the private views of ministers and advice given by officials. The main reason for the practice is to prevent a minister from one party having access to ‘matters that the previous administration had been most anxious to keep quiet’.⁴³ Former ministers retain the right of access to documents that they saw in office.

Before access to Cabinet papers or other ministerial documents of a former government can be given to third persons, the present Prime Minister must seek the agreement of the former Prime Minister concerned or the current leader of his or her party. Thus, when a committee of privy counsellors was appointed to review British policy towards the Falkland Islands before the Argentine invasion, five former Prime Ministers agreed to the relevant documents being seen by the committee.⁴⁴ Ministers relinquishing office without a change of government ‘should hand back to their department any Cabinet documents and/or other departmental papers in their possession’.⁴⁵

Cabinet secrecy and the courts

Cabinet documents are protected to some extent from (a) production as evidence in litigation by public interest immunity, which authorises non-disclosure of documents which it would be injurious to the public interest to disclose,⁴⁶ and (b) examination by the Parliamentary Ombudsman;⁴⁷ they may also be protected by the Official Secrets Acts,⁴⁸ and – as we shall consider – be exempt from disclosure under the Freedom of Information Act 2000.⁴⁹ Political

⁴⁰ See Freedom of Information Act 2000, ss 35, 36, 63–7; and Public Records Act 1958, s 5 (amended by the Freedom of Information Act 2000, s 67).

⁴¹ Lord Hutton, Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG (2004). See also Butler Report, above, and the evidence given in public by Cabinet ministers and senior civil servants to the Chilcott inquiry of 2010 into the events leading up to the invasion of Iraq in 2003.

⁴² Cmnd 5104, 1972, p 68.

⁴³ HC Deb, 8 July 1982, col 474 (Mr M Foot).

⁴⁴ HC Deb, 1 July 1982, col 1039; 8 July 1982, col 469. See Lord Hunt [1982] PL 514.

⁴⁵ *Ministerial Code*, para 2.7. And see R Brazier [1996] CLJ 65, on the sale of the Churchill papers in 1995.

⁴⁶ Ch 26. On the relationship between the Cabinet and the courts, see M C Harris [1989] PL 251.

⁴⁷ Parliamentary Commissioner Act 1967, s 8(4); ch 23.

⁴⁸ Ch 19.

⁴⁹ Section F below.

sanctions also operate: a serving Cabinet minister would be liable to lose office if he or she could be shown improperly to have revealed the details of Cabinet discussions.

But is a former Cabinet minister, who may be subject to no political sanction, under a legal obligation not to reveal such secrets? The question arose for decision in *Attorney-General v Jonathan Cape Ltd.*⁵⁰

Richard Crossman kept a political diary between 1964 and 1970 while a Labour Cabinet minister. After his death in 1974, his diary for 1964–66 was edited for publication and, as was customary, submitted to the Secretary to the Cabinet. He refused to consent to publication, since the diary contained detailed accounts of Cabinet discussions, reports of the advice given to ministers by civil servants and comments about the suitability of senior civil servants for promotion. When Crossman's literary executors decided to publish the diary, the Attorney General sought an injunction to stop them.

Lord Widgery CJ held that the court had power to restrain the improper publication of information which had been received by a Cabinet minister in confidence, and that the doctrine of collective responsibility justified the court in restraining the disclosures of Cabinet discussions; but that the court should act only where continuing confidentiality of the material could clearly be shown. On the facts, he held that publication in 1975 of Cabinet discussions during the period 1964–66 should not be restrained. In this decision, no reliance was placed either upon the Privy Counsellor's oath of secrecy or upon the Official Secrets Acts.

This decision established the power of the court to restrain publication of Cabinet secrets but gave no clear guidance as to when the power should be exercised. The problems of memoirs of ex-Cabinet ministers were subsequently considered by a committee of Privy Counsellors.⁵¹ The committee distinguished between secret information relating to national security and international relations, on which an ex-minister must accept the decision of the Cabinet Secretary, and other confidential material about relationships between ministers or between ministers and civil servants. In the latter case there should be no publication within 15 years, except with clearance from the Cabinet Secretary.

In the event of a dispute between the minister and the Cabinet Secretary, it must in the last resort be for the ex-minister to decide what to publish. Advice given by a civil servant to a minister should not be revealed while the adviser is still a civil servant. The latter committee recommended against legislation, preferring to suggest a clear working procedure which would be brought to the attention of every minister on assuming office. The committee's recommendations were accepted by the government in 1976 and have been maintained by subsequent governments. There has since been a spate of ministerial memoirs,⁵² though the government believes that the existing procedures generally work well in practice.⁵³

⁵⁰ [1976] QB 752; Young, *The Crossman Affair*.

⁵¹ Cmnd 6386, 1976 (Radcliffe Report). For more recent considerations of this issue, see HC 689 (2005–06); HC 664 (2007–08); HC 428 (2008–09).

⁵² The *Ministerial Code* requires former ministers to submit their manuscript to the Cabinet Secretary and to conform to the principles set out in the Radcliffe Report (para 8.10).

⁵³ HC 428 (2008–09).

C. Ministers and departments

Ministerial offices

Some ministerial offices have a much longer history than the office of Prime Minister, others have been created more recently. The office of Lord Chancellor goes back to the reign of Edward the Confessor and was of great political and judicial significance for several centuries after the Norman conquest. The office of Lord Privy Seal dates from the 14th century and in a later period was often held by leading statesmen; but the historic duties in respect of the Privy Seal were abolished in 1884 and the office now carries no departmental responsibilities.

The office of Lord President of the Council was created in 1497 and became important during the period of government through the Council under the Stuarts. The office of Secretary of State has almost as long a history, acquiring its political significance in the Tudor period, particularly during the tenure of the Cecils under Elizabeth I. It came to be recognised as the means by which communications could take place between citizen and monarch.⁵⁴ From the 17th century, two and sometimes three Secretaries of State were appointed who divided national and foreign affairs between them.

In 1782 a different division of functions vested in one Secretary of State responsibility for domestic affairs and the colonies, and in the other Secretary responsibility for foreign affairs. Thus were created the offices of Home Secretary and Foreign Secretary. In 1794 a Secretary of State for War was appointed and thereafter, from time to time, additional Secretaryships (for example, for the colonies, for India, for Scotland) were created and abolished as need arose. Appointments are now made on the advice of the Prime Minister who decides what offices are needed, and what departments should be created to support the office holders.⁵⁵

When statutory powers are conferred on a Secretary of State, it is usual for the statute to designate him or her as ‘the Secretary of State’; it will also usually be obvious from the context which Secretary of State is intended to exercise the new functions.⁵⁶ In law the duties of Secretaries of State are interchangeable, but in practice each Secretary’s functions are limited to those related to his or her own department. One Secretary of State may be named by the Prime Minister as First Secretary; while this makes no legal difference to the office, it determines precedence in the Cabinet.

Government departments

While the term ‘government department’ has no precise meaning in law, it usually refers to those branches of the central administration staffed by civil servants, paid for out of exchequer funds and headed by a minister responsible to Parliament. A single minister may be responsible for more than one department: thus the Chancellor of the Exchequer is responsible for the Treasury as well as HM Revenue and Customs. Moreover, one person may hold two offices: in 2005, the Secretary of State for Transport was also the Secretary of State for Scotland, while the Secretary of State for Northern Ireland was also the Secretary of State for Wales. Exceptionally, there are departments which for constitutional reasons do not have a ministerial head: thus the National Audit Office is headed by the Comptroller and Auditor General.⁵⁷

⁵⁴ For the history of the Secretaries of State, see Anson, *The Law and Custom of the Constitution*, vol II, i, pp 172–84.

⁵⁵ HC 540 (2008–09).

⁵⁶ By the Interpretation Act 1978, unless the contrary intention appears, ‘Secretary of State’ means ‘one of Her Majesty’s Principal Secretaries of State’. See *Agee v Lord Advocate* 1977 SLT (Notes) 54.

⁵⁷ Ch 12.

For the purposes of legal proceedings against the Crown, a list of departments is maintained under the Crown Proceedings Act 1947.⁵⁸ For the purposes of investigation by the Parliamentary Ombudsman, a statutory list of departments is maintained and this is revised as new departments are established.⁵⁹ There are many public bodies with governmental functions only some of which are regarded as non-ministerial government departments. They include local authorities; regulatory bodies such as the utility regulators; and a wide range of other bodies with policy-making and advisory functions, often resembling executive agencies (on which see below), but usually classified in a different way.⁶⁰ Often such bodies are financed from central government funds.

To enable changes in the structure of government to be carried out quickly, there have been statutory powers since 1946 by which new needs can be met without recourse to Acts of Parliament. The Ministers of the Crown Act 1975 now authorises the Crown, by Order in Council, to transfer to any minister functions previously exercised by another minister; to provide for the dissolution of a government department and for the transfer to other departments of the functions previously exercised by that department; and to direct that functions shall be exercised concurrently by two ministers. Consequential steps may also be authorised, such as the transfer of property from one department to another and changes in the title of ministers. Orders in Council under the 1975 Act are subject to parliamentary scrutiny.

The extensively used powers conferred by the 1975 Act are in addition to the Crown's prerogative powers which may still be exercised to make some governmental changes,⁶¹ and are without prejudice to the government's ability to seek parliamentary approval for the creation of a new department by introducing a Bill.⁶² Although the Foreign and Commonwealth Office, the Home Office and the Ministry of Defence have remained intact since 1970, there are many changes elsewhere. Most recently new departments have been created for Justice; Culture, Media and Sport; and Energy and Climate Change. There are also now separate departments for Health on the one hand and Work and Pensions on the other. While it is important that the structure of government should not be ossified, it is equally important that the capacity to engineer radical structural change is subject to meaningful parliamentary scrutiny,⁶³ though recommendations to this effect have not been met with great enthusiasm.⁶⁴

Ministers of the Crown⁶⁵

According to one statutory definition, minister of the Crown means 'the holder of any office in Her Majesty's Government in the United Kingdom, and includes the Treasury . . . and the Defence Council'.⁶⁶ In a less technical sense, ministers are those members or supporters of the party in power who hold political office in the government. They are all appointed by the Crown on the advice of the Prime Minister and their offices are at the disposal of an incoming Prime Minister. They do not include members of the civil service or the armed forces, who continue in office despite a change of government; or special advisers to ministers, who may be paid salaries and are temporarily attached to departments but who lose their position when a minister leaves office; or members of public boards, regulatory bodies and so on.

⁵⁸ Ch 26.

⁵⁹ Ch 23.

⁶⁰ See ch 12.

⁶¹ 1975 Act, s 5; see ch 10 on the prerogative.

⁶² See Defence (Transfer of Functions) Act 1964. The now defunct Ministry of Labour was also created by statute – see New Ministries and Secretaries Act 1916.

⁶³ HC 672 (2006–7); HC 160 (2007–08) (Public Administration Select Committee).

⁶⁴ HC 514 (2007–08); HC 540 (2008–09) (government response).

⁶⁵ See Brazier, *Ministers of the Crown*, for a full account.

⁶⁶ Ministers of the Crown Act 1975, s 8(1).

Unlike most of these other office-holders, ministers are not disqualified from membership of the House of Commons. Indeed, it is a convention that ministerial office-holders should be members of one or other House of Parliament. There is, however, no law that a minister must be in Parliament and the possibility of recruiting ministers from outside is sometimes discussed. This could only take place if the individuals in question could be made responsible to Parliament other than by membership, and it is not clear that it would be a good practice. If a Prime Minister wishes to appoint to ministerial office someone who is not already in Parliament, the current practice is to confer a life peerage on the individual in question so that he or she may take a seat in the Lords, and this not infrequently happens.

There are various grades of ministerial appointment today, but they may be grouped into three broad categories: (a) Cabinet ministers, who may or may not have departmental responsibilities; (b) departmental ministers and ministers of state who are outside the Cabinet, the duty of a minister of state being to share in the administration of a department headed by a Cabinet minister; and (c) parliamentary secretaries, whose duty it is to assist in the parliamentary work of a department and who may also have some administrative responsibility. The two Law Officers of the Crown for England and Wales are within category (b) but the government whips, who have no departmental responsibilities, may be allotted among the categories according to their status and seniority.

By exercise of the prerogative, new posts in the Crown's service can be created, for example, extra Secretaries of State. But when a new ministry is formed, there is often secondary legislation to create the minister a corporation sole, thus giving him or her legal capacity, and providing in broad terms for his or her functions.⁶⁷ There are no legal limits on the number of ministers which the Crown may appoint, assuming that they are not to receive a salary and do not sit in the House of Commons. However, as already pointed out, there are statutory limits on the number of ministers who may be members of the Commons and on the number of salaries payable to holders of ministerial office.⁶⁸ Ministerial salaries are now governed by a formula set out in the Ministerial and Other Salaries Act 1975, as amended by the Ministerial and Other Salaries Act 1997.

The Ministerial Code

The conduct of ministers is governed by the *Ministerial Code*, now 'an integral part of the new constitutional architecture'.⁶⁹ The Code – which is not legally binding – was first compiled by Attlee in 1945, although some of its provisions go back further.⁷⁰ It deals with a range of matters relating to the relationship between ministers and the government, Parliament and the civil service. It also deals with ministers' private interests. Previously known as *Questions of Procedure for Ministers* (QPM), the Code was first made public by Mr Major in 1992 and was revised following the recommendations of the Committee on Standards in Public Life,⁷¹ before being reissued by each of his successors.⁷² The current code was issued in 2010, retaining a style based more on principles and less on procedures.⁷³

Section 1 reminds ministers that they are 'expected to behave in a way that upholds the highest standards of propriety'. In particular, they are required to observe the ten principles of ministerial conduct that are set out in the Code. These include a duty to uphold the

⁶⁷ Important examples include SI 2001 No 2568; SI 2007 No 3224; SI 2009 No 2478; SI 2010 No 1836.

⁶⁸ Ch 7.

⁶⁹ HC 235 (2000–01), para 15.

⁷⁰ *Ibid.*

⁷¹ Cm 2850-I, 1995.

⁷² The Code is set out in full at www.cabinetoffice.gov.uk.

⁷³ See HC 381, 1056 (2007–08).

principle of collective responsibility, save where explicitly set aside; a requirement to account for the activities of their departments and executive agencies; and an obligation to ‘give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity’. Ministers who ‘knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister’. There are those who feel that the word ‘knowingly’ should be removed from the text.⁷⁴

In addition to the duty not to mislead Parliament, the *Ministerial Code* also advises ministers of the need to be ‘as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest’. This should be determined in accordance with relevant statutes (which are not specified) and the Freedom of Information Act 2000.⁷⁵ One of the other key principles provides that ministers should require civil servants who give evidence before select committees ‘on their behalf and under their direction’, to be as ‘helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the *Civil Service Code*’.

Otherwise, the Code deals with ministerial conflicts of interest (on which see below) and a prohibition on using government resources for party political purposes. Ministers are also required to uphold the political impartiality of the civil service, and they are reminded of their responsibility ‘for justifying their actions and conduct to Parliament and the public’, and that they can ‘remain in office [only] for so long as they retain the confidence of the Prime Minister’, who is ‘the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards’. Where a breach of the Code is alleged, the Prime Minister may refer the matter to the Independent Adviser on Minister’s Interests.⁷⁶

Financial interests of ministers

Because of their office, many ministers take decisions which have a direct financial effect on particular businesses, sections of industry and land values. They also have access to confidential information about future decisions which could be put to financial profit. The Marconi affair of 1912 involved three leading members of the Liberal government who were alleged to have made use of secret information about an impending government contract to make an investment in Marconi shares: an inquiry by a parliamentary committee established that they had bought shares not in the company to which the contract was about to be awarded, but in a sister company.⁷⁷

In 1948 the Lynskey Tribunal of Inquiry reported on allegations that ministers and other public servants had been bribed in connection with the grant of licences by the Board of Trade; a junior minister, who later resigned from Parliament, was found to have received presents of wine and spirits and other gifts, knowing that they had been made to secure favourable treatment by the department of applications for licences.⁷⁸ While such conduct could give rise to criminal proceedings, additional safeguards are required if ministers are to avoid suspicion. In 1952 the rules then in force were published in a parliamentary written answer.⁷⁹

⁷⁴ See A Tomkins [1996] PL 484. Cf HC 115 (1995–6), para K8.5.

⁷⁵ Section F below.

⁷⁶ For background, see HC 1457 (2005–06); HC 381, 1056 (2007–08); HC 1761 (2010–12); HC 976 (2012–13). See also HC Deb, 13 June 2012, col 315 et seq.

⁷⁷ See Donaldson, *The Marconi Scandal*.

⁷⁸ Cmd 7616, 1949.

⁷⁹ HC Deb, 25 February 1952, col 701; and 20 March 1980, col 293 (WA).

These rules remain in operation, although they have been amended and are now to be found in the *Ministerial Code*. The overriding principle is that ministers must ensure that no conflict arises, or could reasonably be perceived to arise, between their private interests and their public duties. This conflict could arise if a minister took any active part or had a financial interest in any undertaking that had contractual or other relations (for example, receiving a licence or a subsidy) with his or her department. Under the current rules, ministers should, on assuming office, provide their Permanent Secretary with a full list of interests that might be thought to give rise to a conflict.

Ministers' interests are now published on the government website, which is updated from time to time and includes interests of a varied nature. Where necessary, a minister will be advised by the Permanent Secretary and the independent adviser on ministers' interests about which interests need to be disposed of.⁸⁰ The government also now publishes details of ministerial meetings with lobbyists. Moreover, the *Ministerial Code* reminds ministers that they should seek advice from the Advisory Committee on Business Appointments about any appointments they wish to take up within two years of leaving office, and that they are expected to abide by the advice of the Committee.⁸¹

D. Civil service: organisation and accountability

A new legal base

The departments of central government are staffed by administrative, professional, technical and other officials who constitute the civil service, which performs many functions, from the development to the implementation of government policy. Traditionally governed by royal prerogative, fresh ground was broken by the Constitutional Reform and Governance Act 2010, which succeeded in putting the management of the civil service on a statutory footing.⁸² The Act also made provision for the Civil Service Commission, which is primarily responsible for developing recruitment principles based on fair and open competition. But in giving power of management to the Minister for the Civil Service, the Act does nothing to structure or constrain that power, which appears to be just as wide as the prerogative power it apparently replaced.

It has been said to be 'common ground that the civil service defies an easy universally applicable definition' and that 'a civil servant has no specific legal status'. In the absence of an adequate legal definition,⁸³ a civil servant has been defined as 'a servant of the Crown working in a civil capacity who is not: the holder of a political (or judicial) office; the holder of certain other offices in respect of whose tenure of office special provision has been made; a servant of the Crown in a personal capacity paid from the Civil List'.⁸⁴ This definition excludes ministers of the Crown, members of the armed forces (who are Crown servants but are not employed in a civil capacity), the police and those employed in local government and the National Health Service, even though they are all engaged in public services.⁸⁵

⁸⁰ See HC 381, 1056 (2007–08).

⁸¹ See HC 651, 1087 (2006–07).

⁸² This was a long time coming: for background, see Cm 4587-I, 2000, HC 128 (2003–04), and Cm 6373, 2004.

⁸³ The Constitutional Reform and Governance Act 2010 unhelpfully defines the civil service to mean 'the civil service of the State', with some exceptions.

⁸⁴ HC 390-II (1992–3), p 261.

⁸⁵ For a somewhat similar definition, see Crown Proceedings Act 1947, s 2(6). See ch 26.

There are now about 450,000 civil servants, though the numbers are falling. As far as their employment position is concerned, there is a sharp contrast between legal doctrine and practical reality. It is true that although civil servants were traditionally regarded as having been appointed under the royal prerogative, the courts nevertheless have gradually recognised that they may have terms of service ‘which are contractually enforceable’.⁸⁶ But although recognising the existence of a contract, the courts seem unwilling to challenge the traditional rule that civil servants are employed at the pleasure of the Crown,⁸⁷ which means that they may be dismissed without a common law remedy for wrongful dismissal.⁸⁸ Moreover, although the management of the civil service has been placed on a statutory footing,⁸⁹ the Cabinet Office still claims the prerogative power to dismiss at pleasure, a claim that now seems implausible.

But although civil servants apparently have no right to notice on termination, the *Civil Service Management Code* provides minimum notice periods which ‘in practice’ departments and agencies ‘will normally apply’.⁹⁰ More importantly it is also the case that civil servants are deemed by statute to be employed under contracts of service for some employment protection purposes and will normally be able to bring an action for unfair dismissal.⁹¹ Other employment protection rights typically also apply now to civil servants, reflecting what has been a trend towards providing civil servants with the same formal protections as their counterparts in the private sector. But whatever the precise legal nature of their relationship with the Crown, it is an important constitutional principle that civil servants should, in fact, enjoy a tenure of office by which they may serve successive ministers of different political parties.

Civil service structure

The structure of the civil service has undergone a great deal of change since the 1980s, reflecting growing Treasury concerns about cost and efficiency.⁹² The starting point is the publication in 1988 of a report to the Prime Minister drawn up by Sir Robin Ibbs, entitled *Improving Management in Government: The Next Steps*.⁹³ This was the most far-reaching and fundamental review of the civil service since 1968 and led to the most radical changes since 1854.⁹⁴ The report expressed concern that the civil service (then with over 600,000 staff) was too big and too diverse to be managed as a single organisation, and recommended that attempts should be made to establish a different way of conducting the business of government.

It was suggested that the central civil service should consist of a relatively small core engaged in the function of servicing ministers and managing departments, which would be the main sponsors of particular government policies and services. Responding to these departments would be a range of agencies employing their own staff, concentrating on the delivery of their particular service, with responsibilities clearly defined between the Secretary

⁸⁶ *McLaren v Home Office* [1990] IRLR 338, 341; *R v Lord Chancellor's Department, ex p Nangle* [1992] 1 All ER 897. And see S Fredman and G Morris [1991] PL 485.

⁸⁷ See *Civil Service Management Code*, s 11.1.1. Compare *Wells v Newfoundland* [1993] 3 SCC 199.

⁸⁸ *Dunn v R* [1896] 1 QB 116; *Riordan v War Office* [1959] 1 WLR 1046. And see ch 26.

⁸⁹ Constitutional Reform and Governance Act 2010, s 3.

⁹⁰ *Civil Service Management Code*, s 11.1.

⁹¹ Employment Rights Act 1996, s 191.

⁹² For a full account, see HL Paper 55 (1998). See also G Drewry, in Jowell and Oliver (eds), *The Changing Constitution* (6th edn), ch 7.

⁹³ The report had been commissioned in 1986. For the reaction to it, see Hennessy, *Whitehall*, pp 620–1, and Lawson, *The View from No 11*, pp 391–3. See also Woodhouse, *Ministers and Parliament*, chs 11, 12.

⁹⁴ See respectively Cmnd 3638, 1968 (Fulton Committee) and Northcote–Trevelyan Report (reprinted in app B of the Fulton Report).

of State and the Permanent Secretary, on the one hand, and the chairman and chief executive of the agency, on the other.⁹⁵

The proposals were largely accepted by the government, and by 2000 137 agencies had been created (accounting for some 80 per cent of the civil service), though the number of such agencies has declined in more recent years. Each agency has a defined task, or range of tasks, which are set out in its published framework document. In addition, ‘key performance targets – covering financial performance, efficiency and service to the customer – are set out by ministers annually. Each agency has a chief executive, normally directly accountable to ministers and with personal responsibility for the success of the agency in meeting its targets.’⁹⁶ Like other government bodies, executive agencies may be subject to judicial review.⁹⁷

Alongside the delegation of tasks to the agencies has been the delegation to the agencies and departments of responsibility for the pay and working conditions of staff. The process of delegation in the setting of working conditions (with an emphasis on performance-related incentives) was facilitated by the Civil Service (Management of Functions) Act 1992. In 1996 the long-established central pay bargaining arrangements were entirely replaced by a system that delegated to the departments and agencies the authority to make their own pay arrangements, ‘albeit within the overall Treasury limits on running costs’.⁹⁸

The civil servant within the department

The senior civil servant within a department is the Permanent Secretary,⁹⁹ below whom in descending order of seniority are directors general, directors and assistant directors. These posts together form what is known as the ‘Senior Civil Service’, an entity created in 1996.¹⁰⁰ Special advisers to ministers – whose numbers have grown in recent years – also play a key role.¹⁰¹ Where schemes of delegation exist within a department, they do not generally affect the legal position of the department or of outsiders dealing with it. Where the power to make a discretionary decision affecting an individual is vested in a minister, an official within the department may in general take that decision on behalf of the minister (the *Carltona* principle),¹⁰² unless there are express or implied limitations in the statute conferring the power.¹⁰³

The latter principle is illustrated by a number of important cases, since it emerged in *Carltona* itself. In a criminal case in which it was claimed that the Home Secretary had never approved a breathalyser device as required by the Road Safety Act 1973, Widgery LJ said: ‘The minister is not expected personally to take every decision entrusted to him by Parliament. If a decision is made on his behalf by one of his officials, then that constitutionally is the minister’s decision.’¹⁰⁴ In regard to the Secretary of State’s powers under the

⁹⁵ For the previous consideration of this option with reference particularly to Sweden, see Cmnd 3638, 1968, paras 188–91.

⁹⁶ Cm 2750, 1994, p ii.

⁹⁷ *R (National Association of Health Stores) v Department of Health* [2003] EWCA Civ 3133. Also more recently *R (VOSA) v Kayes* [2012] EWHC 1498 (Admin).

⁹⁸ HL 55 (1997–8), para 94. See also Cm 4310, 1999, p 58.

⁹⁹ For a study of permanent secretaries, see K Theakston and G K Fry (1989) 67 *Public Administration* 129.

¹⁰⁰ HL 55 (1997–8). On the continuing influence of the civil service in the legislative process, see E C Page (2003) 81 *Public Administration* 651. See also HC 74 (2013–14) for claims of civil service obstruction of government.

¹⁰¹ See HC 238 (1999–2000); and HC 423-I (2003–4), Q 63. On special advisers, see T Daintith [2002] PL 13.

¹⁰² *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. See ch 5.

¹⁰³ *R v Home Secretary, ex p Oladehinde* [1991] 1 AC 254, at p 282.

¹⁰⁴ *R v Skinner* [1968] 2 QB 700, 707. See also *Copeland v H M Advocate* 1988 SLT 249, and *R v Home Secretary, ex p Doody* [1994] 1 AC 531, at p 566. And see ch 5.

Immigration Act 1971, it was held that immigration officers (in whom certain functions are expressly vested by the Act) were also entitled by virtue of the *Carltona* principle to exercise decision-making powers in regard to deportation on behalf of the Secretary of State.¹⁰⁵

New questions about departmental delegation arise following the introduction of the executive agencies. But despite initial doubts to the contrary,¹⁰⁶ it seems likely that the *Carltona* principle is sufficiently flexible to accommodate these new developments. It is important to stress that the framework documents establishing the agencies typically make clear that it is the minister who has ultimate responsibility for determining the policy and financial framework within which the agency operates, and that it is the minister who is accountable to Parliament for all matters concerning the agency, even though he or she is not normally involved in the day-to-day running of the agency. The framework documents also provide that the agency chief executive will represent the minister at parliamentary committees and answer questions on his or her behalf, an arrangement reinforced by the Cabinet Office rules relating to evidence to select committees.

The latter make clear that chief executives give evidence ‘on behalf of the minister to whom they are accountable and are subject to that minister’s instruction’.¹⁰⁷ In terms of the adaptability of the *Carltona* principle, it is perhaps instructive that its alleged shortcomings were not raised in *Quinland v Governor of Swaleside Prison*¹⁰⁸ where the claimant brought an action for false imprisonment against two prison governors and the Lord Chancellor’s Department. As a result of an administrative error by an official in the Court Service (then an executive agency of the Lord Chancellor’s Department), the claimant had served a longer sentence than was required. The claim failed, not because there was no departmental responsibility for officials employed by the agency (a point which was never raised by the defence), but because the agency was covered by the immunity from liability in the Crown Proceedings Act 1947, s 2(5) for those performing a judicial function (a point vigorously contested by the defence).

Civil servants and ministerial responsibility

The principle of responsibility through ministers to Parliament is one of the most essential characteristics of the civil service. In a memorandum to the House of Commons Treasury and Civil Service Committee in the early 1990s, the Cabinet Office asserted that,

The Minister in charge of a department is the only person who may be said to be ultimately accountable for the work of his department. It is usually on the Secretary of State as minister that Parliament has conferred powers, and Parliament calls on ministers to be accountable for the policy, actions and resources of their departments and the use of those powers. While ministers may delegate much of the day to day work of their departments, often now to agencies, they remain ultimately accountable to Parliament for all that is done under their power. Civil servants, except in those particular cases where statute confers powers on them directly, cannot take decisions or actions except insofar as they act on behalf of ministers. Civil servants are accountable to ministers, ministers are accountable to Parliament.¹⁰⁹

¹⁰⁵ *R v Home Secretary, ex p Oladehinde* [1991] 1 AC 254.

¹⁰⁶ See M R Freedland [1996] PL 19. Also M R Freedland, in Sunkin and Payne (eds), *The Nature of the Crown*, ch 5.

¹⁰⁷ Cabinet Office, *Departmental Evidence and Response to Select Committees* (2005, re-issued 2010), para 50.

¹⁰⁸ [2002] EWCA Civ 174, [2003] QB 306. Hale LJ pointed out: ‘The Court Service [as it then was] may be an agency of the executive but it exists in part, if not in whole, to facilitate and implement the workings of the judiciary’.

¹⁰⁹ HC 27-II (1993–4), p 188.

According to the Cabinet Office, ministerial responsibility has often been used to describe this process. In recent years, however, there has been a significant refinement of the principle, the government taking the view that ministers are ‘accountable’ to Parliament for the work of their department, but are not ‘responsible’ for all the actions of civil servants in the sense of being blameworthy. There appears as a result to be a greater willingness to attribute responsibility for operational matters to individual civil servants. Although the distinction has been strenuously defended, there are those who remain sceptical, yet it remains unclear how far the distinction expresses anything which is qualitatively different from what was expressed by Sir David Maxwell-Fyfe in the aftermath of the Crichton Down affair in the 1950s.¹¹⁰

This is a question that has been brought sharply into focus as a result of the creation of the executive agencies. Although ministers are formally accountable for the work of the agencies, there is nevertheless concern that there is now a responsibility gap, as ministers are able to deflect blame onto the shoulders of chief executives.¹¹¹ These concerns were highlighted following difficulties in the Prison Service which led to the dismissal in October 1995 of its chief executive, Mr Derek Lewis, by the Home Secretary, Mr Michael Howard. Mr Lewis is not the only chief executive to lose office because of failure within an agency,¹¹² but his departure has been the most controversial. It followed the report of a review of security procedures in prisons by General Sir John Learmont, conducted after the escape of three prisoners from Parkhurst Jail on the Isle of Wight.

The latter report made a number of criticisms of Parkhurst and its security, but also claimed that some of the problems could be ‘traced along the lines of communication to Prison Service headquarters’.¹¹³ In the words of the Home Secretary, Learmont did not find that ‘any policy decision of [his], directly or indirectly, caused the escape’.¹¹⁴ Mr Lewis was dismissed, although not without complaining of ministerial interference in operational matters and not without a substantial settlement being made in his favour for the premature termination of his appointment.¹¹⁵ In the controversy that followed this dismissal, the Home Secretary declined to accept responsibility for the agency failures. In his view there was a distinction between policy and operations, a distinction said to be ‘reflected in the framework document that established the Prison Service as an Executive Agency’.¹¹⁶

Civil servants and select committees

Select committees are now an important channel for ministerial accountability. Although it is the departmental minister who is responsible to Parliament, the select committees nevertheless may wish to take evidence from civil servants within the minister’s department, sometimes for a more informed and detailed account of the issues which the department may be dealing with. A question which has arisen is whether select committees can summon and require the attendance of named officials,¹¹⁷ or whether a minister can instruct the official not to attend and thereby potentially frustrate a select committee’s investigation. During the Westland affair in 1985–86, the House of Commons Defence Committee wished to examine

¹¹⁰ HC Deb, 20 July 1954, cols 1285–7. And see ch 5.

¹¹¹ HC 27-II (1993–4), p 189.

¹¹² See *The Guardian*, 17 November 2004 (resignation of Chief Executive of the Child Support Agency).

¹¹³ HC Deb, 16 October 1995, col 31.

¹¹⁴ *Ibid.*

¹¹⁵ *The Times*, 17 October 1995.

¹¹⁶ HC Deb, 19 October 1995, col 519.

¹¹⁷ See also p 281 above.

five named officials, three from the Department of Trade and Industry and two from the Prime Minister's Office. The government took the view, however, that because these officials had participated in an internal departmental inquiry, it would be neither fair nor reasonable to expect them to submit to a second round of detailed questioning.

The Defence Committee nevertheless asserted that 'its power to secure the attendance of an individual *named* civil servant is unqualified',¹¹⁸ and that it was unacceptable for the government to prevent these officials from attending, a power which the same committee reasserted in 1994.¹¹⁹ Although such instances are rare, Westland is not unique: in 1992, the Ministry of Defence frustrated efforts by the Trade and Industry Committee's inquiry into arms to Iraq (following allegations that British companies had sold arms to Iraq), the Committee having wished to take evidence from recently retired officials.¹²⁰ In a decision which was subsequently criticised by Sir Richard Scott (a Lord Justice of Appeal who had been appointed by the government to investigate the allegations of arms for Iraq), the Ministry refused to help contact the officials in question on the ground that 'retired officials are not normally given access to departmental papers'.¹²¹

Sir Richard, in fact, proposed that in the interests of full and effective accountability, select committees should not be hindered by the government in summoning named officials to appear before them, as did the Public Service Committee in 1996 which proposed that 'there should be a presumption that Ministers accept requests by Committees that named individual civil servants give evidence to them'.¹²² The government agreed that 'where a Select Committee indicates that it wishes to hear evidence from named civil servants, Ministers should normally accept such a request',¹²³ and the rules have been amended accordingly.¹²⁴ But these rules – sometimes known as the Osmotherly Rules – also provide that ministers retain the right to suggest an alternative official to that named by the committee if they feel that the former is better placed to represent them.¹²⁵ The rules further provide that it is not the role of a select committee to act as a disciplinary tribunal and that a minister may wish to suggest someone else where the named official is likely to be exposed 'to questioning about their personal responsibility or the allocation of blame as between them and others'.¹²⁶

But as the amended rules also make clear: 'If a Committee nonetheless insists on a particular official appearing before them, contrary to the Minister's wishes, the formal position remains that it could issue an order for attendance, and request the House to enforce it.'¹²⁷

¹¹⁸ HC 519 (1985–6).

¹¹⁹ HC 27-I (1993–4). But this was contested by the government, which pointed out that it was ministers who were ultimately accountable to Parliament 'for the whole range of a department's business', even though this did not mean that 'Ministers must be expected to be personally responsible, in the sense of being creditworthy or blameworthy, for every act of their department' (Cm 2627, 1994, p 28).

¹²⁰ HC 86 (1991–2).

¹²¹ HC 115 (1995–6), para F4.64.

¹²² HC 313-I (1995–6), para 83.

¹²³ HC 67 (1996–7), p x.

¹²⁴ Cabinet Office, *Departmental Evidence and Response to Select Committees*, above. The rules now provide that 'Where a Select Committee indicates that it wishes to take evidence from a particular named official, including special advisers, the presumption should be that the minister will agree to meet such a request' (para 44).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, para 46.

¹²⁷ *Ibid.*, para 47. The House of Commons Liaison Committee (the Committee of Select Committee chairs) has said that the Osmotherly rules 'should [not] have any bearing on whom a select committee should choose to summon as a witness. The Osmotherly rules are merely internal for Government. They have never been accepted by Parliament' (HC 697 (2012–13)).

In 2003, the Foreign Affairs Committee summoned Dr David Kelly, a distinguished weapons inspector seconded to the Defence Science and Technology Laboratory (a trading fund of the Ministry of Defence). There had been much political controversy arising from a claim by a BBC journalist that the government had exaggerated Saddam Hussain's military capabilities in the run-up to the war in Iraq. Dr Kelly had been disclosed as the source of the journalist's claim, and the Defence Secretary agreed to the Foreign Affairs Committee's request to take evidence from Dr Kelly in the light of an inquiry they had recently concluded on the war in Iraq. Despite the provisions of the Osmotherly Rules (and para 46 in particular), Dr Kelly was questioned not about government policy but about his own role in the preparation of the dossier and his relationship with journalists. It was felt by at least one member of the committee that Dr Kelly had been 'thrown to the wolves'. Dr Kelly took his own life two days later. The Defence Secretary had agreed to the Committee's request that Dr Kelly appear as a witness despite the fact that he was 'a relatively junior official', unaccustomed 'to being thrust into the public eye'. In the subsequent inquiry into the circumstances surrounding Dr Kelly's death, Lord Hutton concluded that 'there would have been a serious political storm' if the Defence Secretary had refused to permit Dr Kelly to appear before the Committee. The decision to agree to the request that Dr Kelly should appear was not one that could be 'subject to valid criticism'.¹²⁸

E. Civil service: ethics and standards

Civil Service Code

A statement of the ethical standards by which the civil service should be bound is to be found in the *Civil Service Code*, which now has a statutory basis in the Constitutional Reform and Governance Act 2010.¹²⁹ The Code states explicitly that it forms part of the contractual relationship between the civil servant and his or her employer, and that it creates an expectation of 'high standards of behaviour'.¹³⁰ A slight and insubstantial document of 'core values', the Code is by no means exhaustive of the obligations of civil servants, with individual departments imposing additional requirements. The Code declares that civil servants are expected to carry out their role 'with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality'.

This means that civil servants are expected to put the obligations of public service above their own personal interests, to be truthful and open, to base their advice and decisions on rigorous analysis of the evidence, and to 'act solely according to the merits of the case', serving equally well 'Governments of different political persuasions'. Apart from laying out the various duties of the civil servant, the *Civil Service Code* includes a procedure for civil servants to raise concerns where they believe that they are being required to act in a way that contradicts the Code, or if they believe that others are acting contrary to the Code. The final stage in the procedure involves the Civil Service Commissioners for those who remain

¹²⁸ See HC 390-I (2003–04) (Foreign Affairs Committee) and Lord Hutton, Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly, CMG, above.

¹²⁹ 2010 Act, s 5. Earlier versions of the code were made in 1996 and 2006, under different legal authority.

¹³⁰ The Code also states that it applies to all Home civil servants, and that those working for the Scottish Executive and the Welsh Assembly will have their own versions of the Code, as will the Executive Agencies.

unsatisfied by a response given at a lower level.¹³¹ Criminal or other unlawful activity may be reported to the police or other appropriate authorities. But there is no right, far less any duty, to bring wrongdoing to public notice.¹³²

Significant provisions of the Code under the rubric of *integrity* require the civil servant to make sure that public money is used ‘properly and efficiently’, deal with the public fairly and promptly, and comply with the law and uphold the administration of justice. Under the rubric of *honesty*, civil servants are required to set out facts and issues truthfully, use resources only for the public purposes for which they are provided, and refrain from deceiving or knowingly misleading ministers, Parliament or others. So far as *objectivity* is concerned, this is stated to mean that the civil servant must provide accurate and evidence-based advice to ministers and others, take due account of expert and professional advice, and must not frustrate the implementation of policies once decisions have been taken.

Impartiality means that the civil servant must carry out his or her responsibilities in a way that is fair, just and equitable and does not unjustifiably favour or discriminate against particular individuals or interests. The Code also addresses specifically the question of political impartiality, and provides that civil servants must serve governments of whatever political persuasion to the best of their ability, regardless of their own political beliefs, acting in a way that retains the confidence of ministers, while ensuring that they will be able to establish a similar relationship with the members of a future government. It is specifically provided that civil servants must not act in a way that is determined by party political considerations, use official resources for party political purposes, or allow personal views to determine advice or actions.

Financial interests of civil servants

We have seen that ministers are subject to rules enforced by the Prime Minister that are intended inter alia to ensure that they do not profit improperly from their public position.¹³³ The *Civil Service Code* informs civil servants that they should not ‘misuse [their] official position, for example by using information acquired in the course of [their] official duties to further [their] private interests or those of others’. Nor should they place themselves in a position which ‘might reasonably be seen to compromise their personal judgment or integrity’. The separate and much larger *Civil Service Management Code* provides further that civil servants must have departmental permission before engaging in any occupation which might affect their work.

The *Code* also requires civil servants to disclose any directorships or shareholdings that could be advanced by their official position, and to accept any instruction as to their retention, disposal or management. There are strict rules about civil servants entering into business relationships with government departments (such as letting property or buying surplus stock), as well as about the acceptance of gifts or hospitality which might compromise the civil servant’s judgment or integrity. Breach of the *Civil Service Management Code* could give rise to contractual sanctions (including dismissal in appropriate cases), though in some cases, a failure of duty could also give rise to prosecution. The Bribery Act 2010 applies to civil servants, and the *Civil Service Management Code* requires its provisions to be notified to staff.¹³⁴

¹³¹ The Civil Service Commissioners were set up in 1870 with the rather different task of promoting competitive entry into the civil service on the principle of intellectual merit. There is no provision in the Code addressing the powers of the Commissioners in these circumstances.

¹³² The issue was considered – albeit inconclusively – by the Public Service Committee in HC 313-I (1995–6).

¹³³ Section C in this chapter.

¹³⁴ The foregoing provisions are drawn from *Civil Service Management Code*, Section 4. See also pp 291–93 below, on links with lobbyists.

The public interest in integrity needs also to address the positions held by officials after they leave the civil service. Suspicions may be aroused – for example – where a civil servant with responsibility for defence procurement is employed by a weapons’ manufacturer following retirement from the service. How can we be sure that the official was not moved by considerations of personal interest when making major decisions before retirement? The Business Appointment Rules (revised in 2011) provide for the scrutiny of appointments which former civil servants propose to accept in the first two years after they leave the service. The aim of the rules is to avoid any reasonable concerns that the advice and decisions of a serving officer ‘might be influenced in carrying out his or her official duties by the hope or expectation of future employment with a particular firm or organisation’.

Another purpose of the Business Appointment Rules is to avoid the risk that ‘a particular firm or organisation might gain an improper advantage by employing someone who, in the course of their official duties, has had access to [information about government policy that may] affect the prospective employer or any competitors’. In some cases permission is required before the civil servant accepts any new appointment or employment within two years of leaving the civil service. In many cases permission will be granted without condition, while in other cases a waiting period or other conditions may be imposed. The process is supervised by the Advisory Committee on Business Appointments, an independent body appointed by the Prime Minister whose members have experience of the relationship between the civil service and the private sector.¹³⁵ The Public Administration Select Committee proposed radical reforms to the procedures in 2013.¹³⁶

Political activities of civil servants

Servants of the Crown are prohibited from parliamentary candidature and disqualified from membership of the Commons. But should civil servants be subject to additional limitations, to secure the political impartiality of the civil service as a whole? The *Civil Service Management Code* points out that ‘from the nature of the work which a civil servant is required to do and the context in which he has to do it, there must be certain restrictions on the type of political activities in which a civil servant is allowed to participate and the extent to which he may do so will, of course, depend on his position and seniority’.¹³⁷ Formal restrictions to give effect to this principle were first brought into force in 1954.¹³⁸

The current procedures recognise that the political neutrality of the civil service is fundamental, but that the rules need not be the same for all members of the service. The position was fully reviewed by the Armitage Committee in 1978, in response to requests from the civil service unions for greater political freedom for civil servants. The committee reasserted the constitutional importance of the political neutrality of the civil service. It recommended that the scheme then in force should continue subject to substantial changes in its operation, the effect of which would be to reduce the number of civil servants in the ‘restricted’ category.¹³⁹ In 1984 these recommendations were adopted after extensive discussion between government and the civil service unions.¹⁴⁰

¹³⁵ See HC 651 (2006–07), and the government’s response (HC 1087 (2006–07)). The current rules from which the foregoing is drawn are to be found in the *Civil Service Management Code*, Section 4.3, Annex A. They are also to be found in the Annual Reports of the Advisory Committee on Business Appointments, which helpfully GIVE an account of the advice it has given in individual cases. See <http://acoba.independent.gov.uk>.

¹³⁶ HC 404 (2012–13).

¹³⁷ *R v Civil Service Appeal Board, ex p Bruce* [1988] 3 All ER 686, at p 690 (May LJ). The arrangements are dealt with in *Civil Service Management Code*, Section 4.4.

¹³⁸ See Cmd 7718, 1949, and Cmd 8783, 1953.

¹³⁹ Cmnd 7057, 1978.

¹⁴⁰ HC Deb, 26 March 1981, col 1186; 4 March 1982, col 503; 19 July 1984, col 272 (WA).

Participation in national political activities (for example, holding office in a political party; expressing public views on matters of national political controversy) is barred to the Senior Civil Service and other senior grades. This ‘politically restricted’ category must seek permission to take part in local political activities and must comply with any conditions laid down by their department or agency. A second ‘intermediate’ category may, with the leave of their departments, take part in national or local activities, although some grades have a mandate to take part in such activities without the need for permission. In cases where there is no mandate, permission will normally be refused only where civil servants are employed in sensitive areas where the impartiality of the civil service is most at risk.

A post is regarded as sensitive for these purposes if it is closely engaged in policy assistance to ministers; it is in the private office of a minister; it requires the post-holder to speak regularly for the government; the post-holder represents the government in dealing with overseas governments; or the post-holder is involved in regular face-to-face contact with the public. The third ‘politically free’ category combines industrial and non-office grades: they are free to engage in all political activities, national and local, except when on duty or on official premises or while wearing their uniform. These procedures are reinforced by the *Civil Service Code* which provides that civil servants must comply with political restrictions that apply to them.¹⁴¹ The foregoing provisions are unlikely to violate Convention rights.¹⁴²

Civil servants and lobbyists

In 1998 new guidelines about contacts with lobbyists were issued to civil servants. These followed a press report that a journalist posing as an American businessman had been introduced by a lobbyist to a senior Downing Street official. In a disputed remark the official is reported to have said to the putative businessman: ‘Just tell me what you want, who you want to meet and . . . I will make the call for you.’¹⁴³ As we have seen in chapter 9 B, the Cash for Questions affair in the 1990s led to the creation of the Committee on Standards in Public Life and tight rules to regulate the relationship between MPs and lobbyists. But at the time of ‘Lobbygate’, as this incident was known, there was no regulation of civil service contact with lobbyists.

The new rules adopt what might best be referred to as a minimalist approach and reflect the view in the first report of the Committee on Standards in Public Life that ‘it is the right of everyone to lobby Parliament and ministers, and it is for public institutions to develop ways of controlling the reaction to approaches from professional lobbyists in such a way as to give due weight to their case while always taking care to consider the public interest’.¹⁴⁴ The government’s approach in the guidelines then is not to ban contacts between civil servants and lobbyists, but ‘to insist that wherever and whenever they take place they should be conducted in accordance with the *Civil Service Code*, and the principles of public life set out by the Nolan Committee’ which are considered in chapter 12. Indeed, the guidelines acknowledge that lobbyists are ‘a feature of our democratic system’.

¹⁴¹ Apart from personal involvement in political activities, civil servants may wish to participate in political action through their trade unions. Civil service unions may establish political funds under what is now the Trade Union and Labour Relations (Consolidation) Act 1992 to enable them more effectively to represent their members by campaigning politically. None is affiliated to any political party (although there are no legal restrictions on such affiliation), but several are affiliated to the TUC.

¹⁴² *Ahmed v United Kingdom* (2000) 29 EHRR 1 (no violation of Convention rights in relation to similar restrictions applying to local government officers).

¹⁴³ *The Observer*, 5 July 1998. The allegations were strongly denied: HC Deb, 8 July 1998, col 1065.

¹⁴⁴ Cm 280-I, 1995, para 72.

The guidelines are drawn from the principles in the *Civil Service Code* that civil servants should conduct themselves with honesty and integrity. Some activities are said to be ‘completely unacceptable’ and to be serious disciplinary offences which could lead to dismissal. These are the leaking of confidential or sensitive material, especially market-sensitive material, to a lobbyist and deliberately helping a lobbyist to attract business by arranging for clients to have privileged access to a minister or undue influence over policy. Other situations are to be handled with care, although again any misjudgement could lead to disciplinary action. A number of basic rules are set out, including a requirement that civil servants should not grant a lobbyist preferential or premature access to information.

Otherwise, the rules provide that civil servants should not meet one group making representations on a particular issue without offering other groups a similar opportunity; accept gifts from a lobbyist; do anything which might breach parliamentary privilege (for example, by revealing the contents of a report not yet published); use knowledge of the workings of government to impress a lobbyist; help a lobbyist to obtain a benefit to which he or she is not entitled; or give the impression of offering a lobbyist preferential access to ministers. Civil servants should also declare to their department any family or business interests which may create a conflict of interest with departmental work; and take care in accepting hospitality from a lobbyist. Although meetings between civil servants and lobbyists are now recorded,¹⁴⁵ the government rejected proposals that these records should be published.¹⁴⁶

Continuing ‘reform’

The large-scale changes to the civil service since 1988 have given rise to a great deal of discussion. In a major report in 1998, the House of Lords Select Committee on Public Service concluded that the changes represented a ‘radical’ and ‘fundamental revolution’ in public administration. But the committee accepted that there had been ‘little open or public debate about the extent of the structural changes being made to the Civil Service’, and expressed itself as being not satisfied that ‘the constitutional implications of the changes were fully thought through’ before they were introduced. There was a tension between the (economic) justification for change based on efficiency, effectiveness and value for money, on the one hand, and traditional (political) concerns based on responsibility and accountability, on the other.

The creation of the executive agencies was not thought, in a constitutional sense, to ‘recast the architecture of the state’, ‘but only so long as accountability of Ministers to Parliament for the work of executive agencies remains the same as their accountability for any other aspect of their Department’s work’. The committee was concerned that ‘the devolution to executive agencies was contributing to a sense of disunity in the Civil Service’, although not yet to fragmentation. There was a need to determine how far this process of reducing the role of the core civil service should go and a need for ‘open and public debate’ about the irreducible nucleus of functions which must be carried out by the core civil service: this is as much ‘a matter for the governed as for the governors’.

The process of civil service reform continued under the Labour government elected in 1997 and has taken on a new dimension.¹⁴⁷ In the white paper, *Modernising Government*, it was announced in 1999 that permanent secretaries and heads of department would have performance targets ‘for taking forward the government’s modernisation agenda and

¹⁴⁵ See Cm 4557-I, 2000, R 28; and HC 1058 (2008–09).

¹⁴⁶ See HC 36 (2008–09), and the government’s response HC 1058 (2008–09).

¹⁴⁷ On the implementation of these reforms, see C D Foster (2001) 79 *Public Administration* 725. For further analysis, see Hennessy, *The Prime Minister*, ch 18. For a full account of civil service reform, see Bogdanor (ed), *The British Constitution in the Twentieth Century*, ch 7.

ensuring delivery of the government's key targets'.¹⁴⁸ There is now great emphasis not only on the public service values of impartiality, objectivity and integrity, but also on the need for 'greater creativity, radical thinking, and collaborative working', as well as efficiency in the delivery of public services.¹⁴⁹ The pace of change continued under the Coalition with a *Civil Service Reform Plan* announcing a reduction in the number of civil servants to 380,000 by 2015 (the lowest since the Second World War).¹⁵⁰

Other proposed changes included giving ministers the power personally to appoint their own civil servants in extended ministerial offices,¹⁵¹ and for the Osmotherly Rules referred to above to be amended to enable senior civil servants to be more directly accountable to Parliament. The last in particular seems a rather ill-judged initiative but one consistent with a general trend which has seen a dilution of the traditional principle of ministerial responsibility, which the development of the Select Committee system has perhaps made inevitable, albeit unintentionally. One reason why many advocates supported the introduction of a statutory framework for the civil service (on which see above) was to ensure greater parliamentary and public debate around the process of change. The Constitutional Reform and Governance Act 2010 is unlikely to provide that opportunity, for reasons already explained.

F. Open government and freedom of information

Background

Discussion of the structure of the civil service and its proposed regulation by statute leads directly to a consideration of open government and the public right of access to official information. Historically there was no such right in the United Kingdom, in contrast to the position in other parliamentary democracies (notably Australia, Canada and New Zealand) where the right of access to information was introduced much earlier than in Britain.¹⁵² Such access is important for a number of reasons, not least because of the insights it provides into the conduct of government and the enhanced opportunities it provides for politicians, the press and the public more effectively to hold government to account. In 1979 a green paper on open government was published by the then Labour government, offering modestly a non-binding code of practice on access to official information.¹⁵³

But electoral defeat meant that these proposals were never implemented. Although campaigners for open government were thus disappointed, important initiatives in the direction of reform were nevertheless taken in the 1980s and 1990s. Apart from a number of specific statutory provisions,¹⁵⁴ these included the *Citizen's Charter* introduced in 1991, providing that every citizen is entitled to expect openness and stating unequivocally that there should be no secrecy about how public services are run, how much they cost, who is in charge and

¹⁴⁸ See Cm 4310, 1999.

¹⁴⁹ Cabinet Office, *Civil Service Reform – Delivery and Values* (2004).

¹⁵⁰ HM Government, *Civil Service Reform Plan* (2012), p 11.

¹⁵¹ See HC 664 (2013–14), where proposals of this kind are strongly criticised as compromising the core principle that recruitment to the civil service should be based on merit.

¹⁵² Open government was actively discouraged by the Official Secrets Act 1911, esp s 2 by which it was an offence for a civil servant to communicate any information to a member of the public without authorisation. There was no right to information and no right to disclose it. Section 2 of the 1911 Act was repealed by the Official Secrets Act 1989. See ch 19.

¹⁵³ Cmnd 7520, 1979.

¹⁵⁴ Access to Personal Files Act 1987, Access to Medical Reports Act 1988, Access to Health Records Act 1990, Environmental Information Regulations 1992, SI 1992 No 3240. Also important was the Data Protection Act 1984 (now Data Protection Act 1998). See ch 16.

whether or not they are meeting their standards.¹⁵⁵ This was followed in 1993 by the white paper, *Open Government*, which revived the idea of a non-binding code of practice. Such a code was, in fact, introduced in 1994 and revised in 1997,¹⁵⁶ allowing for complaints to be made to the Ombudsman (through the medium of a member of Parliament) that information had been unreasonably withheld.¹⁵⁷

It was the Labour government's turn to publish a white paper ('with green edges') on freedom of information in 1997.¹⁵⁸ The original plan was to replace existing open government initiatives (including the Code of Practice) 'with clear and consistent requirements which would apply across government'.¹⁵⁹ The white paper proposed the introduction of 'a right, exercisable by any individual, company or other body to records or information of any date held by the public authority concerned in connection with its public functions'.¹⁶⁰ The presumption would be that information should be released unless disclosure would cause harm to one or more specified interests or would be contrary to the public interest. But these original proposals were abandoned and responsibility for open government transferred from the Cabinet Office to the Home Office (said to be 'one of the most overworked and accident-prone departments of government').¹⁶¹

A diluted measure was subsequently introduced, this forming the basis of what is now the Freedom of Information Act 2000,¹⁶² which was not brought fully into force until 1 January 2005, along with a separate regime for access to environmental information held by public authorities.¹⁶³ Although the Act gives a legal right of access to official information, it was nevertheless criticised for being too restrictive in a number of key respects, these criticisms being voiced on two occasions by the Public Administration Committee of the House of Commons.¹⁶⁴ The government openly acknowledged some of these criticisms,¹⁶⁵ and responded by having 'some of that diluting removed'.¹⁶⁶ A similar regime was introduced in Scotland by the Freedom of Information (Scotland) Act 2002, and the Environmental Information (Scotland) Regulations 2004.¹⁶⁷

Scope of the Act

The Freedom of Information Act 'creates a general right of access to information upon written request made to a public authority'.¹⁶⁸ Any person making a request for information is

¹⁵⁵ Cm 1588, 1991. See C Scott [1999] PL 595; G Drewry [2002] PL 12.

¹⁵⁶ Cm 2290, 1993.

¹⁵⁷ See Birkinshaw, *Freedom of Information*.

¹⁵⁸ *Your Right to Know: Freedom of Information*, Cm 3818, 1997. For comment, see P Birkinshaw [1998] PL 176.

¹⁵⁹ Cm 3818, 1997, para 1.6.

¹⁶⁰ *Ibid*, para 2.6.

¹⁶¹ HL Deb, 20 April 2000, col 836.

¹⁶² For a valuable account, see S Palmer, in Beatson and Cripps (eds), *Freedom of Expression and Freedom of Information*, ch 15. Also P Birkinshaw, in Jowell and Oliver (eds), *The Changing Constitution*, ch 14.

¹⁶³ SI 2004 No 3391, implementing EC Directive 2003/4/EC. These regulations revoked the earlier SI 1992 No 3240.

¹⁶⁴ HC 570-I (1998–9); HC 78 (1999–2000).

¹⁶⁵ HL Deb, 20 April 2000, col 824.

¹⁶⁶ *Ibid*, col 831. The Act is the subject of ongoing review: HC 96 (2012–13) (post-legislative scrutiny by Justice Select Committee).

¹⁶⁷ SSI 2004 No 520.

¹⁶⁸ *R(Ofcom) v Information Commissioner* [2008] EWHC 1445 (Admin), para 5.

¹⁶⁹ Although there are over 400 bodies listed in the Act, some of these are listed collectively (such as NHS bodies, universities and local authorities). As a result there are very many more individual bodies to which the Act applies.

entitled (a) to be told in writing by the authority whether it holds information of the type specified in the request, and if so (b) to have that information communicated to him or her (s 1). A public authority's duty to comply with (a) is referred to as 'the duty to confirm or deny'. The public authorities to which the Act applies are listed in Schedule 1: there are over 400 such bodies,¹⁶⁹ a list which may be added to by order of the Secretary of State for Justice (now the minister responsible for freedom of information) (s 4).¹⁷⁰ The list – which inevitably is amended as new legislation creates new public authorities – includes central government departments, local authorities, national health service bodies, schools and educational institutions, and the police.

In this respect the Act contrasts sharply with the Human Rights Act 1998, which also applies to public authorities. There is no definition of a public authority in the Human Rights Act (save to make clear that a court is a public authority), the scope of the Act being left to the courts to determine.¹⁷¹ Although there ought thus to be less room for uncertainty about the application of the Freedom of Information Act 2000, tortuous difficulties have arisen about the nature of its application to bodies like the BBC.¹⁷² The BBC is one of a few bodies listed only in relation to some information they hold: for example, the Act applies to the BBC 'in respect of information held for purposes other than those of journalism, art or literature'. The only information the BBC can be required to disclose is that held exclusively for non-journalistic purposes, a position justified on grounds of freedom of expression.¹⁷³

A request for information is to be made in writing to the relevant public authority (s 8), which may (but need not) charge a fee for the information in accordance with regulations (s 9).¹⁷⁴ The fee may be not insignificant, and may be charged at a rate of up to £25 an hour.¹⁷⁵ Requests are to be dealt with promptly and within 20 working days of receipt (s 10). There is a right only to have access to information: there is no right to have access to documents (s 11),¹⁷⁶ though there is now a right to have datasets provided electronically (s11(A)).¹⁷⁷ The authority may refuse to comply with a request for information where the cost would be excessive (s 12), or where the application is vexatious (s 14). The public authorities to which the Act applies must provide advice and assistance to persons who propose to make or who have made requests under the Act (s 16).

Where an application for information is refused, the public authority must issue the applicant with a notice explaining the grounds for the refusal (s 17). In addition, publication schemes must be approved by the Information Commissioner (s 19), who is also required to produce model publication schemes (s 20). The publication scheme should specify the classes of information that the authority in question publishes or intends to publish, specifying the manner in which information of each class is to be published, indicating whether a charge is made. It has been said that 'the requirement for all public authorities to apply a scheme for publication – in effect to say what, when and how information will be

¹⁷⁰ The Act also allows an order to be made bringing in private bodies exercising public functions, such as companies running prisons and the British Board of Film Classification: HL Deb, 20 April 2000, col 825.

¹⁷¹ See ch 14.

¹⁷² *BBC v Information Commissioner* [2009] UKHL 9; *Sugar v BBC* [2012] UKSC 4, [2012] 1 WLR 439.

¹⁷³ *Sugar v BBC*, above.

¹⁷⁴ The regulations provide a limit of £600 or £450 depending on the nature of the public authority: SI 2004 No 3244.

¹⁷⁵ See SI 2004 No 3244.

¹⁷⁶ In practice documents will often be produced: *Home Office v Information Commissioner* [2009] EWHC 1611 (Admin), para 8. Compare TFEU, art 15: any citizen of the Union, and any natural or legal person residing or based in the Union, has a 'right of access' to documents of the Union institutions. See Regulation 1049/2001/EC.

¹⁷⁷ Inserted by Protection of Freedoms Act 2012, s 102.

published – is probably the most powerful push to openness in the [Act].¹⁷⁸ These schemes will help to guide citizens through the freedom of information process.

Exemptions

It is almost certainly the case that ‘no legislation which any responsible government could introduce would completely satisfy [the more ardent advocates of freedom of information]’.¹⁷⁹ Nevertheless it is a striking feature of the FOI regime that there are so many categories of exempted information. Many of the 24 sections of exempt information (ss 21–44) are wholly predictable, with the exemptions falling into two groups: those which carry absolute exemption, and those which do not (s 2). In the latter case, the exemption applies only where the public interest in maintaining the exclusion of the duty to confirm or deny (s 1(1)(a)), or in withholding the information (s 1(1)(b)) outweighs the public interest in disclosing whether the public authority holds the information or in communicating it to the person seeking access, as the case may be (s 2(1),(2)).¹⁸⁰

Information which will be absolutely exempt (and which therefore does not need to be disclosed) includes that which is reasonably accessible to the public by other means (s 21), information which relates to bodies dealing with security matters (s 23), information relating to court records, or to the conduct by public authorities of inquiries held under statute (s 32),¹⁸¹ information which consists of personal data the release of which would violate the data protection principles (s 40),¹⁸² information obtained in confidence (s 41), and information the disclosure of which is prohibited by statute, incompatible with an EU obligation or would constitute a contempt of court (s 44).

The larger category of information to which an absolute exemption does not apply (and the withholding of which therefore has to be justified on public interest grounds) includes information which is held by the authority with a view to its future publication (s 22), information required for the purpose of safeguarding national security (s 24), information relating to defence (s 26), information the disclosure of which would prejudice international relations (s 27), information the disclosure of which would prejudice relations between Whitehall and the devolved administrations or between the devolved administrations (s 28), and so on at some length.

Among the other noteworthy categories of information not subject to absolute exemption are information which if disclosed would or would be likely to prejudice the economic interests of the United Kingdom or any part thereof or any administration in the United Kingdom (s 29);¹⁸³ information relating to criminal investigations conducted by a wide range of statutory agencies (s 30) or law enforcement (s 31); information relating to the formulation or development of government policy (s 35); as well as information held by a public authority which, in the reasonable opinion of an appropriately qualified person (such as a Minister), if disclosed could prejudice the effective conduct of public affairs (s 36). It will be noted that

¹⁷⁸ HL Deb, 20 April 2000, col 826 (Lord Falconer).

¹⁷⁹ HL Deb, 20 April 2000, col 863.

¹⁸⁰ See *Home Office v Information Commissioner*, above: a broad judgment is required to determine where the public interest lies (para 25), citing *Office of Communications v Information Commissioner* [2009] EWCA Civ 90.

¹⁸¹ On which see *Kennedy v Charity Commission* [2012] EWCA Civ 317, [2012] 1 WLR 3524.

¹⁸² These principles are set out in the Data Protection Act 1998 (see ch 6). On how personal data protected by the 1998 Act might be rendered suitable for release under the FOI Act 2000, see *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, [2008] 1 WLR 1550, and *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55.

¹⁸³ On the purpose of this exemption, see HL Deb, 19 October 2000, col 1287.

many of these exemptions apply on the low threshold that publication would cause ‘prejudice’. It was felt by some that the higher standard of ‘substantial prejudice’ or ‘necessity’ would be more appropriate.

Public interest considerations

Since the Act was introduced, there have been several notable decisions in which government departments have challenged rulings that they release information. Many of these have been contested on public interest grounds, which on some occasions concerned important constitutional principles and practices not always consistent with freedom of information. In *HM Treasury v Information Commissioner*,¹⁸⁴ it was held that the convention that the law officers’ advice to ministers (in this case the Attorney General’s advice on the compatibility of the Financial Services and Markets Act 2000 with the Human Rights Act 1998) had not been given sufficient weight by the Information Tribunal in ordering its release.

This latter convention had been breached on only five occasions since 1968, and in the view of Blake J, it had not been modified by the 2000 Act. It had rather been preserved but rendered ‘amenable to being out-weighed by greater considerations of the public interest requiring disclosure of information in either limb of the Convention’. Section 35(1)(c) of the 2000 Act specifically refers to ‘the provision of advice by any of the Law Officers or any request for the provision of such advice’ as information exempt from disclosure, and the tribunal was found to have erred by ‘failing to conclude that Parliament intended real weight should continue to be afforded to [the] Law Officers’ Convention’.

On the other hand, in *House of Commons v Information Commissioner*,¹⁸⁵ there was no question of parliamentary privilege standing in the way of a request for information about MPs’ allowances,¹⁸⁶ which had been required by the Information Commissioner and the Information Tribunal (which at that time dealt with appeals under the Act). In a strong judgment it was held by a three-member Administrative Court that the ‘legitimate public interest engaged by these applications [was] obvious’, with questions relating to MPs’ allowances having ‘a wide resonance throughout the body politic’, and to ‘bear on public confidence in the operation of our democratic system at its very pinnacle’.

Also, in *Evans v Information Commissioner*,¹⁸⁷ the Upper Tribunal upheld an appeal from an Information Commissioner’s decision that the substance of correspondence between the Prince of Wales and seven government departments should not be disclosed on public interest. In this important decision, the tribunal weighed up competing public interest grounds considerations based principally on arguments about constitutional conventions. But it was held that advocacy by the Prince could not be protected by the conventions relating to the constitutional role of the monarch, which might otherwise have tended towards non-disclosure. In a bold decision the tribunal said that:

none of the Departments’ contentions persuades us that, in the absence of special circumstances, as regards advocacy correspondence it is appropriate to give correspondence between ministers and Prince Charles greater protection from disclosure than would be afforded to correspondence with others who have dealings with government in a context where those others are seeking to advance the work of charities or to promote views.¹⁸⁸

¹⁸⁴ [2009] EWHC 1811 (Admin).

¹⁸⁵ [2008] EWHC 1084 (Admin). See P Leyland [2009] PL 675.

¹⁸⁶ But compare *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin). See chapter 9 above.

¹⁸⁷ [2012] UKUT 313 (AAC).

¹⁸⁸ *Ibid*, para 211.

Enforcement and remedies

Enforcement of the Act is the initial responsibility of the Information Commissioner (s 18). A complaint may be made to the Commissioner that a public authority has failed to comply with the requirements of Part I of the Act and if the complaint is upheld the Commissioner may issue a decision notice specifying steps to be taken to comply with the Act (s 50). These notices are published on the Commission's website, and there is now a significant volume of them that – along with the other enforcement responsibilities of the Commissioner – still awaits full academic analysis. The Commissioner is also empowered to issue an enforcement notice (s 52), failure to comply with which may lead to the matter being referred to the High Court or Court of Session to be punished as a contempt of court (s 54).

The right of appeal to the Information Tribunal against a decision of the Commissioner (s 57) has been transferred to the unified tribunal system,¹⁸⁹ with a further appeal on a point of law to the High Court or the Court of Session (s 59). Under s 60, the Tribunal (which in some cases will be the First-tier Tribunal but in others the Upper Tribunal) has been given powers to quash a ministerial certificate protecting national security information from disclosure. As an expert body, the tribunal 'is not required to defer to the views of Ministers or civil servants' when exercising its powers under the Act,¹⁹⁰ though as already indicated the courts have emphasised on several occasions the need to take seriously government claims that information must be withheld in particular cases on public interest grounds.¹⁹¹ It is an offence to destroy or tamper with information, but only if this is done after a request for disclosure has been made (s 77).

Although he has wide powers under the Act, the government has nevertheless been reluctant to leave the last word to the Commissioner (or the tribunals or courts), taking the remarkable view that it would be 'profoundly undemocratic' to permit the Commissioner to have the final say on what should be disclosed. Section 53 thus contains a so-called 'executive override', a 'kind of nuclear option for the Government',¹⁹² allowing a minister in some limited circumstances to override a decision notice (under s 50) or an enforcement notice (under s 52) of the Commissioner which has been served on a government department.¹⁹³ This power – to be exercised by means of a ministerial certificate which must be laid before Parliament – reflects the government's belief that 'there will be certain cases dealing with the most sensitive issues where a senior member of the Government, able to seek advice from his Cabinet colleagues, should decide on the final question of public interest in relation to disclosure'.¹⁹⁴

The power was used in 2007 to prevent publication of minutes of two Cabinet meetings in March 2003 (relating to the Iraq war), and again in 2009 to prevent the publication of minutes of Cabinet sub-committee meetings in 1997 (relating to devolution). On this latter occasion, the Justice Secretary claimed that 'disclosure of the information in this case would put the convention [of collective responsibility] at serious risk of harm'.¹⁹⁵ The consistent use of the over-ride in relation to Cabinet minutes (suggesting the existence of a policy) seems calculated to be tested in judicial review proceedings at some point. Most controversially, however, the power was used to veto the decision in the *Evans* case discussed above, thereby saving the Prince of Wales the embarrassment of his correspondence to government departments being made public. In subsequent judicial review proceedings, the decision of the

¹⁸⁹ Tribunals, Courts and Enforcement Act 2007; see ch 23 below.

¹⁹⁰ *Home Office v Information Commissioner* [2009] EWHC 1611 (Admin), at para 29.

¹⁹¹ See also *Common Services Agency v Scottish Information Commissioner*, above, para [4].

¹⁹² HL Deb, 22 November 2000, col 843.

¹⁹³ The power applies only to decisions taken in relation to exempt information.

¹⁹⁴ HL Deb, 14 November 2000, col 258.

¹⁹⁵ *BBC News*, 10 December 2009.

Attorney General was upheld,¹⁹⁶ in a case in which the court's awareness of the constitutional significance of the Attorney General's power was not matched by its decision on the merits.

G. Conclusion

This chapter has been concerned principally with the structure of government and the constitutional foundations on which it is based. In the United Kingdom, questions of government structure are largely a matter of convention, from the existence of various offices and institutions (such as the Cabinet and Prime Minister), to the way in which they should conduct themselves (such as the requirement of collective responsibility). The formation of a Coalition government in 2010 took place within these structures, which required little adaptation or amendment, though it did serve significantly to reduce the power of the Prime Minister in a number of areas, from membership of his Cabinet to the development of government policy.¹⁹⁷

A second theme to emerge in this chapter is that behind the façade of the traditional constitution has been a process of perpetual change. This is particularly marked in relation to the civil service, which has undergone major organisational re-structuring, alongside which the relationship of civil servants to ministers and to Parliament is also changing. Senior civil servants are now much more visible, and partly because of the work of the House of Commons Select Committees in particular they are also much more accountable for the conduct of their departments. Although the deflection of responsibility from ministers may be regretted, this is a process that nevertheless helps to shine a brighter light on the workings of government.

A third theme to emerge in this chapter is the proliferation of codes of conduct – such as the *Ministerial Code* and the *Civil Service Code* – to govern the behaviour of those engaged in central government. It is a short step from the introduction of codes to a more formal arrangement in which codes of conduct have a statutory base, as is now the case in relation to the *Civil Service Code*. This is a process that will have longer-term implications, with demands already emerging for more statutory regulation of those involved in government. A notable example is the Public Administration Select Committee's recommendation that the existing business appointment rules for civil servants should be replaced by statute.¹⁹⁸

The final theme to emerge from the foregoing has been the persistent push from Parliament and elsewhere to open up the process of government to greater scrutiny and accountability. These steps in the direction of more open and accountable government are calculated only to grow longer, notwithstanding attempts such as those on display after the *Evans* case to frustrate the operation of freedom of information principles. That case raises serious concerns about the rule of law, and prompts questions about the possible impact in this area of the Human Rights Act 1998 should the courts eventually decide that the right to freedom of expression includes the right of access to official information.¹⁹⁹

¹⁹⁶ [2013] EWHC 1960 (Admin), [2013] WLR(D) 313. See C Knight (2014) 130 LQR 38.

¹⁹⁷ But although the powers of the Prime Minister have been diminished by the exigencies of Coalition politics, it would be premature to be rewriting the script about the role of the Prime Minister in the British system of government (which in any event ought not to be exaggerated).

¹⁹⁸ HC 404 (2012–13).

¹⁹⁹ On which see *Sugar v BBC*, above, and *Kennedy v Charity Commissioners*, above.

CHAPTER 12

Public bodies and public appointments

Chapters 10 and 11 give a very incomplete account of the structure and powers of government in the United Kingdom. They tell us about the Crown, the Prime Minister and the Cabinet, as well as government departments, civil servants and executive agencies. But they tell us nothing about the role of what are loosely referred to as public bodies, which exercise various governmental functions, sometimes independently of government. An outline of the role of these public bodies will help us to give a fuller account of the Executive in modern Britain.

Public bodies – which range in scope from the Bank of England to the Low Pay Commission – raise important constitutional questions, partly because they are policy-makers or otherwise influential, yet with members who are appointed rather than elected, who in the course of their tenure frequently manage large budgets. It has been estimated that one category of public bodies (so called non-departmental public bodies) has a combined budget of £26 billion and employs over 150,000 people; while another category of public bodies (NHS bodies) administers an annual budget in excess of £100 billion, and in the process employs over 1.3 million people.

In this chapter we address a feature of modern government which is routinely condemned and denigrated by most governments, but which all governments discover they cannot manage without. So although the government elected in 2010 sought to cull public bodies, nevertheless it also created new ones.¹ The first task then is to trace the origins of such bodies and to explain why they are thought to be necessary, a process that reveals that the shape and form of such bodies continues to evolve, to reflect the changing nature of the state in modern British society.

It is important also to emphasise the lack of homogeneity around the structure and functions of public bodies: they come in several different shapes and forms, and perform different kinds of functions. Although by no means exhaustive and although by no means an official classification, there are bodies which now perform a policy-making function, others that have a service delivery function, others a regulatory function, others an enforcement function, and others still an advisory function. In the case of at least some advisory bodies there appears to be an expectation that their advice will be followed.

These bodies are thus important for a host of reasons, not least because their work may bear on the lives of citizens just as directly as will the work of ministers and government departments. One question raised by such bodies relates to their appointment. If such bodies are not elected, how do we avoid the risk of nepotism and the abuse of patronage, or what is referred to in some countries as the development of the ‘party state’, in which major positions are gifted to leading supporters of the party in power? And if they are not elected, how do we ensure that they are fully accountable, and to whom, and why?

One final question to be considered in this chapter is the attempts by the Coalition government to reduce the number of public bodies. Extensive powers were taken for this purpose in the Public Bodies Act 2011, a measure giving wide powers to ministers with limited parliamentary oversight, to enable changes to be made as quickly as possible. This reflects the commitment made in the Coalition’s programme for government to reduce the number and cost of public bodies, as well as to enhance the transparency of their operation.²

¹ See Budget Responsibility and National Audit Act 2011, Groceries Code Adjudicator Act 2013.

² The Coalition, *Our Programme for Government* (2010), p 16.

A. Evolution

Purpose

The work of many public bodies could be performed just as easily by government departments, for which ministers would be directly responsible to Parliament. Thus the enforcement work of the Health and Safety Executive could be done by inspectors employed by a Ministry of Labour, as could the work of the Gangmasters Licensing Authority, which registers and supervises the suppliers of labour in some sectors of the economy.³ Indeed the now privatised Post Office was until 1969 a government department headed by a minister – the Postmaster General – who was responsible to Parliament.

There are several reasons why governments may seek less involvement over certain questions. One is to reduce the scope for direct political control or interference over some decisions. At times the reasons are fully understandable, in cases – such as the BBC – where political independence is essential to the integrity of the service in question. It is hardly conceivable that a non-partisan public service broadcaster could be organised in the form of a government department, headed by a Cabinet minister directly responsible to Parliament.

Sometimes the reason is less understandable, as in the case of decision of the government in 1997 to transfer responsibility for interest rates – a key economic lever – from the Treasury to the Bank of England. Apart from the fact that key decisions relating to economic management might be thought to be the direct responsibility of the government, there is no way by which the Monetary Policy Committee of the Bank of England can be as directly accountable to Parliament for its decisions as would be the Chancellor of the Exchequer, no matter how intense the scrutiny.

Otherwise, it is not always clear why certain activities are allocated to departments, and other to executive agencies or public bodies, and the quest for rational explanation is likely to prove elusive. Nor is it always clear why a particular form of public body is chosen for a particular task. Whatever the explanations, ministers should not absolve themselves of responsibility for the composition, activities, funding of public bodies, nor seek to deflect blame when things go wrong. Not all attempts to take sensitive questions ‘out of politics’ by entrusting them to a public body have been successful.⁴

Evolution

The creation of specialised public agencies that are not government departments is not new. In the 18th century, there were innumerable bodies of commissioners created by private Acts, which exercised limited powers for such purposes as police, paving, lighting, turnpikes and local improvements. Through the curtailment of the powers of the Privy Council in the previous century, they were free from administrative control by central government, but in England they were subject to legal control by means of the prerogative writs issued by the Court of King’s Bench.

These bodies were essentially local in character. In the period of social and administrative reform that followed the reform of Parliament in 1832, experiments were made in setting up national agencies with powers covering the whole country. One of the most notable experiments occurred in 1834 when the English Poor Law was reformed. The Poor Law Commissioners enforced strict central control on the local administration of poor relief, by means of rules, orders and inspection. Yet no minister answered for the commissioners in Parliament, to defend them against political attack or to control their decisions.

³ Gangmasters (Licensing) Act 2004.

⁴ As with financial relief for the unemployed in 1934: see Millett, *The Unemployment Assistance Board*.

In 1847, the experiment gave way to a system based on a minister responsible to Parliament but similar experiments occurred, such as the General Board of Health in 1848. Administration by the board system was much used in Scotland and in Ireland. By the late 19th century, it was accepted that the vesting of public powers in departments of central government had the great constitutional advantage of securing political control through ministerial responsibility.⁵ As Chester remarked, the House of Commons has never found a way of making anybody other than ministers accountable to it.⁶

In the 20th century, new public bodies were created as the state took wide-ranging powers to intervene more extensively in social and economic affairs, to improve the general well being of the population. Steps were taken to regulate working conditions (and to create trade boards and wages councils for this purpose); new national insurance and social security systems were created (with different boards and commissions established to manage the various schemes); and a national health service was set up (along with various bodies to administer its operation).

Nationalisation

In addition to the foregoing, the Labour governments from 1945 onwards adopted a programme of nationalisation of many key areas of the economy, leading to the creation of public corporations like the National Coal Board and British Rail to administer the industries taken into public ownership. In theory, the tasks entrusted to public boards and agencies could be undertaken directly by civil servants working in government departments, although this would mean a vast increase in the civil service and the adoption by it of new methods.

Indeed as we have already seen, postal and telephone services were for very many years provided by the Post Office as a government department.⁷ But the existence of public corporations affords strong evidence for the view that departmental administration of major industries was thought likely to be less efficient and flexible than management by a public board. The post-war nationalisation legislation sought to apply the concept of the public corporation associated with the late Herbert Morrison.⁸

The latter aimed at a combination of vigorous and efficient business management with an appropriate measure of public control and accountability. Civil service methods, Treasury control and complete accountability to Parliament were considered unsuited to the successful running of a large industry. In the 1945–51 period, when major industries and services were acquired by the state, they were thus entrusted not to departments but to statutory boards.

Under these arrangements, the relevant ministers were given important powers relating to the boards but were not expected to become concerned with day-to-day management of the industries. Similar reasoning led to the creation of public corporations to take over certain activities formerly performed by departments, for example the Atomic Energy Authority (1954) and the British Airports Authority (1965). Such arrangements presented problems of parliamentary accountability of the boards, one solution being the creation of select committees for the purpose.

⁵ See also ch 5 above and, for rise and fall of the board system, F M G Willson (1955) 33 *Public Administration* 43, and Parris, *Constitutional Bureaucracy*, ch 3.

⁶ D N Chester (1979) 57 *Public Administration* 51, 54.

⁷ See now Postal Services Act 2011.

⁸ See Morrison, *Government and Parliament*, ch 12.

Privatisation

Conservative governments after 1979 operated a policy of privatisation of public corporations, whereby the ownership of many state-controlled enterprises was transferred to the private sector. In an important report by the Public Accounts Committee published in 1998, it was stated that:

During that time over 150 United Kingdom businesses have been privatised, ranging from major undertakings with billions of pounds to small loss-making enterprises. In the process, the proportion of Gross Domestic Product accounted for by state-owned businesses has fallen from 11 per cent to 2 per cent. These privatisations have shared a number of overall objectives, including improving the efficiency of the business concerned, promoting the development of a market economy, reducing state debt and increasing state revenues.⁹

The privatisation programme took several forms, including the denationalisation and break up of state corporations such as British Gas, British Telecom, British Airways, British Coal and British Rail,¹⁰ the disposal of shares in companies previously owned by the government (such as Jaguar, Rolls-Royce, Amersham International, British Nuclear Fuels Ltd, and Cable and Wireless),¹¹ and the sale of government holdings in companies such as British Petroleum.¹² Two hotly contested privatisations, for different reasons, were of the water supply industry in England and Wales, and the Trustee Savings Bank.¹³

Two highly symbolic privatisations were those of the coal industry and the railways, both of which had been nationalised by the post-war Labour government. Yet this programme of privatisation has not removed the need for public bodies, but to the emergence of different kinds of bodies to regulate rather than manage the public utilities. These include the Gas and Electricity Markets Authority established under the Utilities Act 2000, with similar bodies having been created by the legislation privatising telecommunications, water, and the railways, as well as in a number of other public services.

It is important to emphasise, however, that public bodies do not exist simply to manage public utilities or public services. And as already pointed out, it is important also to emphasise that public bodies do not only perform a regulatory function. Changing ideas about the role of the state partially dictate the changing role of such bodies and the nature of the activities in which they are engaged. Despite the apparent ‘hollowing out’ of the state since the 1980s, the role of public bodies remains and is calculated always to be wide ranging and far reaching. Even free markets need regulatory bodies and government supervision.

B. Categories of public body

Non-ministerial departments (NMDs)

Public bodies take a number of forms, beginning now with NMDs. According to the Cabinet Office, there were 23 NMDs in 2013, in contrast to 24 ministerial departments.¹⁴ These

⁹ HC 992 (1997–8).

¹⁰ See Gas Act 1986, Civil Aviation Act 1980, Telecommunications Act 1984, Railways Act 1993 and Coal Industry Act 1994. Other major privatisations included water (Water Act 1989) and electricity (Electricity Act 1989).

¹¹ See Atomic Energy (Miscellaneous Provisions) Act 1981 (Amersham, BNFL); British Telecommunications Act 1981, s 79 (Cable and Wireless). See also Atomic Energy Authority Act 1995. For the developments in the motor industry, see A A McLaughlin and W A Maloney (1996) 74 *Public Administration* 435.

¹² On this form of state intervention (the mixed enterprise), see pp 309–10 of the 10th edn of this book.

¹³ See *Ross v Lord Advocate* [1986] 1 WLR 1077; and *M Percival* (1987) 50 MLR 231.

¹⁴ <https://www.gov.uk/government/organisations>.

NMDs are at best a constitutional curiosity,¹⁵ and as their name suggests NMDs are not led by a minister responsible to Parliament for the department's activities, but in the case of the National Crime Agency, for example, by a Director General appointed by the Home Secretary.¹⁶ NMD staff are civil servants, and NMDs differ from executive agencies to the extent that they are independent departments rather than agencies with an arm's length relationship with departments.¹⁷ As discussed below, there may not be much to distinguish an NMD from a non-departmental public body.¹⁸

The 23 NMDs include the utility regulators, such as, the Gas and Electricity Markets Authority and the Water Services Regulation Authority (OFWAT), considered more fully below. But they also include other important bodies encountered at various points in the book, such as the CPS (chapter 13) and the National Crime Agency (chapter 15), as well as HMRC, the National Archives, and the UK Statistics Authority, and agencies like the Food Standards Agency.

It appears that the main consequences of being a NMD is that the body in question is directly accountable to Parliament. But it is not clear that this amounts to very much as a distinctive feature of such bodies in the absence of a ministerial head. NMDs appear in practice to be accountable to Parliament in much the same way as NDPBs sponsored by government departments.¹⁹

NMDs are creatures of statute, though the statutes creating them do not make use of the term 'non-ministerial department', which appears to be an administrative rather than a legal designation. There may be legal clues as to this status in the legislation establishing these bodies, but if so they are deeply buried, for there may be little formally to distinguish an NMD from an NDPB (on which see below).²⁰ To this end, a comparison of two bodies operating in two quite different fields is quite striking. Thus while both ACAS (in the field of industrial relations) and the NCA (in the field of policing) are appointed by ministers, exercise their functions on behalf of the Crown,²¹ and are staffed by civil servants, the former is classified as an NDPB and the latter as an NMD.

Just to add to the confusion, an NDPB may also be regarded as if it were a government department for the purposes of the Crown Proceedings Act 1947.²² Otherwise, NMD members will normally be expressly disqualified from membership of the House of Commons, as in the case for example of the members of the Food Standards Agency and the National Crime Agency.²³ In this sense NMDs differ from ministerial departments at least to the extent that the minister must by convention be a member of Parliament (even if departmental staff as

¹⁵ J Rutter, *The Strange Case of Non Ministerial Departments* (Institute for Government, 2013) (describing NMDs as a 'oxymoronic anomaly').

¹⁶ Crime and Courts Act 2013, Sch 1.

¹⁷ As already pointed out, they continue to be created, as in the case of the National Crime Agency: Crime and Courts Act 2013.

¹⁸ Two recently created NMDs – the National Crime Agency and the Competition and Markets Authority – were created to replace pre-existing NDPBs (the Serious Organised Crime Agency, and the Competition Commission respectively, though the Competition and Markets Authority also inherited work previously performed by the Office of Fair Trading, also an NMD).

¹⁹ From the Food Standards Agency website: 'Although the FSA is a government department, it works at "arm's length" from government because it doesn't report to a specific minister and is free to publish any advice it issues. We are, however, accountable to Parliament through health ministers, and to the devolved administrations in Scotland, Wales and Northern Ireland for our activities within their areas'.

²⁰ The main clue will be that the NMD has its own estimate voted by Parliament annually.

²¹ Crime and Courts Act 2013, Sch 1(1).

²² Health and Safety at Work Act 1974, s 10 (Health and Safety Executive).

²³ Food Standards Act 1999, Sch 1, para 7. Similar provision is made in the case of other NMDs. See generally ch 7 above.

civil servants are disqualified). It is an open question, however, whether NMDs really differ from NDPBs in this respect, given that at least in some – if not all – cases there is a similar disqualification.²⁴

Non-departmental public bodies (NDPBs)

There is no legal definition of an NDPB. For administrative purposes, however, an NDPB is defined as a ‘body which has a role in the processes of national government, but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm’s length from ministers’.²⁵ According to the Cabinet Office an NDPB is distinguished from an executive agency, which is ‘a part of a government department which enables executive functions within government to be carried out by a well-defined business unit with a clear focus on delivering specified outputs within a framework of accountability to ministers’.²⁶

Despite their role in national government, it is said to be atypical for NDPBs to be ‘part of the Crown’, and to be usual for them to have their own legal personality.²⁷ In addition, it may be expressly stated that members of the NDPB in question are not to be ‘regarded as the servant or agent of the Crown’.²⁸ Yet although the NDPB in question may be a ‘body corporate’, in the case of ACAS it is one that is stated expressly to perform its functions ‘on behalf of the Crown’.²⁹ This is qualified so as not ‘to make [ACAS] subject to directions of any kind from any Minister of the Crown as to the manner in which it is to exercise its functions under any enactment’.³⁰

The Cabinet Office reported in 2013 that there were 497 NDPBs, this by far the largest category of public bodies.³¹ Within this category there were reported to be:

- Executive NDPBs (of which there were 175) are statutory bodies, which carry out administrative, regulatory and executive functions. Examples of such bodies include the Advisory Conciliation and Arbitration Service (ACAS), the Equality and Human Rights Commission, the Competition Commission (as it then was), the Higher Education Funding Council, the Care Quality Commission, and the Independent Police Complaints Commission.
- Advisory NDPBs (of which there were 177) set up to ‘provide independent and expert advice to ministers on particular topics of interest’. Included in this category are the Advisory Committee on Pesticides, the Commission on Human Medicines, the Low Pay Commission, the Fuel Poverty Advisory Group, and the Regulatory Policy Committee.

²⁴ Equality Act 2006, Sch 1. Although there is no statutory disqualification of ACAS council or HSE board members, it is nevertheless difficult to see how membership of these bodies could be performed by someone who was also an MP.

²⁵ Cabinet Office, *Categories of Public Bodies: A Guide for Departments* (2013), p 16.

²⁶ But see the reference by the Health Select Committee to Monitor (a health service NDPB) as ‘independent of government and directly accountable to Parliament’: HC 1431 (2012–12), para 1. See below, pp 317–18.

²⁷ Cabinet Office, *Categories of Public Bodies: A Guide for Departments*, above, p 15.

²⁸ Equality Act 2006, Sch 1, para 42(1)(a) (Equality and Human Rights Commission).

²⁹ Trade Union and Labour Relations (Consolidation) Act 1992, s 247(3). The Health and Safety Executive, also created to exercise functions previously exercised by departments, is also stated to perform its functions on behalf of the Crown: Health and Safety at Work etc. Act 1974, s 10(7).

³⁰ Ibid. See also Equality Act 2006: the minister ‘shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining (a) its activities . . .’ (Sch 1, para 42(3)).

³¹ Cabinet Office, *Public Bodies 2013 – Summary Data* (2014).

In addition to the Executive and Advisory NDPBs, there are also Tribunal NDPBs sponsored by individual departments, with jurisdiction in specialist fields of law. Some of these tribunals deal with important economic and political questions, in some cases raising sensitive human rights questions, and their members may include senior judges, raising questions about why this particular form is adopted for such purposes. Examples from diverse fields include the Central Arbitration Committee, the Competition Appeal Tribunal, the Copyright Tribunal, the Insolvency Practitioners Tribunal, and (even more curiously) the Investigatory Powers Tribunal (on which see chapter 19 below).

Public corporations

Public corporations are a dwindling and motley category of public bodies that in the past included a number of nationally significant institutions, such as the National Coal Board, the British Railways Board, and the British Gas Corporation. Although the category is now greatly diminished in significance, it still includes bodies such as the BBC, Channel 4 and the Audit Commission, and a few more besides. The idea of a public corporation is one that has a historical and political resonance and refers back to the post-war era of nationalisation, from which – perhaps regrettably all political parties wish to distance themselves.

Nevertheless, public corporations still exist, in some – though not all – cases as a creature of statute (the BBC and the BBC World Service being notable exceptions). Public corporations – which are thought to be most appropriate where they can operate commercially – are likely to work at a greater distance from ministers than other public bodies. Thus, the Audit Commission is expressly stated ‘not to be regarded as acting on behalf of the Crown’, while ‘neither the Commission nor its members, officers or servants shall be regarded as Crown servants’.³²

But distance does not mean complete autonomy, and the distinction from NDPBs may not be easy to draw. The Audit Commission Act 1998 provides that the ‘Secretary of State may give the Commission directions as to the discharge of its functions and the Commission shall give effect to any such directions’.³³ The Commission must also provide the Secretary of State with ‘such information relating to the discharge of its functions as he may require’, and for that purpose the Commission must permit ‘any person authorised by him to inspect and make copies of any accounts or other documents of the Commission’.³⁴

It is notable that when a number of failing banks had to be rescued by being taken into public ownership during the banking crisis in 2008, no attempt was made to use the classic public corporation model for this purpose. Thus, when the (Labour) government stepped in with a financial rescue package, it did so by securing shareholdings in the banks in question. These shareholdings were then managed on behalf of the ‘taxpayer as shareholder’ by UK Financial Investments Ltd, a company established under the Companies Act, with the Treasury being the sole shareholder.

Parliamentary bodies

A new category of public body to have emerged in recent years has been referred to as parliamentary bodies, by virtue of the fact that the bodies in question are not only created by Parliament but are also accountable directly to Parliament rather than a minister (though so too are NMDs). These include the Parliamentary Commissioner for Administration, the National Audit Office, the Electoral Commission, and the Independent Parliamentary

³² Audit Commission Act 1998, Sch 1, para 2.

³³ Ibid, para 3(1).

³⁴ Ibid, para 3(2). But ‘no direction shall be given by the Secretary of State and no information shall be required by him under this paragraph in respect of any particular body subject to audit’ (ibid, para 3(3)).

Standards Authority. There is also a separate category of independent office holders, such as the Commissioner for Public Appointments considered below.

Reinforcing the sense that they appear to be designed to be independent of the government of the day, these bodies are not to be regarded as servants or agents of the Crown, or as enjoying any status, immunity or privileges of the Crown. Nor are their staff, who are to be appointed on terms determined by the body in question, though in the case of the Electoral Commission, ‘the Commission shall have regard to the desirability of keeping the remuneration and other terms and conditions of employment of its staff broadly in line with those applying to persons employed in the civil service of the State’.³⁵

A distinguishing feature of these bodies is that they are directly responsible to Parliament, and not indirectly responsible through an appropriate minister as appears to be the case in relation to NMDs and NDPBs, as explained above. In the case of the Electoral Commission this responsibility is via the cross-party Speaker’s Committee,³⁶ which has important responsibilities for the budget of the Commission. Although it is inevitable that ministers should have a say in the appointment of Commissioners, their influence is limited by a statutory duty to consult the leaders of other political parties.³⁷

Similar arrangements apply in relation to the National Audit Office,³⁸ with slight variations (there is no Speaker’s committee). The NAO is not the servant or agent of the Crown, nor are its employees, though there is a requirement to have regard to the desirability of maintaining pay parity with the civil service. The Prime Minister nominates the chair of the NAO, and in doing so must have the agreement of the chair of the Public Accounts Committee and thereafter the approval of the House of Commons. Other members are appointed by and may be removed by the Public Accounts Commission.³⁹

C. Status, functions and powers

Status

Except where statutes provide otherwise, departments of central government share in the legal status of the Crown and may benefit from certain privileges and immunities peculiar to the Crown.⁴⁰ But local authorities, statutory bodies set up for local commercial purposes and privately owned companies do not benefit from Crown status.⁴¹ Into which category do other public bodies fall?

In *Tamlin v Hannaford*, it had to be decided whether, after nationalisation of the railways, a dwelling-house owned by the British Transport Commission was subject to the Rent Restriction Acts or was exempted from them by virtue of being Crown property. After examining the Transport Act 1947, the Court of Appeal rejected the view that the Commission was the servant or agent of the Crown, even though the Ministry of Transport had wide statutory powers of control over the Commission:

³⁵ Political Parties, Elections and Referendums Act 2000, Sch 1, para 11(5).

³⁶ *Ibid*, s 2.

³⁷ *Ibid*, s 3.

³⁸ The NAO has responsibility for the scrutiny of government finances on behalf of Parliament.

³⁹ Budget Responsibility and National Audit Act 2011, Sch 2. The Public Accounts Commission is a cross-party committee of senior MPs established by the National Audit Act 1983 with responsibility to keep the work of the NAO under review.

⁴⁰ Chs 10 D and 26 D.

⁴¹ *Mersey Docks and Harbour Trustees v Gibbs* (1866) LR 1 HL 93; ch 26 A.

'In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants and its property is not Crown property . . . It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.'⁴²

It would seem that this decision would govern the status of other public corporations, unless they are expressly made to act by and on behalf of the Crown or are directly placed under a minister of the Crown. In *Pfizer Corp v Ministry of Health*,⁴³ it was held that, since a hospital board was acting on behalf of the then Minister of Health, the treatment of patients in NHS hospitals was a government function and thus the use of drugs was use 'for the services of the Crown'; the Crown could therefore make use of its special rights under patent law for importing drugs.⁴⁴ NHS immunities were later removed by statute.⁴⁵

It is not clear how helpful the distinctions drawn in the *Tamlin* case would be today. If we take the National Crime Agency as an example, as an NMD it is notionally an independent body, but the Home Secretary sets its strategic priorities, though it is unlikely that its officers with various police powers are civil servants.⁴⁶ In the absence of legislation putting the question beyond doubt, is it part of the Crown or not following the *Tamlin* test? For this reason the modern practice of making clear in statute whether the body in question is part of the Crown or not is a good one.

But if the function of the body and its relationship to government may not now provide a clear answer to questions of this kind, nor will the status of the body in question. Although it might be expected that NMDs would be treated as part of the Crown, there is often very little to distinguish an NMD from an NDPB. Yet while it might be assumed from the nature of their activities that the latter would invariably be part of the Crown, this is not normally the government's intention, to clarify which legislation is required in the way outlined above. As we have seen, that legislation does not always make consistent provision for NDPBs.

Policy-making and regulatory functions

As suggested in the introduction to this chapter, public bodies can be said to be set up to perform a number of different functions. The first is **policy-making**, with the Bank of England being perhaps the best known example, with a number of responsibilities that have evolved over its long history.⁴⁷ These include acting as banker to the government and to the clearing banks; the implementation of monetary policy; and the issue of currency.⁴⁸ A major initiative introduced in 1997 was to give the Bank operational responsibility to set interest rates.⁴⁹

⁴² [1950] 1 KB 18, 24 (Denning LJ).

⁴³ [1965] AC 512.

⁴⁴ By contrast, in the BBC were held not to be entitled to benefit from the Crown's immunity from taxation in *BBC v Johns* [1965] Ch 32, since broadcasting had not become a function of the central government. It was strange that financial considerations led the BBC in this case to argue its close dependence upon the Crown and central government, whereas usually the BBC is anxious to stress its independence.

⁴⁵ National Health Service and Community Care Act 1990.

⁴⁶ Crime and Courts Act 2013, Sch 1.

⁴⁷ The government previously classified the Bank of England as a public corporation. It is now treated *sui generis* as a 'central bank'.

⁴⁸ Responsibilities for the management of government debt were transferred to the Treasury (HC Deb, 20 May 1997, col 509) and for the supervision of other banks and financial institutions to the Financial Services Authority (Bank of England Act 1998, s 21).

⁴⁹ HC Deb, 6 May 1997, col 509; also HC Deb, 20 May 1997, col 507 et seq.

This was done ‘to ensure that decision-making on monetary policy was more effective, open, accountable, and free from short-term political manipulation’.⁵⁰

Under the Bank of England Act 1998 the Bank is responsible for monetary policy within the objectives set out in the Act: these are to maintain price stability and to support the economic policy of the government, ‘including its objectives for growth and employment’ (s 11). It is the specific responsibility of the Monetary Policy Committee of the Bank of England to formulate monetary policy. The committee consists of the governor and the deputy governors, two senior Bank officials with responsibility for monetary policy and market operations, but also ‘four other expert members appointed from outside the Bank by the government’.⁵¹

Apart from policy-making, public bodies have a prominent **regulatory role**.⁵² The key to the regulatory model initially adopted is the idea of ‘a single independent regulator for each industry, operating without undue bureaucracy and supported by a small staff’, the government rejecting regulatory systems found overseas, ‘in favour of a quicker and less bureaucratic system of regulation’.⁵³ This model was strongly criticised by the Comptroller and Auditor General, who raised questions about ‘the over-concentration of power in one pair of hands’, leading him to consider whether there might be a case for ‘possible alternatives to the current system of industry-specific regulation by single regulators’.

The gas and electricity regulators – OFGAS and OFFER – were merged in 1999, to become OFGEM (the Office of Gas and Electricity Markets), which operates under the direction of the Gas and Electricity Markets Authority.⁵⁴ In taking these steps, the government explained that the task of regulation was becoming increasingly complex, with the interests of what are now hundreds of licensees to be considered and balanced. It thus accepted that regulatory responsibilities can best be undertaken by a regulatory authority, to ensure that regulatory decisions are ‘less dependent on the personality of a single regulator’, thereby ensuring in turn greater continuity and consistency in decision making.⁵⁵

Supervisory and advisory functions

A different role performed by public bodies is in **supervising various regulatory regimes**, usually to ensure that minimum standards are followed in the area within which the body in question operates. The Information Commissioner’s Office is a good example, with responsibility for the Data Protection Act 1998 and the Freedom of Information Act 2000. Under the former, the Commissioner manages a scheme whereby those who process personal data must register with the ICO in accordance with statutory requirements. The ICO also has power to ensure that data are not unlawfully processed, and to take action against those who are alleged to be acting in breach of the Act.

Another example is the Gangmasters Licensing Authority, which supervises the supply of labour in (mainly food processing) sections of the economy, where workers have been found to be particularly vulnerable to exploitation. The labour suppliers in these sectors (known as gangmasters) must obtain a GLA licence, and in order to do so they must meet various licence conditions relating to wages, health and safety and accommodation for the workers in

⁵⁰ HC Deb, 20 May 1997, col 508 (Mr Gordon Brown).

⁵¹ Ibid. The Treasury has reserve powers to give the Bank directions relating to monetary policy in ‘extreme economic circumstances’ (s 19). The government expected this power to be used ‘rarely, if at all’ (HC Deb, 20 May 1997, col 509).

⁵² Important contributions are Graham, *Regulating Public Utilities*; Prosser, *Laws and the Regulators* and T Prosser, in Jowell and Oliver (eds), above, ch 12, which give a good insight into the scale and scope of regulatory activity in contemporary Britain.

⁵³ A Carlsberg (1992) 37 *New York Law School Law Rev* 285.

⁵⁴ Utilities Act 2000. For background see Cm 3898, 1998; T Prosser (1999) 62 *MLR* 196.

⁵⁵ HL Deb, 4 May 2000, col 1141.

question. It is an offence to operate without a licence, and the GLA enforcement officers have a duty to conduct investigations, as well as wide powers to investigate offences, including powers of arrest (on which see below).⁵⁶

Turning from supervisory to **advisory functions**, it is important to note here that advice in this context has a scale of meanings, from the non-prescriptive (in the sense that it need only to be considered) to the highly prescriptive (in the sense that there is an expectation that it will normally be acted upon). The Low Pay Commission is an advisory body operating at the higher end of the scale, with a responsibility under the National Minimum Wage Act 1998 to set the level of the national minimum wage. If the minister decides not to act on the recommendations of the LPC, he or she must report to both Houses of Parliament his or her reasons for doing so.⁵⁷

The LPC is an advisory NDPB, as is the Police Negotiating Board, established by the Police Act 1996, which among other things makes provision for the Home Secretary to regulate police and conditions of service by regulations.⁵⁸ Before making regulations, the minister must consider the recommendations of the PNB, which consists of representatives of local police authorities and of all ranks of the police.⁵⁹ It has been the normal practice of successive Home Secretaries to accept these recommendations (this was ‘advice’ at the strong end of the scale). But in 2007 the then Labour Home Secretary carefully considered the recommendations but refused to follow them, and her decision was held not to be unlawful.⁶⁰

Powers

It has already been suggested that some public bodies have significant powers in terms of the functions they perform. Some perform multiple roles, of what might be referred to as roles of a legislative, executive or judicial (or quasi-judicial nature), and they are equipped with the capacity to perform these different roles. Among NMDs this is particularly true of the utility regulators, with the Gas and Electricity Markets Authority having the power to make statutory instruments (a legislative power), to issue licences, vary the terms of licences and regulate the activities of licence holders (an executive power), and deal with complaints from consumers (a quasi-judicial power).

Under the Utilities Act 2000, the regulator also has the power to impose financial penalties on licence holders who have breached a licence condition, a power which has given rise to questions about compliance with art 6 of the ECHR (which guarantees the right to a fair trial in the determination of civil rights and obligations):

How can the regulator, who determines the penalty, be an independent and impartial tribunal? The regulator decides whether he will pursue the licensee. He assesses whether the licensee has broken the terms of his licence. He then decides what the penalty is. He is an individual appointed by the executive . . . he is legislator, prosecutor and judge, all rolled into one.⁶¹

There are also examples of NDPBs having a wide range of powers of this kind, though perhaps not on this scale.⁶²

⁵⁶ Gangmasters (Licensing) Act 2004.

⁵⁷ National Minimum Wage 1998, s 1(4).

⁵⁸ Police Act 1996, s 50.

⁵⁹ *Ibid*, s 61.

⁶⁰ See *Staff Side of Police Negotiating Board v Home Secretary* [2008] EWHC 1173 (Admin).

⁶¹ HL Deb, 4 May 2000, col 1171 (Lord Kingsland). There is, however, a right of appeal against the imposition of a penalty and against the amount of the penalty: Gas Act 1986, s 30E, as inserted by Utilities Act 2000, s 95.

⁶² The Certification Officer for Trade Unions and Employers’ Associations is perhaps an example of such a body with a blend of ‘legislative’, executive and quasi-judicial functions: see Collins, Ewing and McColgan, *Labour Law*, ch 13.

Public bodies are curious institutions not only for the blend of powers they may have, but also for the nature of some of their powers. Thus, as an NMD the National Crime Agency has powers that perhaps no government department – ministerial or otherwise – ought to have. Notable in this respect is the power of the Director General of the NCA to designate NCA officers as having the powers and privileges of a constable; an officer of Revenue and Customs; and/or an immigration officer.⁶³ It is then provided that

If an NCA officer (other than the Director General) is designated as a person having the powers and privileges of a constable, the NCA officer has –

- (a) in England and Wales and the adjacent United Kingdom waters, all the powers and privileges of an English and Welsh constable;
- (b) in Scotland and the adjacent United Kingdom waters, all the powers and privileges of a Scottish constable;
- (c) in Northern Ireland and the adjacent United Kingdom waters, all the powers and privileges of a Northern Ireland constable; and
- (d) outside the United Kingdom and the United Kingdom waters, all the powers and privileges of a constable that are exercisable overseas.⁶⁴

But it is not only NMDs that have powers of this kind. NDPBs with enforcement functions are also likely to have extensive powers, as in the case of the Gangmasters Licensing Authority, which is authorised to appoint enforcement and compliance officers respectively to ensure the Act is followed. These officers have wide powers ‘for the purposes of the Act’ to demand (i) the production of documents (including access to computers), (ii) explanations about the documents, (iii) the provision of information, as well as (iv) to enter private property without a warrant. Additional powers authorise GLA officers to apply for search warrants to enter and search private property where unlicensed activities are suspected to be taking place.⁶⁵

D. Appointments to public bodies

Committee on Standards in Public Life

The members of public bodies exercise a government function, yet are appointed by ministers or civil servants rather than elected. Not surprisingly, political patronage of this kind has given rise to concern and was fully addressed by the Committee on Standards in Public Life (CSPL),⁶⁶ itself an advisory NDPB established in 1995. The first report of the Committee is famous for having developed seven principles for the conduct of public life (selflessness, integrity, objectivity, accountability, openness, honesty and leadership).⁶⁷

Also in its first report the CSPL found no evidence of political bias in public appointments and rejected calls for an impartial and independent body to be given the responsibility

⁶³ Crime and Courts Act 2013, s 10.

⁶⁴ Ibid, Sch 5, para 10. Tucked away in the Crime and Courts Act 2013, Sch 5 are provisions making it an offence to resist, willfully obstruct or assault a designated NCA officer: *ibid*, Sch 5, paras 21–24.

⁶⁵ Gangmasters (Licensing) Act 2004, ss 15–17. For similar provisions in a wholly different field, see Health and Social Care Act 2008, ss 62–65 (Care Quality Commission). Workplace health and safety inspectors have also long had powers of entry.

⁶⁶ Cm 2850-I, 1995. One complaint was that public bodies were ceasing to be representative and were increasingly dominated by business people.

⁶⁷ These are the so-called ‘Nolan principles’ after the Committee’s first chair (Lord Nolan).

for making appointments, recommending that ‘ultimate responsibility for appointments should remain with ministers’. But it did not follow that ministers ‘should act with unfettered discretion’, and it was proposed that existing procedures should be ‘substantially improved’ in order to ensure that they were ‘sufficiently robust’.

The first of two safeguards proposed by the CSPL (or Nolan Committee as it was sometimes called) was that appointments should include the principle of appointment on merit; the principle that ‘selection on merit should take account of the need to appoint boards which include a balance of skills and backgrounds’; and that appointments should be made only after advice from a panel or committee which included independent members, who would normally account for at least one-third of the membership.

Apart from ‘the establishment of clear published principles governing selections for appointment’, the second safeguard against abuse proposed by Nolan was the more effective external scrutiny of appointments. This latter safeguard was to be achieved principally by the appointment of a Commissioner for Public Appointments to ‘monitor, regulate, and approve departmental appointments procedures’ and to draw up a Code of Practice for public appointments procedures.

Commissioner for Public Appointments

These recommendations were accepted by the government of the day, and a Commissioner for Public Appointments was appointed (under the prerogative rather than statute) by an Order in Council in November 1995. The role of the Commissioner was to oversee the way public appointments are made to the executive departmental bodies, a term defined then to include only 274 NDPBs and executive NHS bodies. The jurisdiction of the Commissioner has since been extended and now covers NDPBs, health bodies, public corporations, public broadcasting authorities and utility regulators. Although there are still a number of exempt posts, it is thought that the OPCA process now covers tens of thousands of positions, over 1,000 vacancies being filled annually by 2011.

In performing his role under what is now the Public Appointments Order in Council 2013, the Commissioner must maintain ‘the principle of selection on merit in relation to public appointments’, though he is to do so in a way best calculated to promote ‘economy, efficiency, effectiveness, diversity, and equality of opportunity in the procedures for making public appointments’.⁶⁸ The Commissioner is also required to ‘prescribe and publish a code of practice on the interpretation and application’ of the principle of appointment on merit and is expressly empowered to adopt and publish from time to time such additional guidance to appointing authorities as she thinks fit.⁶⁹

In order to ensure that any procedures are duly followed, the Commissioner must ‘audit appointment policies and practices pursued by appointing authorities to establish whether the code of practice is being observed’,⁷⁰ and OPCA now engages 14 independent public appointment assessors to chair some appointments processes and to advise departments about others.⁷¹ The Commissioner is also empowered to ‘conduct an inquiry’ into the policies and practices followed by individual appointing authorities, and for this and other purposes the authority in question must provide ‘any information the Commissioner requires’.⁷²

⁶⁸ Public Appointments Order in Council 2013, art 3(1). On the issue of diversity in public appointments, see L Barmes [2002] PL 606.

⁶⁹ Public Appointments Order in Council 2013, art 3(2).

⁷⁰ *Ibid*, art 3(3).

⁷¹ See Commissioner for Public Appointments, *Annual Report and Accounts 2012–13* (2013).

⁷² Public Appointments Order in Council 2013, art 3(7).

The Commissioner must publish an annual report giving an account of his auditing activity. A review of the system initiated by the Commissioner in 2011 led to a rationalising and streamlining of the process. The former was needed because of the erratic way in which some bodies were covered by the process while others were not. The latter was needed because the system had been allowed to become much too complex, cumbersome and bureaucratic, without leading to significant improvements in some departments.⁷³ In the words of the Commissioner in 2011, the ‘focus on process and prevention of abuse’ had ‘perhaps inevitably resulted in a heavily regulated and process-driven system’.⁷⁴

Code of Practice

The Code of Practice (now required by the Public Appointments Order in Council 2013) was rewritten in 2012, and replaces an earlier version drafted under the Public Appointments Order in Council 2002. In the process of revision, the Code of Practice has been reduced in size from 126 to eight pages, an initiative of the new Commissioner applauded by the Public Administration Select Committee.⁷⁵ The new code now sets out the general principles to be followed in the making of public appointments.

The Code emphasises three principles, while recognising – and this is important – that ‘the ultimate responsibility for appointment rests with ministers’. The overriding principle is ‘selection on merit’, based on a choice of high quality candidates drawn from a strong and diverse field. This is followed by ‘fairness’, in the sense that ‘selection processes must be objective, impartial and applied consistently to all candidates’; and ‘openness’ in the sense that ‘information about the requirements of the post and the selection process must be publicly available’. Public advertising must be undertaken in such a way as to attract a strong and diverse field of suitable candidates.

It is the responsibility of departments to design appointments procedures consistently with these principles, though in some cases (senior appointments) the panel established to oversee the process must be chaired by an assessor appointed by the Commissioner. Otherwise, the panel will be chaired by a departmental official, and it is the responsibility of the panel in all cases to ensure that various legal obligations relating to appointment are met (notably those under the Equality Act 2010) and that successful candidates can meet the seven principles of public life, first established by the Committee on Standards in Public Life (the so-called ‘Nolan principles’).

Complaints about public appointments conducted in breach of the code may be made to the Commissioner,⁷⁶ though complaints should first be addressed to the department concerned, which is responsible for having in place effective complaints handling procedures. Quite what would happen if an appointment was made in breach of the code is unclear: even if it was in breach of the law, it would be highly unusual for an appointment to be annulled without the risk of legal liability to the successful appointee. The Commissioner is subject to scrutiny by the Public Administration Select Committee,⁷⁷ as well as the Committee on Standards in Public Life.⁷⁸

⁷³ OCPA, *Review of Public Appointments Regulation – A Consultation* (2011).

⁷⁴ *Ibid.*, p 9.

⁷⁵ HC 1389 (2010–12).

⁷⁶ See Commissioner for Public Appointments, Ninth Report 2003–2004 (2004), p 3: four departments routinely showed shortlists privately to ministers during the appointment process. The Commissioner expressed concern that the unrecorded involvement of a minister at such a late stage in the appointments process could be construed as ‘political interference or personal preference’.

⁷⁷ HC 165-I (2002–3); HC 122 (2006–07); HC 152 (2007–08); HC 1389 (2010–12).

⁷⁸ See Cm 6704, 2005; and Cm 6723, 2005 (government’s response).

Political activists and ministerial involvement

A particularly important issue in dealing with the potential problem of political patronage and cronyism is the political background of individual applicants. This is a tricky question, because although there may be a need to stop the abuse of patronage by filling public bodies with political placemen, it is also the case that individuals should not be denied the opportunity to serve on public bodies by virtue of their political views, while there are also cases where the nature of the appointment is such that it requires someone with a partisan political background (as with the political members of the Electoral Commission or the CSPL).

The solution adopted in the current code of practice is that political activity is declared ‘in itself’ not to be a bar to appointment. However, candidates are required to declare ‘any significant political activity (which includes holding office, public speaking, making a recordable donation, or candidature for election) which they have undertaken in the last five years’. There should also be transparency after appointment in the sense that details of the successful candidate’s declared political activity must be published. Recent annual reports by the Commissioner have revealed a decline in the number of applicants declaring political activity.

The other important question to arise relates to ministerial involvement in the appointments process. Here a case could be made that the Code provides too much scope for ministerial involvement, the ultimate responsibility of the minister being such that he or she must be:

- involved at the beginning of the competition, when they must be asked to agree the selection process, selection criteria and publicity strategy and to suggest potential candidates to be invited to apply;
- kept in touch with progress of the competition throughout, including, if they wish, being provided with information about the expertise, experience and skills of the candidates; and
- at the end of the process, given a choice of candidates assessed by the panel to be appointable, unless only one candidate is found by the panel to be appointable, in which case that candidate should be put to the minister.

This is not the only scope for ministerial engagement with the appointment process in individual cases. In addition to the foregoing the minister may be given an opportunity ‘at each stage of the competition’ to convey to the panel ‘views about the expertise, experience and skills of the candidates’. The minister may also have an opportunity before an appointment is made to speak to each of the candidates identified by the appointment panel as being appointable. It is expressly provided, however, that the minister ‘must not add or remove candidates from the long or short list, sit on the panel, or appoint a candidate not assessed as appointable by the panel’.⁷⁹

⁷⁹ By a separate initiative, some senior appointments to public bodies may now be subject to scrutiny by select committees: Cm 7170, 2007, pp 28–9. See for example, HC 152 (2007–08); also HC 119 (2008–09) (pre-appointment hearing by Business Innovation and Skills, and Culture, Media and Sport committees sitting jointly, relating to chairman of OFCOM). This is an important part of the work of many select committees, and provision is made in the Code of Practice to ensure that appointments that go through the OCPA process do not run aground before select committees.

E. Legality and accountability

Judicial review and NMDs

NMDs are generally created by statute, and they exercise authority on behalf of the Crown. As such there seems to be little doubt that they would be subject to judicial review, and in recent years judicial review proceedings have been initiated against NMCs as diverse as OFWAT (the water regulator) and the UK Statistics Authority, in the latter case unsuccessfully raising important questions relating to Convention rights (especially art 8) in relation to the conduct of the national census.⁸⁰

The role of judicial review has been controversial in relation to the activities of the utility regulators. Questions were raised about the suitability of judicial review, it being questioned whether it was ‘always appropriate’ or ‘a substitute for proper political supervision and well thought-out decision-making procedures’.⁸¹ Other questions related to its effectiveness, on the ground that the courts are unprepared ‘to question the quality of the regulator’s decision or require that the evidence underpinning the decision be examined’.⁸²

In addition, at least one regulator (OFGAS) went to considerable lengths to avoid judicial review by adopting a ‘deliberate policy’ of refusing to give reasons for decisions and by failing to keep adequate records of reasons for decisions (in this case relating to the adoption of a particular price control). This was strongly deprecated by the Public Accounts Committee, which considered it ‘essential that public bodies keep adequate records of the reasons for their decisions, to help ensure the proper conduct of public business and accountability’.⁸³

The utility regulators have wide powers in relation to the utility companies, and the Utilities Act 2000 requires reasons to be given for a wide range of decisions taken by both the Gas and Electricity Markets Authority and the Secretary of State.⁸⁴ There is now an appeal from many of the decisions of the utility regulators to the Competition Appeal Tribunal (a tribunal NDPB in the Department for Business Innovation and Skills), and from the latter tribunal to the Court of Appeal. The CAT also deals with appeals from OFCOM.

Judicial review and NDPBs

The scope for the judicial review of NDPBs might depend on the manner and formality of their creation. Sedley LJ has already raised questions in the Court of Appeal that might apply in the context of legal proceedings against executive agencies, and in particular whether they had sufficient legal personality.⁸⁵ Similar questions could conceivably arise in the case of some NDPBs not created by statute, about which there is often little published information. Where, however, the NDPB is set up by statute, it seems unlikely that there could be any doubt about it being subject to judicial review.⁸⁶

It is true that the founding statute will sometimes provide – as in the case of public corporations⁸⁷ – that the body in question does not act on behalf of the Crown. But this formula

⁸⁰ *R (Thames Water Utilities) Ltd v Water Services Regulation Authority* [2012] EWCA Civ 218; *R (Ali) v Minister for Cabinet Office and Statistics Board* [2012] EWHC 1943 (Admin).

⁸¹ A McHarg [1995] PL 539, at p 550.

⁸² HC 481-iii (1994–5), p 77 (memorandum submitted by National Power plc). For fuller treatment of judicial review in this context, see Graham, pp 68–75.

⁸³ HC 37 (1996–7).

⁸⁴ Utilities Act 2000, s 87, amending Gas Act 1986, s 38A.

⁸⁵ *R (National Association of Health Stores) v Department of Health* [2003] EWCA Civ 3133, para 41.

⁸⁶ *R (JBol) Ltd v Health Protection Agency* [2011] EWCA Civ 1 (Laws LJ).

⁸⁷ On which, see *Charles Roberts and Co Ltd v British Railways Board* 1964] 3 All ER 651. See also *NUM v National Coal Board* [1986] ICR 736.

– used as we have seen in the case of the Equality and Human Rights Commission⁸⁸ – is not used in relation to all NDPBs.⁸⁹ In any event, although this form of words may seek to emphasise distance from ministers, it remains unequivocally the case that an NDPB is a public authority for the purposes of judicial review.⁹⁰ Whether or not the NDPB is subject to review or not will thus depend on what it does and how it does it.

As a result of the nature of their activity, some NDPBs are more likely to be subject to judicial review than others. And because of the manner of their composition and the subject matter they deal with, the courts may be more or less likely to subject the body in question to intense scrutiny. So a Tribunal NDPB like the Central Arbitration Committee is by its activity (the recognition of trade unions by employers) clearly the subject of judicial review, but by virtue of the expertise of its tripartite specialist membership also shown a measure of deference by the High Court.⁹¹

Rather different considerations applied to the Serious Organised Crime Agency, which was an NDPB (unlike the National Crime Agency by which it was replaced), which had the power to apply for a search warrant, and ‘for these purposes [had] identical powers to those of the police’.⁹² It was held in *Cook* that SOCA could not – by virtue of the Police and Criminal Evidence Act 1984 – retain documents that had been obtained as a result of a defective search warrant.⁹³ But in a case acknowledged by the court to be of ‘real importance’, the claimants had no right to the return of copies made of the documents.

Select committees and NMDs

Moving from legality to accountability, privatisation has obviously eliminated the need for scrutiny of the former nationalised industries by the select committees. But parliamentary accountability of public bodies continues to be important, and scrutiny has by no means disappeared. Both the Public Accounts Committee and the Trade and Industry Committee (as it then was) have conducted a number of enquiries into the work of the regulators, who have been ‘fairly regular witnesses’ before select committees.⁹⁴

The Public Accounts Committee has been concerned to ensure that OFGEM maintained pressure on the gas companies to reduce their prices,⁹⁵ while the Trade and Industry Committee has in the past examined the annual reports of OFGAS (the former gas regulator)⁹⁶ and investigated the work of OFGAS and more recently OFGEM.⁹⁷ These investigations have dealt with a range of issues, although a constant refrain has related to the role of the regulator in promoting price competition on the one hand, and protecting the ‘fuel poor’, on the other.⁹⁸

The select committees have also examined the work of other regulators, including OFCOM, OFWAT and the Rail Regulator,⁹⁹ while the investigation by the Culture, Media

⁸⁸ Equality Act 2006, Sch 1, para 42(1)(a).

⁸⁹ As in the case of ACAS, on which see *Grunwick Processing Laboratories Ltd v ACAS* [1978] AC 655.

⁹⁰ See ch 25 below.

⁹¹ See *R (BBC) v Central Arbitration Committee* [2003] EWHC 1375 (Admin), [2003] ICR 1542, per Moses J, esp paras 14 and 15.

⁹² *R (Cook) v Serious Organised Crime Agency* [2010] EWHC 2119 (Admin), [2011] 1 WLR 144, para 1 (Leveson LJ).

⁹³ *Ibid.* On PACE 1984, see ch 15 below.

⁹⁴ HC 193-i (1999–2000), p i.

⁹⁵ HC 171 (1999–2000).

⁹⁶ HC 646 (1994–5).

⁹⁷ HC 185 (1993–4); HC 193-i, ii (1999–2000).

⁹⁸ HC 174 (1998–9); HC 171 (1999–2000); HC 193-ii (1999–2000); HC 206 (2003–04); HC 297 (2004–05); and HC 422 (2004–05).

⁹⁹ See HC 407 (2004–05); HC 463 (2003–04); and HC 205 (2003–04).

and Sport Committee into the National Lottery included an examination of the work of the National Lottery Commission.¹⁰⁰ Select committees have proposed important reforms to the regulatory framework,¹⁰¹ and reforms have also been proposed by both witnesses and the committees in relation to the structure and powers of the select committees.¹⁰²

Many important regulatory reforms were implemented by the Utilities Act 2000.¹⁰³ Otherwise the select committees have examined the utility companies themselves, and their practices, as well as the problems of fuel debt and the practice of disconnection by the gas and electricity companies.¹⁰⁴ But proposals by the House of Lords Constitution Committee to enhance scrutiny by establishing a joint committee of both Houses to scrutinise ‘the regulatory state’ failed to secure government support.¹⁰⁵

Select committees and NDPBs

In contrast to the one time intense (though perhaps now declining) scrutiny of the NMDs (and the utility regulators in particular), select committee scrutiny of NDPBs is sporadic, being one of many tasks which fall to select committees. It is true that there have been a number of important select committee inquiries and reports into NDPBs. The Work and Pensions Select Committee inquiry into the Health and Safety NDPBs is both a case in point and a good example of the select committee system working well.¹⁰⁶

But for the most part, there are too many NDPBs, and too many other demands on the time of select committees for this to be a serious form of intense or regular scrutiny. There must be hundreds of NDPBs whose work has never been examined by any select committee, and almost as many whose work is never likely to be. Indeed, since the general election in 2010, the attention of select committees has been not on the work of selected NDPBs but on whether the government has made a case for their abolition under the Public Bodies Act 2011 (below).

Such parliamentary scrutiny that does take place thus tends to be reactive, usually in response to a crisis reported in the press. The extent to which NDPBs are subject to scrutiny depends also on the priorities of the Committee in question. In the case of the Health Select Committee, since 2010 scrutiny appears to have been a high priority, with important accountability work being done in relation to the Care Quality Commission,¹⁰⁷ and other bodies. But there are other committees that appear to have undertaken very little or no scrutiny work of this kind.

The Health Select Committee has initiated a process of annual accountability sessions that includes NDPBs, the Committee unusually aware of the constitutional significance of NDPB

¹⁰⁰ HC 56, 57 (2000–2001). The committee lamented the lack of ‘relevant skills or experience on the part of the Commission’ and questioned whether the body selecting the licence holder should also be the regulator. See also HC 196 (2003–04).

¹⁰¹ HC 481 (1994–5).

¹⁰² HC 646 (1994–5) (calls from gas regulator for separate select committee for the ‘regulation and regulators’); HC 536 (1999–2000) (need for committee to take evidence from previous regulators where incumbent unable to explain decisions of predecessor).

¹⁰³ Notably the duty of the Gas and Electricity Markets Authority to give reasons for decisions: Utilities Act 2000, s 87.

¹⁰⁴ HC 297-I (2004–05).

¹⁰⁵ HL Paper 68 (2003–04), and for the government’s response see HL Paper 150 (2003–04). It was also proposed that ‘select committees consider expanding their terms of reference to include a requirement routinely to consider and react to regulators’ annual reports, and monitor the use of resources. These activities would be in addition to the *ad hoc* inquiries they undertake from time to time’.

¹⁰⁶ HC 246 (2007–08).

¹⁰⁷ HC 761 (2013–14) – a good example of the select committee system. See also HC 7779 (2010–12) – scrutiny of the Care Quality Commission by the Public Accounts Committee.

scrutiny, drawing attention to one NDPB in its sphere as being ‘independent of government and directly accountable to Parliament’.¹⁰⁸ Although the Health Select Committee’s model is a good one for other committees to follow, it is nevertheless unclear how far effective annual scrutiny can go: it will draw in some but not all NDPBs (as well as NMDs and executive agencies). Nor is it realistic to expect select committee to be able to provide much more.

F. Reform

Public Bodies Act 2011

On assuming office in 2010 the Coalition government embarked on a programme to overhaul the number of public bodies operating in the United Kingdom, starting with the presumption that ‘if a public function is needed then it should be undertaken by a body that is democratically accountable at either national or local level’.¹⁰⁹ With this in mind, the government concluded that ‘a body should only exist at arm’s length from government if it performs a technical function; its activities require political impartiality; or it needs to act independently to establish facts’.¹¹⁰

As a result, a review of all NDPBs, as well as some NMDs and public corporations led to proposals to reduce the number of public bodies from what was said then to exceed over 900 such bodies, with 200 to be abolished, and 170 to be merged into fewer than 80, leading eventually to a total reduction of about 300. Powers to enable this to be done quickly were taken in the Public Bodies Act 2011, in cases where change could only take place as a result of legislation because the bodies in question had been created by statute.

The 2011 Act gives remarkable powers to ministers to abolish by order any of the 34 bodies and/or categories of bodies specified in Schedule 1 of the Act (s 1), while power was also given by order to merge groups of bodies specified in Schedule 2 (such as the DPP and the Director of Revenue and Customs Protections) (s 2). In addition, power was given in sections 3 and 4 to modify by order the constitutional and/or funding arrangements of other groups of bodies listed in Schedules 3 and 4, and in s 5 to modify the functions of a number of bodies listed in Schedule 5.

Some bodies – including the Equality and Human Rights Commission and the Administrative Justice and Tribunals Council – appeared in several Schedules, thereby giving the minister wide powers in terms of how to deal with them. The Equality and Human Rights Commission could have its constitutional arrangements, its funding arrangements and its functions modified, and the same was true of the Administrative Justice and Tribunals Council, which could also be abolished, as a body falling within Schedule 2, as well as Schedules 3–5.

Conditions and procedures

Before these powers could be exercised, however, the minister had to ‘consider’ (a very weak standard doubtless to protect against judicial review) that the order would serve the purpose of improving the exercise of public functions, having regard to efficiency, effectiveness, economy, and securing appropriate accountability to ministers (s 8(1)). All these conditions must be met, and the minister would doubtless be required to have reasonable grounds to

¹⁰⁸ HC 1431 (2010–12), para 1. Monitor is a regulatory body in the health service.

¹⁰⁹ Cabinet Office, *Public Bodies Reform* (2013).

¹¹⁰ *Ibid.*

consider that they were met in any particular case.¹¹¹ It is an additional qualification that an order must not ‘remove any necessary protection’ (s 8(2)(a)).¹¹²

A minister must consult with a range of interested parties before an order is made under sections 1–5. As might be expected, the parties in question include ‘the body or the holder of the office to which the proposal relates’, as well as others appearing to the minister ‘to be representative of interests substantially affected by the proposal’ (s 10). Thereafter, the minister may lay a draft order along with an explanatory document before Parliament for the purposes outlined in sections 1–5 above. That may be done after 12 weeks beginning with the start of the consultation (s 11).

The explanatory document should give reasons for the order and explain why the conditions in s 8 are met, and give an account of the representations received during the consultation process. The committee of each House responsible for scrutiny of a public bill order has 30 days to consider and clear the order (s 11(5)). The draft order will be scrutinised to ensure that the foregoing statutory tests for making the order in question are met, and that the order serves the purpose of improving the exercise of public functions.

If the draft order is cleared, it may then be debated and approved by both Houses of Parliament. This may be done 40 days after it was laid, enabling the minister then to make an order in terms set out in the draft. If, however, the scrutiny committee has concerns, an enhanced scrutiny procedure may be invoked, permitting the period of scrutiny to be increased by another 30 days (which means that there would be 60 days scrutiny in total). This enables the appropriate committee to make representations to the minister, before the order is debated (with or without amendment) after 60 days.¹¹³

Parliamentary scrutiny

Notwithstanding these various qualifications and restrictions, the powers in the 2011 Act are nevertheless significant. Not only does the Act authorise ministers to abolish and change the constitution and scope of specific public bodies, but in the process it allows the minister by order to do so by repealing or amending the primary legislation by which the bodies in question were created. It also allows for the amendment of other legislation, as result of the consequences of the abolition of the public body in question, though this will usually be much less controversial.

Although the powers of those engaged in the scrutiny of public body orders ultimately are limited, the scrutiny committees can cause unwanted problems for government departments. The task is performed in the Commons by select committees and in the Lords by the Secondary Legislation Scrutiny Committee, which expressed concern that ‘in a few instances, the explanatory material provided with the draft order may have given rise to an impression that the Department concerned viewed the public bodies order process as a rubber stamping mechanism’.¹¹⁴

The latter Committee sought to ‘challenge such assumptions’, and in a number of cases the process has been uncomfortable for the government. The most notable of these cases

¹¹¹ See ch 24 below. For comment on the 2011 Act, see also ch 22 B.

¹¹² It is also provided that the order ‘does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise’ (s 8(2)(b)).

¹¹³ Two qualifications need to be added to the outline of the 2011 Act provided above. The first is that the consent of the Scottish Parliament and the Northern Ireland and Welsh Assemblies is required where the body in question falls within the legislative competence of the devolved body in question (s 9). In addition, some of the powers under the Act have been expressly devolved to the Welsh ministers insofar as these relate to bodies operating only in Wales, or to national bodies with certain functions devolved to Wales (ss 13–15).

¹¹⁴ HL Paper 90 (2012–13), para 30. Also HL Paper 98 (2013–14).

related to the abolition of the Administrative Justice and Tribunals Council, where the Lords committee questioned whether the case for abolition had been made out, and expressed criticism of the government.¹¹⁵ The House of Commons Justice Select Committee also doubted whether the abolition satisfied ‘the statutory tests in respect of efficiency and effectiveness’.¹¹⁶

The government’s proposals involved a transfer of functions to the Ministry of Justice, and were criticised by the Justice Committee on the ground that the AJTC’s costs were ‘relatively small’, and also because ‘greater accountability to ministers is not appropriate’, due to ‘the extent to which the administrative justice and tribunal system deals with disputes between the citizen and the executive’.¹¹⁷ Although the committee suggested that the AJTC could have a restricted role, the government proceeded as planned, after ‘carefully’ considering the Committee’s report.¹¹⁸

Use of other powers

It is important to note that the 2011 Act does not provide the only means for the ‘culling’ of public bodies. Not all public bodies are statutory bodies: those established without the formality of statute could be abolished by the same means as those by which they were created. In other cases, the powers under the 2011 Act were eschewed in favour of primary legislation, even though the 2011 Act expressly made provision to abolish or merge the bodies in question.

The latter is true for example of the Competition Commission and the Office of Fair Trading, which were merged by the Enterprise and Regulatory Reform Act 2013 to become the Competition and Markets Authority. It is also true of the Agricultural Wages Board which set minimum terms and conditions of employment for farm workers, and was also abolished by the 2013 Act. It is not altogether clear why the government proceeded in this way, though there may be a number of explanations.

First, it would be reasonable to conclude that in some cases it would be especially inappropriate to abolish or merge by order. The establishment of the Competition and Markets Authority is perhaps a case in point, given the importance of its role as a ‘super-regulator’. This argument would not be as persuasive for some in the case of the Agricultural Wages Board, but here there may have been concerns about problems that might have been encountered in Parliament if the 2011 Act had been used.¹¹⁹

In by-passing the 2011 Act, the use of primary legislation does not guarantee that the abolition or merger of a public body will be more fully considered by Parliament. In the case of the last-mentioned Board, it has been pointed out that the relevant abolition provisions were tabled as a Lords amendment, and guillotined in the Commons by which they were never considered.¹²⁰ One other consequence of using primary legislation would be to frustrate any legal challenge to abolition based on Convention rights.¹²¹

¹¹⁵ HL Paper 109 (2012–13). And see ch 23 A.

¹¹⁶ HC 965 (2012–13), para 25.

¹¹⁷ *Ibid.*

¹¹⁸ HC 1119 (2012–13). For consideration by the Scottish government (recording that there was no opposition from the Scottish government), see <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/62870.aspx>.

¹¹⁹ 2011 Act, s 8 may have given rise to particular problems.

¹²⁰ *Farmers’ Guardian*, 18 April 2013.

¹²¹ Concerns were expressed by the JCHR about the government’s failure to provide it with an assessment of the human rights implications of this amendment: HL Paper 157, HC 107 (2012–2013), para 83.

G. Conclusion

There is now a mosaic of bodies at the heart of government responsible for a wide range of activities. In this chapter we have encountered the central bank, non-ministerial departments, non-departmental public bodies, public corporations and parliamentary bodies. To this list might be added health service bodies (not dealt with in this chapter) and the executive agencies discussed in chapter 11. It is a mosaic that does not appear to take any rational form.

There are otherwise problems with administration by public body, these bodies not guaranteed to provide any greater independence from government than if the work were undertaken by civil servants in government departments with security of tenure. There are also serious problems of the parliamentary accountability of government departments that have no ministerial head (as in the case of NMDs), or public bodies that are at some length removed from their sponsoring department (as in the case of NDPBs).

Complaints are made from time to time about the politicisation of appointments (and more usually re-appointments) to these bodies, it sometimes being alleged that governments try to ensure that government supporters are appointed to public positions. It is partly to prevent the scourge of favouritism, cronyism and nepotism that the OCPA based rules relating to public appointments have been introduced, and these rules ought also to prevent public appointments from being used as a reward for services rendered or donations made.

The positions to which these procedures apply are important and many have a bearing on the lives of millions of citizens. Although complaints of impropriety are made from time to time in the appointments process, it is difficult to judge whether what one side sees as an abuse is a crude attempt at balance by the other side enjoying the spoils of office. But so long as the procedures continue to provide for appointments by ministers these questions will continue to be raised and suspicions will continue to be aroused.

There are thus legitimate questions about the proliferation of these many bodies and the constitutional status they are given, and equally legitimate questions about appointments. But there are also questions about the manner of their reform under the Public Bodies Act 2011, even if the instinct behind the reform process is sound: without descending into populism, policy-making and other activities should be undertaken so far as possible by those who are elected and accountable for the policies they make and the decisions they take.

But perhaps the main criticism of the Public Bodies Act 2011 is that it is little more than window dressing, which will help to remove some of the clutter, but will not really address the central concern by which it was moved. Major decisions continue to be taken by unelected bodies, and new 'super'-regulatory authorities continue to be created. As a result, it remains the case that there is an urgent need to develop better forms of parliamentary accountability than those currently on display, even if it is difficult to see how this might be done.

CHAPTER 13

Courts and the administration of justice

In this chapter we address a number of constitutional questions relating to the judiciary and the administration of justice. First, we consider the procedures for the appointment of judges, and the measures designed to protect their independence; secondly, we examine the steps taken to ensure that litigants have a right to a fair trial, and the circumstances in which that right may collide with the rights of others; and thirdly we deal with the role of the executive in the administration of justice, concentrating on the position of the Lord Chancellor and the Ministry of Justice, together with the procedures for the prosecution of offenders.

These are all areas where in recent years extensive changes have been made, the most important of these being introduced by the Constitutional Reform Act 2005, particularly notable for establishing the Supreme Court of the United Kingdom.¹ Designed to reinforce both the rule of law and the independence of the judiciary, the Act proved to be highly controversial and many of its provisions were hotly contested. An important driving force behind the Act was a belief in the principle that the judicial function should be institutionally distinct from the legislative function, and that the highest court should not be based in the legislature.²

A. Judiciary and judicial appointments

Judicial appointments in the United Kingdom are a matter for the executive, the Queen's judges being appointed on the advice of the Queen's ministers. Supreme Court appointments are made by the Queen on the advice of the Prime Minister. Other senior positions (including Lord Chief Justice, Master of the Rolls, and President of the Family Division) are made on the advice of the Prime Minister and Lord Chancellor, while High Court judges, circuit judges, and recorders are appointed by the Queen on the advice of the Lord Chancellor.³ The advice of ministers is, however, now effectively constrained by the appointments commissions discussed below.⁴

Judges of the Court of Session (as well as sheriffs principal and sheriffs) are now appointed by the Queen on the recommendation of the First Minister, who must consult the Lord President before making a recommendation. The Lord President of the Court of Session and the Lord Justice Clerk (also in the Court of Session) are appointed by the Queen on the recommendation of the Prime Minister, who in turn must recommend the persons nominated by the First Minister. The First Minister must consult the Lord President and the Lord Justice Clerk (unless in either case the office is vacant) before making a nomination.⁵

¹ The process is ongoing: Crime and Courts Act 2013, extensively amending the Constitutional Reform Act 2005. For a summary of the 2005 Act and the issues raised by it, see A W Bradley, HL 83, 2005–6 (Appendix 1). See also Lord Windlesham [2005] PL 806; [2006] PL 35.

² See ch 4 C above.

³ Senior Courts Act 1981, s 10.

⁴ Magistrates are appointed by the Lord Chancellor.

⁵ Scotland Act 1998, s 95. In making his nomination, the First Minister must have regard to the recommendations of a panel established under the Judiciary and Courts (Scotland) Act 2008, s 19 and Sch 2.

Unlike in the United States, there is no requirement anywhere in the United Kingdom that executive nominees should be subject to scrutiny and confirmation by Parliament, and the Constitutional Reform Act 2005 did not introduce such a procedure.⁶

Qualifications for appointment

By statute, minimum qualifications for appointments must be observed. Before the Courts and Legal Services Act 1990, judges of the High Court had to be of at least ten years' standing as a barrister. Since the 1990 Act, however, it is now possible for solicitors with rights of audience in the High Court and for circuit judges of at least two years' standing to be appointed.⁷ As far as the Court of Appeal is concerned, candidates for appointment as a Lord Justice of Appeal had previously to be of at least 15 years' standing as a barrister or already to have been a High Court judge.⁸ Since the 1990 Act, this has been reduced to ten years and extended to include solicitors.

In general, however, appointments to the superior courts are made only from successful legal practitioners and the average experience of those appointed is well above the legal minimum. In Scotland, membership of the Court of Session is regulated by a rule of five years' standing as a member of the Faculty of Advocates.⁹ In 1990, however, the rules were relaxed, with eligibility being extended to sheriffs principal and sheriffs (who must have held office for at least five years) and solicitors, who must have had a right of audience in the Court of Session for at least five years.¹⁰ There are also rules of standing for members of the lower judiciary.

Appointment to the more senior positions (Court of Appeal and Supreme Court) is normally by way of promotion, and it remains exceptional for someone to be appointed to a senior judicial position without coming through the traditional channels. Although there have been a few appointments of academics to judicial office in recent years, those appointed from such a background must also satisfy the standard requirements of office, which emphasise the need for many years of practical experience. A major innovation in recent years has been the advertisement of some vacancies up to the level of the High Court.

In other countries experience as a legal practitioner is not the only route to a career on the Bench, with civil law countries in particular providing opportunities for recruitment at a young age into a career judiciary, with opportunities to progress through the various layers in the court structure. Without removing the scope for appointment of legal professionals, arrangements of this kind would help to ensure that there is no single route to appointment, nor a monopoly of the appointment process by one particular interest group, and may help also to overcome some of the problems of diversity addressed below.¹¹

Judicial Appointments Commission

In the Constitutional Reform Act 2005 (as amended), the government yielded to growing concern about the process of judicial appointment, widely criticised for its secrecy and lack of transparency. The creation of the Judicial Appointments Commission, which was formally launched in April 2006, follows the formation of a Judicial Appointments Board in Scotland

⁶ For discussion of this issue, see K D Ewing, in Flinders *et al.* (eds), *The Oxford Handbook of British Politics*, pp 275–7.

⁷ Courts and Legal Services Act 1990, s 71.

⁸ Senior Courts Act 1981, s 10(3).

⁹ Treaty of Union 1706, art 19.

¹⁰ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 35.

¹¹ See K D Ewing (2000) 38 *Alta Law Rev* 708.

in 2001,¹² albeit on a non-statutory basis, and the creation of a Commission for Judicial Appointments for England and Wales in the same year. Established by Order in Council, the latter was empowered only to review rather than recommend appointments, though even in this limited capacity it did cause some discomfort by reporting on the role of the Lord Chancellor in some judicial appointments.¹³

The Commission established for England and Wales under the 2005 Act has a much wider remit than the non-statutory body which preceded it, and consists of a lay chairman,¹⁴ as well as a number of other Commissioners as determined by regulations made by the Lord Chancellor with the agreement of the Lord Chief Justice (who is now Head of the Judiciary of England and Wales).¹⁵ Although judges are appointed to serve on the Commission, the majority of members must not be holders of judicial office, with provision also made for the appointment of legal practitioners and non-lawyers. Amendments made in 2013 also require regulations to deal with a range of matters, including eligibility for appointment to the Commission, regional balance, the terms and conditions of employment, and the length of service of Commissioners.¹⁶

Different procedures apply for different appointments. The first relate to the senior posts of Lord Chief Justice, Master of the Rolls, President of the Queen's Bench Division, President of the Family Division and Chancellor of the High Court: in the event of a vacancy arising in one of these posts, the Lord Chancellor may ask the Commission to convene a selection panel. The panel must consist of five members, of whom at least two must not be legally qualified, and at least two must be judges.¹⁷ Only two members of the panel must be members of the Commission,¹⁸ which means in effect that the Commission is represented on the selection panel, but that it is not directly responsible for making the recommendation. It is only in the case of the appointment of the Lord Chief Justice that the panel must be chaired by a non-lawyer.¹⁹

Turning from the Lord Chief Justice and the Heads of Division, the procedure for the Court of Appeal is similar to that described above, though there are a number of small differences of composition following the Judicial Appointments Regulations 2013.²⁰ So far as the High Court judges are concerned, there is no mandatory composition for a selection panel, though the panel is required to consult the Lord Chief Justice and another High Court judge before making the recommendation. It is important to note, however, that in all cases the process leads to a recommendation to the Lord Chancellor who may ask the panel to reconsider its recommendation or reject it altogether.²¹ The government thus has the last word: the Judicial Appointments Commission may be independent but does not have full autonomy in the appointment process.

¹² There is now a statutory Judicial Appointments Board for Scotland: Judiciary and Courts (Scotland) Act 2008, Part 2.

¹³ See Commission for Judicial Appointments, *Annual Report 2005*, para 2.44; Commission for Judicial Appointments, *Review of the Recorder 2004/05 Competition (Midland Circuit)* (2005), pp 89–90.

¹⁴ On which see K Malleon [2004] PL 102.

¹⁵ The role of Head of the Judiciary is one previously performed by the Lord Chancellor.

¹⁶ Constitutional Reform Act 2005, Sch 12 (as amended by the Crime and Courts Act 2013).

¹⁷ *Ibid*, s 70 (as amended). See also s 71A. The precise composition of the panels is set out in SI 2013 No 2192.

¹⁸ Constitutional Reform Act 2005, s 70 (as amended).

¹⁹ *Ibid*.

²⁰ *Ibid*, s 79. SI 2013 No 2192.

²¹ SI 2013 No 2192, regs 8 (Lord Chief Justice), 14 (Heads of Division), 20 (Senior President of Tribunals), 26 (Lord Justice of Appeal), 32 (High Court judge).

Supreme Court of the United Kingdom

The foregoing procedures do not apply to the Supreme Court of the United Kingdom, which acquired the existing appellate jurisdiction of the House of Lords, as well as the devolution jurisdiction of the Privy Council.²² The Constitutional Reform Act 2005 (as amended) provides that the court is to consist of the equivalent of twelve full-time judges, who (with the exception of the President and Deputy President) are to be styled Justices of the Supreme Court. The founding members of the Court were the Law Lords in post at the time the Court was created. These members retained their titles as Lords of Appeal in Ordinary (which under the 1876 Act cannot be revoked); but as discussed below, serving justices of the Supreme Court are prohibited from taking an active part in the work of the legislature, from which they had in any event largely withdrawn even before the Supreme Court was established.

The Supreme Court was established on 1 October 2009. Appointments since that date are governed by the Constitutional Reform Act 2005 (as amended), with the qualifications for appointment being similar to those under the (repealed) Appellate Jurisdiction Act 1876.²³ It is not necessary to have prior judicial experience, and unusually Lord Sumption was appointed to the Court in 2012 under the new procedures straight from the Bar, the first time it is thought such an appointment has been made to the highest court since Lord Radcliffe was appointed to the House of Lords in 1949. Appointment to the Supreme Court will not, however, bring a peerage (though justices appointed under the 2005 Act are given the courtesy title 'Lord'), but there is no reason why retired justices of the Supreme Court could not be made life peers under the Life Peerages Act 1958, so long as the House of Lords remains a wholly or partially nominated body.

When a vacancy arises on the Supreme Court, the 2005 Act requires an ad hoc Supreme Court Selection Commission to be appointed, the process for initiating the establishment of such a Commission depending on whether the vacancy relates to the President or Deputy President of the Court on the one hand, or its other members on the other. In all cases the Commission is to consist of five members, at least one of whom must be a member of the Supreme Court, at least one of whom must be a lay member, and three of whom must be a member of each of the Judicial Appointments Commission and its Scottish and Northern Irish equivalents. Further provision about the membership of the selection commission and the procedures to be followed is to be found in the Supreme Court (Judicial Appointments) Regulations 2013.²⁴ These regulations must be agreed with the President of the Supreme Court before being approved by Parliament.²⁵

As in the case of other judicial appointments, the Crime and Courts Act 2013 has stripped much of the detail from the primary legislation (the 2005 Act) and transferred it to regulations. From a constitutional perspective the latter are at least interesting if only for the extent to which they formally involve the Lord Chief Justice and the Supreme Court president in the legislative process, albeit that the legislation is concerned exclusively with judicial recruitment. The 2013 Act has also moved from primary to secondary legislation the provisions authorising the Lord Chancellor to (i) require a Supreme Court Selection Commission to reconsider the selection, or (ii) reject it altogether.²⁶ This relocation does not, however, alter the fact that while the Lord Chancellor no longer selects candidates for presentation to the Prime Minister (as was the case in relation to House of Lords appointments under the Appellate Jurisdiction Act 1876), he or she retains a veto on who may be nominated.

²² Constitutional Reform Act 2005, s 40.

²³ *Ibid*, s 25.

²⁴ SI 2013 No 2193.

²⁵ Constitutional Reform Act 2005, s 27A (as amended).

²⁶ *Ibid*, s 27A(2); SI 2013 No 2193, reg 20.

Diversity of judicial composition

Should the judiciary be ‘representative’ and, if so, what does this mean? The idea that the judiciary should be ‘representative of the community’ was repudiated by the Home Affairs Committee and by the Lord Chancellor’s Department, on behalf of which it was asserted in 1996 that:

It is not the function of the judiciary to reflect particular sections of the community, as it is of the democratically elected legislature. The judges’ role is to administer justice in accordance with the laws of England and Wales. This requires above all professional legal knowledge and competence. Any litigant or defendant will usually appear before a single judge and it is of paramount importance that the judge is fully qualified for the office he or she holds, and is able to discharge his or her functions to the highest standards. Social or other considerations are not relevant for this purpose; the Lord Chancellor accordingly seeks to appoint, or recommend for appointment, those who are the best qualified candidates available and willing to serve at the time.²⁷

This is not a view that is often heard today, it now being recognised that the judiciary should at least ‘more closely’ reflect the make-up of society as a whole. The Constitutional Reform Act 2005 requires the Judicial Appointments Commission to have regard to ‘the need to encourage diversity in the range of persons available for selection for appointments’ (s 64). But although there has been some improvement in recent years, women and members of the ethnic minority communities remain poorly represented on the Bench, particularly at its highest levels. On 31 July 2013 only one member of the Supreme Court was female, and all the heads of division were men. Moreover, although the number of female judges in the Court of Appeal was growing, on the same date, it remained the case that only seven of the 43 members of that court were female. The great bulk of High Court judges were men.

Apart from the chronic under-representation of women, it is thought that ethnic minorities continue to be even more poorly represented. As the Judicial Appointments Commission has pointed out, however, the judiciary ‘will always be dependent on the diversity of the legal profession’ (at least so long as judges continue to be recruited from experienced legal practitioners), where there is an issue about the lack of diversity at the more senior levels. In 2009, the Commission pointed out, for example, that only 20–25 per cent of partners in solicitors’ firms are women, though women make up a majority of those entering the profession; and that only 10 per cent of QCs are women, though women account for 49 per cent of pupils. Only 4 per cent of QCs are from black and ethnic minority backgrounds.²⁸ Diversity cannot be separated from methods of recruitment and barriers – formal and informal – to career progression.

Nevertheless, the Crime and Courts Act 2013 makes a number of notable amendments to the Constitutional Reform Act 2005, particularly in relation to the question of diversity. Thus, in making judicial appointments ‘solely on merit’,²⁹ it is now provided expressly that the relevant appointments commission may make a choice between two candidates of equal merit ‘for the purpose of increasing diversity’ within the court to which the appointment is to be made.³⁰ That is to say, where there are two equally meritorious candidates, one may be preferred on grounds of sex or race, though there is no obligation to use this power in any appointments recommended by the appointment commission in question. In addition, a new statutory duty requires both the Lord Chancellor and the Lord Chief Justice to ‘take such steps’ as they consider ‘appropriate for the purpose of encouraging judicial diversity’.³¹

²⁷ HC 52-II (1995–6), p 130.

²⁸ Judicial Appointments Commission, *Annual Report 2008/09*, p 38.

²⁹ Constitutional Reform Act 2005, s 63(2).

³⁰ *Ibid*, s 27A (as amended) (Supreme Court), 63(4) (as amended) (other appointments). Also s 137A below.

³¹ *Ibid*, s 137A (as amended).

B. Independence of the judiciary

The principle of judicial independence is now formally recognised in legislation, the Constitutional Reform Act 2005 introducing a legal duty to ‘uphold’ the continued independence of the judiciary.³² The duty is addressed to the Lord Chancellor, other government ministers, and anyone else ‘with responsibility for matters relating to the judiciary or otherwise to the administration of justice’.³³ Compliance with this obligation relies heavily on self-restraint by ministers, while its enforcement relies heavily on a Lord Chancellor capable of rising above partisan interest. This general obligation to uphold judicial independence is strengthened by specific obligations addressed personally to the Lord Chancellor.

Thus, the Lord Chancellor must have regard to (i) the need to defend judicial independence, (ii) the need for the judiciary to have the support necessary to carry out its functions, and (iii) ‘the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters’ (s 3(6)). There is, however, no definition of judicial independence in the 2005 Act, though the principle has been re-invigorated also by the Human Rights Act 1998. It has been said that the Lord Chancellor’s duty requires him to draw to the attention of the Cabinet any proposed legislation that would undermine the independence of the judiciary, and that it obliges him to deal with any ministers who indulge in personal attacks on judges.³⁴

It is strongly arguable otherwise that the Lord Chancellor is under a duty to intervene to remind ministers of their statutory duty relating to judicial independence and if necessary to rebuke those who may be thought to fall short of expectations if not obligations. It is not clear to what extent this is done privately, in circumstances where there is no public response from the Lord Chancellor, as where the Home Secretary took to the *Daily Mail* to accuse ‘judges of “subverting” British democracy and making the streets of Britain more dangerous by ignoring rules aimed at deporting more foreign criminals’.³⁵

Protection of judges from political pressure

Judicial independence requires that judges should be protected from political pressure to reach decisions which suit the government or other powerful interests. In recent years, however, there has been an erosion of the long-standing convention that ministers do not criticise the judiciary or judicial decisions. For example, in 2003 the sentence imposed on a convicted paedophile by the Recorder of Cardiff attracted criticism from the then Home Secretary (and a junior minister), which in turn fanned a hostile press response addressed to the courts. Concern was compounded by a feeling that the Lord Chancellor had been too slow to defend the judge (against whose decision there was no appeal by the Attorney General).³⁶ This latter affair led to calls for the *Ministerial Code* to be amended to include ‘strongly worded guidelines setting out the principles governing public comment by ministers on individual judges’.³⁷

No less contentious were comments made by the Prime Minister in 2005 which were seen as being designed to put pressure on the courts generally in cases about the extradition of

³² For comparable provisions in Scotland, see Judiciary and Courts (Scotland) Act 2008, s 1.

³³ Constitutional Reform Act 2005, s 3. See HL Paper 151 (2006–07), para 39.

³⁴ HL Paper 151 (2006–07), paras 38–40. The Act expressly provides that the Lord Chancellor and other ministers must not seek to influence particular judicial decisions through any special access to the judiciary (s 3(5)).

³⁵ *The Guardian*, 17 February 2013.

³⁶ HL Paper 151 (2006–07), paras 45–49. The Lord Chancellor would now have a duty under the Constitutional Reform Act 2005 to intervene.

³⁷ *Ibid*, para 49.

foreign terrorist suspects. After noting that each tightening of the terrorism laws had met ‘fierce opposition in the courts’, and that the ‘rules of the game are changing’, the Prime Minister continued by saying that should legal obstacles arise in the future, the government ‘will legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the European Convention on Human Rights’.³⁸ Although the Prime Minister’s comments were not seen to impugn an individual judge, it is nevertheless difficult to recall circumstances in which a Prime Minister has informed the judiciary in advance of any litigation that the law will be changed if the government is unhappy with the result.

Members of Parliament are also subject to restraints in their criticism of judges. There is a long-standing rule of the House that unless the discussion is based on a substantive motion, reflections must not be cast on the conduct of judges or upon judges generally.³⁹ Another parliamentary rule seeks to protect the principle of a fair trial rather than the status of the judges: by the *sub judice* rule, matters awaiting the adjudication of a court may not be raised in debate. The rule – which was codified for the first time in 1963 and updated in 1972 and again in 2001⁴⁰ – is designed to ensure that there is no interference with the right to a fair trial. In this sense the rule complements (though it does not overlap precisely with) the Contempt of Court Act 1981, which is designed to protect the integrity of legal proceedings from improper influence by the press. Considered in the following section, the 1981 Act does not apply to parliamentary proceedings.

The *sub judice* rule is also designed to acknowledge the respective roles of judiciary and Parliament: if the role of the former is to be discharged effectively, the judges ‘should not only be, but also be seen to be, the only constitutional body for determining issues which come before the courts’.⁴¹ Under the terms of the rule, matters which are the subject of legal proceedings may not be referred to in any motion, debate or question. This is subject to a discretion on the part of the Speaker to permit such a reference ‘where a ministerial decision is in question’, or where the case ‘concerns issues of national importance such as the economy, public order or the essential services’. The reason for this relaxation is to permit some parliamentary discussion of ministerial decisions or other major issues of public concern, notwithstanding the fact that legal action may have been instituted.⁴² Nevertheless, the operation of the rule continues to give rise to frustration on the part of MPs.⁴³

Protection of judges from dismissal

At the apex of the principle of judicial independence is security of tenure: judges cannot be dismissed because they are unpopular with the government. Judges of the Supreme Court, Court of Appeal and High Court hold office during good behaviour, subject to a power of removal by the Queen on an address presented by both Houses of Parliament.⁴⁴ These statutory rules clearly prevent a judge from being removed at the pleasure of the Crown, but their meaning is not wholly certain. The wording of the provision in the Act of Settlement from which these rules derived,⁴⁵ suggests that the intention of Parliament was that, while a judge

³⁸ As expressed on the No 10 website on 2 November 2005.

³⁹ Erskine May, *Parliamentary Practice*, pp 396 and 443–4.

⁴⁰ See HC Deb, 23 July 1963, col 1417 and HC Deb, 28 June 1972, col 1589. For the text of the current rule, see HC Deb, 15 November 2001, col 1012. Also HL Deb, 11 May 2000, cols 1725–6. For the report of the Joint Committee on Parliamentary Privilege, see HC 214–I–III (1998–9) and HL 43–I–III (1998–9).

⁴¹ HC 125 (2004–5), para 13, citing evidence of Lord Nicholls.

⁴² See e.g. debate on the thalidomide cases, HC Deb, 29 November 1972, col 432.

⁴³ HC 125 (2004–5). The rule does not affect the power of Parliament to legislate: the War Damage Act 1965 altered the law retrospectively while litigation against the government was in process.

⁴⁴ Constitutional Reform Act 2005, s 33; Senior Courts Act 1981, s 11(3).

⁴⁵ Ch 1.

should hold office during good behaviour, Parliament itself should enjoy an unqualified power of removal.

Assuming that there was no intention to alter the effect of the Act of Settlement by the revised wording now contained in modern legislation, it is thus theoretically possible for a judge to be dismissed not only for misconduct but for any other reason which might induce both Houses to pass the necessary address to the Crown. This appears to have been the position of the Ministry of Justice, which understood that it appointed judges on the condition that they could be removed from office by the Lord Chancellor for misbehaviour or inability, with the concurrence of the Lord Chief Justice. This is reinforced by the Constitutional Reform Act 2005, which clearly recognises that judges may be removed by an Address, presumably for reasons other than misbehaviour or inability (s 109).

But whatever the theoretical position, there are a number of reasons which help to ensure that these latter powers are unlikely ever to be used, with the security of judicial tenure relying not so much on legal rules as on a shared constitutional understanding which these rules reflect. In Scotland, these understandings are reinforced by legislation that gives the Scottish judge greater security than his or her English counterpart. The historic tenure on which Scottish judges hold office is *ad vitam aut culpam*, which means that they cannot be removed except on grounds of misconduct.⁴⁶ Judges of the Court of Session now hold office until retirement, and may be removed by Her Majesty following a recommendation by the First Minister, who may make a recommendation only with the authority of the Scottish Parliament.⁴⁷

Provision is made for a tribunal (to be chaired by a judicial member of the Privy Council) to be established by the First Minister to investigate whether a Court of Session judge is unfit for office by reason of 'inability, neglect of duty or misbehaviour'.⁴⁸ This must be done before the First Minister seeks parliamentary approval to recommend the removal of a judge. A sheriff may be removed from office only after a tribunal constituted by the First Minister (to include senior judicial as well as lay representation) has established unfitness for office due to inability, neglect of duty or misbehaviour. The sheriff may be removed by the First Minister by statutory instrument, after the tribunal's report has been laid before the Scottish Parliament.⁴⁹ Judges lower down the pecking order in England and Wales may be removed from office for incapacity or misbehaviour.⁵⁰

Use of judges for extra-judicial purposes

Judges have often been called on by the government to preside over royal commissions, departmental committees and inquiries conducted under the Tribunals of Inquiry (Evidence) Act 1921 (now replaced by the Inquiries Act 2005). It has been claimed that there were 366 major commissions and inquiries throughout the 20th century, as well as another 1,000 or so departmental inquiries. Thirty per cent of these major commissions and inquiries are said to have been conducted by a judge.⁵¹ These have included matters as diverse as safety at sports

⁴⁶ Claim of Right 1689, art 13; *Mackay and Esslemont v Lord Advocate* 1937 SC 860.

⁴⁷ Scotland Act 1998, s 95.

⁴⁸ *Ibid*, s 95(8). See now Judiciary and Courts (Scotland) Act 2008, ss 35–39.

⁴⁹ Sheriff Courts (Scotland) Act 1971, s 12A–12F (as inserted by the Judiciary and Courts (Scotland) Act 2008, s 40).

⁵⁰ Courts Act 1971, s 17(4). Lay magistrates may be removed from office for incapacity, misbehaviour, incompetence or neglect of duty: Courts Act 2003, s 11. District judges (magistrates' courts) may be removed for incapacity or misbehaviour (s 22(5)). On the procedure to be followed, see Constitutional Reform Act 2005, s 108.

⁵¹ J Beatson (2005) 121 LQR 221.

grounds, prison riots, the collapse of an international bank, the so-called Arms for Iraq affair, the future of legislation against terrorism, BSE and the Bloody Sunday killings in 1972.

An emerging theme of some significance has been the appointment of senior judges as commissioners to oversee and to report annually to the Prime Minister about the operation of surveillance powers created by legislation such as the Regulation of Investigatory Powers Act 2000,⁵² though the practice has changed in recent years in the sense that these roles are now generally performed by retired judges. Also important was the appointment of Lord Nolan in 1994 to examine concerns about standards of conduct in public life.⁵³ Many judges are well suited to this work but there are potential dangers to judicial independence, especially when matters of acute political controversy are referred to a judge for an impartial opinion.⁵⁴

Particularly controversial references in the past were the investigations conducted by Lord Denning on the request of the Prime Minister into the security aspects arising out of the resignation of a minister (John Profumo) in 1963; by the Lord Chief Justice, Lord Widgery, in 1972 into deaths in Londonderry; and by Lord Bridge in 1985 into allegations of improper telephone tapping of trade unionists and peace activists by members of the security service.⁵⁵ Such references may give rise to allegations that the government is using the judiciary for its own ends; and they may expose the judge in question, particularly if he or she is the sole member of the inquiry, to political or personal criticism by those who disagree with his or her report. The report by Lord Hutton in 2004 about the circumstances surrounding the death of a government scientist (Dr David Kelly) attracted a great deal of media criticism.⁵⁶

Before a judge is appointed to an inquiry, ministers would normally consult with senior judges about the appointment, a practice which is now sometimes mandatory.⁵⁷ It needs to be stressed that such work is not the primary task of the judges and that the government cannot assume that the services of a judge will be available whenever an awkward political situation might be eased by an impartial inquiry. There may also be concerns about judges being too intimately involved with the operation and needs of government, particularly in cases where they are drawn on to give advice on a matter about which they are subsequently called upon to adjudicate, albeit in a different context. Nevertheless, judges continue to be deployed to conduct high-profile inquiries, as in the Prime Minister's appointment of Sir Brian Leveson in 2011 to examine the culture, practices and ethics of the press.

Judges in the political process

The role of judges acting at the behest of the executive in the manner described above is increasingly anomalous in a constitution which now embraces a stronger formal commitment to judicial independence, and to a greater separation of powers. That such activity should continue is all the more anomalous for the fact that judicial involvement in the political process generally has greatly receded in recent years. It is true that by a strong convention mentioned in chapter 1 C the judges must not be seen to be engaged in party political activity, a convention now set down in the outline terms and conditions of judicial service which provides that judges 'must expect to forgo any kind of political activity and be on their guard against circumstances arising in which their involvement in any outside activity might be seen to cast doubt on their judicial impartiality'.

⁵² See ch 16 D.

⁵³ HC Deb, 25 October 1994, col 757. Lord Nolan was also a commissioner under the Interception of Communications Act 1985. And see ch 16 D.

⁵⁴ See also Beatson, above.

⁵⁵ See respectively Cmnd 2152, 1963; HC 220 (1971–2); and *The Times*, 7 March 1985.

⁵⁶ I Steele [2004] PL 738.

⁵⁷ Inquiries Act 2005, s 10.

It is true that this convention did not in the past prevent Law Lords from taking part in the political work of the House of Lords, when they felt inclined to do so. Judicial members of the House of Lords took part in a number of debates on a number of bills covering a wide range of issues, by no means all of which were uncontroversial. As a result, judges were responsible for a number of important amendments, which improved measures such as the Contempt of Court Act 1981, with s 10 on journalists' sources being an amendment tabled by Lord Scarman. Another example is the Police and Criminal Evidence Act 1984, with s 78 on the admissibility of evidence also being a Scarman amendment. In addition, the Law Lords (serving and retired) played a prominent part in the debates relating to the Human Rights Bill.⁵⁸

But that is in the past. As explained above, these opportunities for parliamentary participation by judges have been brought to an end by the Constitutional Reform Act 2005, with Supreme Court justices being prohibited from sitting in the House of Lords. Members of the House of Lords who are appointed as Supreme Court justices (notably the Law Lords in post at the time the Supreme Court was created) will be entitled to receive a writ of summons at the beginning of each session (and presumably to attend the House), but not to sit or vote in its proceedings or those of its committees.⁵⁹ Despite the removal of the platform provided by the House of Lords, it is implausible to believe that the senior judges will cease to be engaged in public affairs, or that they will be able to ignore demands for greater accountability.

As they are subjected to more media attention in the wake of the Human Rights Act, senior judges may feel obliged to explain their role in various forums.⁶⁰ Apart from exceptional provisions in the Constitutional Reform Act 2005,⁶¹ there are no formal channels for this to be done, though judges are increasingly responding to events by way of unattributed interviews in the press, speeches and lectures reported in the press and elsewhere,⁶² and media interviews in the case of retired judges. Select committees provide another important forum for senior judges to make their views known, though there are sensitive constitutional issues to be considered when judges appear before such bodies.⁶³ But if these can be overcome, the select committees provide an opportunity for structured dialogue between legislature and judiciary, which may be of benefit to both.⁶⁴

⁵⁸ See K D Ewing (1999) 62 MLR 79.

⁵⁹ Constitutional Reform Act 2005, s 137. The individuals in question are, however, excluded from the list of members of the House of Lords and appear on a separate list of ineligible members. By the same token, it will be possible (if unlikely) for (a) a serving Justice of the Supreme Court to be made a life peer, or (less unlikely) (b) an existing life peer (suitably qualified) to be made a justice of the Supreme Court, but subject to provisions of the CRA, s 137 by which they would be unable to sit or vote until retirement from the bench.

⁶⁰ See HL Deb, 12 February 2004 (Lord Hoffmann responding to the 'unconstitutional, inexcusable behaviour' of Mr Blunkett, then Home Secretary).

⁶¹ The 2005 Act, s 5, provides that 'The chief justice of any part of the United Kingdom may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.' But this seems designed as a 'nuclear option' signalling a serious breakdown in relations between the government and the judiciary collectively.

⁶² See for example Lord Woolf [2004] CLJ 317. See also *Guardian*, 15 September 2005 (Lord Bingham responding robustly to criticism of the judiciary). For consideration of this form of judicial activity, see K D Ewing, 'Judges and Free Speech in the United Kingdom', in Lee (ed.), *Judiciaries in Comparative Perspective*, ch 12.

⁶³ HL 66-iii, HC 332-iii (2000-01), Q 77.

⁶⁴ The Senior Law Lord, the Lord Chief Justice and the Master of the Rolls appeared together before the Joint Committee on Human Rights in 2000-01: HL 66, HC 133 (2000-01). See also HC 51 (2004-05) (Beatson J before the Public Administration Committee), HC 754-i (2005-06) (Lord Phillips before the Constitutional Affairs Committee), and HL 165-ii/HC 150-ii (2007-08) (Baroness Hale before the JCHR). See now Judicial Executive Board, *Guidance to Judges on Appearances before Select Committees* (2012).

C. Administration of justice and contempt of court

Article 6 of the ECHR provides that the individual has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. There are a number of legal rules designed to maintain the quality of justice in the courts. In principle all trials are conducted in open court,⁶⁵ although, exceptionally, cases may be heard *ex parte* or in camera (in whole or in part);⁶⁶ witnesses may be permitted to give evidence anonymously;⁶⁷ and restrictions may be imposed on reporting legal proceedings.⁶⁸ The written rules of court procedure as well as the unwritten rules of natural justice seek to ensure for each litigant a fair and orderly hearing.⁶⁹

The rules of evidence, particularly in criminal trials before a jury,⁷⁰ exclude material that might be unfairly prejudicial to an accused. To the extent that legal representation contributes to the quality of justice, there are also schemes to enable people with limited means to be defended by a lawyer in criminal proceedings and to seek redress through the civil courts, though these have been seriously compromised in recent years. The right to a fair and public hearing has to be balanced against other Convention rights, most notably the right to freedom of expression in art 10 of the ECHR. The latter, however, is not an absolute right, and is one that allows many exceptions.

As we will see, there are several areas where the right to a fair trial will overlap with the right to freedom of expression, and where judgments have to be made about which has priority. There is – most notably – a difficult tension between the right to a fair trial and the right to freedom of expression when newspapers publish material that might prejudice the position of an accused person by influencing a jury.⁷¹ One of the functions of the law of contempt of court is to manage this tension,⁷² although it also has other functions; these include protecting the dignity of the court and generally safeguarding the administration of justice.

Contempt in the face of the court

All superior courts have power to punish summarily by fine or imprisonment violence committed or threats uttered in face of the court. Thus the judge may punish an attack on anyone in court or restrain the use of threatening words or scurrilous abuse. The issue whether an act constitutes a contempt is for the judge alone. If the act is committed in court, the judge is in a sense prosecutor, chief witness, judge and jury.⁷³

⁶⁵ See *Scott v Scott* [1913] AC 417. Also *Chibbery v Allan* [2002] EWCA Civ 45; [2002] Fam 261 for a review of the issues; and *BBC, Petitioners* 2002 SLT 2.

⁶⁶ Official Secrets Act 1911, s 8(4); Children and Young Persons Act 1933, s 37; Justice and Security Act 2013, Pt 2. The 2013 Act allows for ‘closed material procedures’ to be adopted in civil litigation essentially to protect evidence that if disclosed would damage national security. This reverses the decision in *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531. See pp 727–8 below.

⁶⁷ *R v Murphy* [1990] NI 306; *R v Lord Saville of Newdigate ex p A* [1999] 4 All ER 860 (B Hadfield [1999] PL 633); *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 666; and *In re Times Newspapers Ltd* [2008] EWCA Crim 2396, [2009] 1 WLR 1015.

⁶⁸ For example, Judicial Proceedings (Regulation of Reports) Act 1926, on which see *Gilchrist v Scott* 2000 SCCR 28; Children and Young Persons Act 1933, s 39, on which see *In re S (A Child)* [2004] UKHL 47, [2004] 4 All ER 683; Youth Justice and Criminal Evidence Act 1999, s 46. See also *A G’s Reference No 3 of 1999: Reporting Restriction Order* [2009] UKHL 34, [2010] 1 AC 145. In addition, ‘super-injunctions’ may exceptionally prevent the existence of the injunction being published. See pp 476–7 below.

⁶⁹ Ch 24 C.

⁷⁰ On which, see ch 15.

⁷¹ See *Miami Herald v Tornillo* 418 US 241 (1974).

⁷² See *Attorney-General v BBC* [2007] EWCA Civ 280.

⁷³ See *European Asian Bank v Wentworth* (1986) 5 NSWLR 445, at p 452.

In *Morris v Crown Office*,⁷⁴ a group of students demonstrated in support of the Welsh language by interrupting a sitting of the High Court in London, where they sang, shouted slogans and scattered pamphlets. After order was restored, the trial judge sentenced some of the students to prison for three months and fined others £50 each.

On appeal, the Court of Appeal, Civil Division, held that a High Court judge still had power at common law to commit instantly to prison for criminal contempt; and that the requirement under the Criminal Justice Act 1967 that prison sentences under six months be suspended did not apply to committal for contempt.

The court did not consider the prison sentences to be excessive, but, having regard to all the circumstances, allowed the appeal against sentence and bound over the appellants to be of good behaviour for one year.

Contempt in the face of the court includes insulting behaviour,⁷⁵ disregard of a judge's ruling, and refusal by a witness to give evidence or to answer questions which he or she is required to answer.⁷⁶

In *Attorney-General v Mulholland and Foster*,⁷⁷ two journalists refused to disclose their sources of information to a tribunal of inquiry appointed after an Admiralty clerk, Vassall, had been convicted of espionage. The tribunal had by statute the powers of the High Court in examining witnesses.⁷⁸

On appeal against a prison sentence imposed by the High Court, to which the tribunal had reported the journalists, it was held that journalists had no legal privilege to refuse to disclose sources of information given to them in confidence, where the information was relevant and necessary to the trial or inquiry.

So too, in *British Steel Corporation v Granada Television Ltd*,⁷⁹ the House of Lords ordered the Granada company to reveal the name of an employee of the corporation who had passed secret documents to Granada that were then used in a programme about the corporation. Although failure by Granada to comply with this order would have constituted contempt, the matter was resolved when the employee concerned made his identity known.

In the Contempt of Court Act 1981, the power of the court to demand information was limited by s 10. The court may not now request a person to disclose the source of information contained in a publication for which he or she is responsible, unless the court is satisfied that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.⁸⁰ If cases such as *Mulholland* and *British Steel Corporation* were to occur today, the statutory test of necessity would have to be applied before the court decided to require disclosure, but the outcome might still be the same.

⁷⁴ [1970] 2 QB 114.

⁷⁵ See *R v Powell* (1994) 98 Cr App R 224. For a fuller account of the type of conduct that may constitute contempt in the face of the court, see Law Commission, *Contempt of Court* (Consultation Paper No 209 (2012)), para 5.5. See also Magistrates Courts Act 1980, s 12.

⁷⁶ *R v Montgomery* [1995] 2 Cr App R 23.

⁷⁷ [1963] 2 QB 477. And see *Senior v Holdsworth* [1976] QB 23. Ch 23 C.

⁷⁹ [1981] AC 1096.

⁸⁰ Contempt of Court Act 1981, s 10.

In *Secretary of State for Defence v Guardian Newspapers Ltd*⁸¹ a junior civil servant delivered anonymously to the *Guardian* newspaper confidential documents addressed to Cabinet ministers by the Secretary of State for Defence. The documents related to the arrival of US cruise missiles at Greenham Common airbase.

The Ministry of Defence sought to recover the documents to help them to identify the person responsible for the leak. The House of Lords held that s 10 of the 1981 Act was a valid defence not only where a journalist was asked a direct question in court, but also in an action for recovery of property where the property once recovered would help to reveal the newspaper's source. But the House also held (Lords Fraser and Scarman dissenting) that it was necessary to recover the documents and identify the source of the leak in the interests of national security.

The minister had expressed concern that a significant document relating to the defence of Britain had found its way to a national newspaper. This was of grave importance for national security, since Britain's allies could not be expected to continue to entrust the government with secret information if it was liable to unauthorised disclosure.

Guardian Newspapers is only one of a number of cases in which the courts at the highest levels have been willing to order the disclosure of journalists' sources by applying a low threshold which applicants need cross.⁸² The more robust view of the European Court of Human Rights on this issue has led to conflict between that body and the House of Lords.⁸³ The domestic courts nevertheless appear willing to require the disclosure of sources where this will help an employer to identify an employee within an organisation who has leaked commercial information, or confidential medical information about a patient.⁸⁴ But the courts may refuse to order the disclosure of sources where the applicant's interests will be adequately protected by an injunction,⁸⁵ or where in the circumstances the applicant has not tried to find the source of the disclosure by other means first.⁸⁶

Strict liability rule

Until the Contempt of Court Act 1981, it was on the basis of the common law that penalties were imposed on those whose publications were prejudicial to a fair trial or to civil proceedings.⁸⁷ The law was reformed in 1981, following recommendations of the Phillimore committee,⁸⁸ and the decision of the European Court of Human Rights in the *Sunday Times* case.

⁸¹ [1985] AC 339.

⁸² *Maxwell v Pressdram Ltd* [1987] 1 All ER 656; *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660; and *X v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1. See T R S Allan [1991] CLJ 131; S Palmer [1992] PL 61.

⁸³ *Goodwin v UK* (1996) 22 EHRR 123, concluding that the decision in *Morgan Grampian* contravened ECHR, art 10.

⁸⁴ See *Camelot Group v Centaur Ltd* [1999] QB 124, and *Ashworth Hospital Authority v MGN* [2002] UKHL 29; [2002] 1 WLR 2033.

⁸⁵ See *Saunders v Punch Ltd* [1998] 1 WLR 986.

⁸⁶ *John v Express Newspapers* [2000] 1 WLR 1931, and *Broadmoor Hospital v Hyde, The Independent*, 4 March 1994.

⁸⁷ Leading cases arising out of criminal litigation before 1981 include *R v Bolam, ex p Haigh* (1949) 93 SJ 220; *R v Evening Standard Co Ltd* [1954] 1 QB 578; *R v Thomson Newspapers Ltd, ex p A-G* [1968] 1 All ER 268; and *Stirling v Associated Newspapers Ltd* 1960 JC 5. And in relation to civil litigation, see *Vine Products Ltd v Green* [1966] Ch 484.

⁸⁸ Cmnd 5794, 1974.

Nearly 400 claims against Distillers Ltd, the manufacturers of thalidomide, were pending when the *Sunday Times* published an article which inter alia urged the company to make a generous settlement. Later it proposed to publish an article examining the precautions taken by the company before the drug was sold. On the Attorney General's request, the Divisional Court granted an injunction to restrain publication of the article, holding that it would create a serious risk of interference with the company's freedom of action in the litigation. The Court of Appeal discharged the injunction, on the grounds that the article commented in good faith on matters of outstanding public importance and did not prejudice pending litigation since the litigation had been dormant for some years.

The House of Lords restored the injunction, holding that it was a contempt to publish an article prejudging the merits of an issue before the court where this created a real risk that a fair trial of the action would be prejudiced; the thalidomide actions were not dormant, since active negotiations for a settlement were going on. It was a contempt to use improper pressure to induce a litigant to settle a case on terms to which he or she did not wish to agree, or to hold a litigant up to public obloquy for exercising his or her rights in the courts.⁸⁹ Thereafter the *Sunday Times* claimed that the decision of the House of Lords infringed the freedom of expression protected by art 10 of the European Convention on Human Rights. Before the European Court of Human Rights, the main issue was whether, under art 10, the ban on publication was 'necessary in a democratic society . . . for maintaining the authority and impartiality of the judiciary'. By 11 to 9 votes, the court held that the ban had not been shown to be necessary for this purpose.⁹⁰

The Contempt of Court Act 1981 was designed to bring British law into line with the requirements of the *Sunday Times* decision,⁹¹ and is now recognised as reconciling the competing rights in articles 6 (fair trial) and 10 (freedom of expression) of the ECHR.⁹² The courts have emphasised that in enacting the Contempt of Court Act 1981,

Parliament was thereby recognising the need to ensure that restrictions should be placed on media coverage of court proceedings only to the extent that it could be shown to be necessary and proportionate to the need to protect the administration of justice.⁹³

Under the Act, liability for contempt is based on the 'strict liability rule', defined to mean 'the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so' (s 1). By s 2, the strict liability rule applies to any publication that creates 'a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'.

The strict liability rule applies to both civil and criminal proceedings. According to the Law Commission in a recent consultation paper canvassing options for the reform of the law relating to contempt of court (on which see below), 'section 2 involves a test with two benchmarks: the level of risk must be substantial; the degree of prejudice or impediment

⁸⁹ *A-G v Times Newspapers Ltd* [1974] AC 273.

⁹⁰ *Sunday Times v UK* (1979) 2 EHRR 245.

⁹¹ See *S Bailey* (1982) 45 MLR 301.

⁹² See *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408, and *Attorney General v Times Newspapers Ltd* [2012] EWHC 3195 (Admin).

⁹³ *Attorney General v Times Newspapers Ltd*, *ibid*, citing Lord Hailsham, HL Debs 9 December 1980, col 660.

likely to be caused must be serious'.⁹⁴ The questions of 'substantial risk' and 'serious prejudice', are to be determined 'as at the date of publication', the questions to be examined from a practical rather than a theoretical perspective.⁹⁵ In emphasising the predictive nature of this task, the courts have also pointed out that it must be 'proved to the criminal standard and separately in relation to each defendant',⁹⁶ 'that there was a significant risk that the potentially highly prejudicial articles would seriously prejudice the course of justice',⁹⁷ and that 'the circumstances of the publication actually gave rise to a substantial risk of serious prejudice'.⁹⁸

The other requirement of s 2 is that the proceedings in question must be 'active', governed by Sch 1, which lays down in detail when civil or criminal proceedings begin to be active. Criminal proceedings become active when an individual is arrested or orally charged or when an arrest warrant is issued (whereas at common law liability for contempt could arise where criminal proceedings were imminent).⁹⁹ Civil proceedings become active not when the writ is served but when the action is set down for trial. In some cases, proceedings may be instituted at common law to deal with publications which are likely to prejudice the outcome of proceedings not yet active within the statutory definition.¹⁰⁰ Proceedings remain active in criminal cases until concluded by acquittal, sentence or discontinuance, and in other cases until the proceedings are disposed of, discontinued or withdrawn.¹⁰¹ Apart from criminal liability, it may be possible to restrain a publication in breach of the strict liability rule by injunction, though this will be difficult if the information is already in the public domain.¹⁰²

Application of strict liability rule

The question whether there is a substantial risk that the course of justice in particular legal proceedings will be seriously impeded or prejudiced is ultimately one of fact; this will depend primarily on whether the publication will bring influence to bear which is likely to direct the proceedings in some way from the course which they would otherwise have followed.¹⁰³ Many of the cases on contempt of court are concerned with pre-trial publicity that may influence the jury, though questions such as the impact of publication on an ongoing police investigation are also relevant.¹⁰⁴ In recent years, however, it appeared that the Act was not vigorously applied and that a great deal of press reporting and speculation was taking place that would not have been tolerated in the past. Indeed, it appears to have been recognised that much of the concern about pre-trial publicity might be exaggerated. In the typical case someone would be arrested and there would be much coverage of the individual

⁹⁴ Law Commission, note 75 above, para 2.45.

⁹⁵ *Attorney General v MGN Ltd*, above, para 17.

⁹⁶ *Ibid.*

⁹⁷ *Attorney General v Times Newspapers Ltd*, above, para 38.

⁹⁸ *Ibid.*, para 35.

⁹⁹ *R v Savundranayagan* [1968] 3 All ER 439; *R v Beaverbrook Newspapers Ltd* [1962] NI 15.

¹⁰⁰ *A-G v News Group Newspapers* [1989] QB 110. Cf *A-G v Sport Newspapers Ltd* [1991] 1 WLR 1194.

¹⁰¹ On the question of appeals against sentence and 'misguided' press campaigns, see *R v Vano, The Times*, 29 December 1994.

¹⁰² *Attorney-General v BBC* [2007] EWCA Civ 280.

¹⁰³ *Re Lonrho* [1990] 2 AC 154.

¹⁰⁴ See also *A-G v News Group Newspapers Ltd* [1986] 2 All ER 833; *A-G v ITN Ltd* [1995] 2 All ER 370; *A-G v BBC* [1997] EMLR 76; *A-G v MGN Ltd* [1997] 1 All ER 456 (no contempt where trial would not take place for several months and where already saturation coverage); *A-G v Birmingham Post and Mail Ltd* [1999] 1 WLR 361. For Scotland, see *HM Advocate v Caledonian Newspapers Ltd* 1995 SCCR 330; *Cox and Griffiths, Petitioners* 1998 SCCR 561; *Al Megrahi v Times Newspapers Ltd* 1999 SCCR 824; *HM Advocate v The Scotsman Publications* 1999 SLT 466; *Scottish Daily Record v Thompson* 2009 SLT 363.

in question. But except in notorious cases,¹⁰⁵ memory of such reporting would be likely to fade by the time of the trial, while other steps would be taken by the judge to ensure the integrity of the jury.¹⁰⁶

Perhaps reflecting the general decline in press standards on the one hand, and a tightening up by the Attorney General on the other, there has been a spate of contempt cases in recent years. In *Attorney General v MGN Ltd*,¹⁰⁷ a man was arrested on suspicion of a murder he plainly did not commit. He was then the subject of the most appalling vilification in the press before being released by the police. Although the man in question was not prosecuted, the abuse took place at a time when proceedings were active, and it was held that the vilification of a suspect ‘readily’ fell within s 2(2) of the 1981 Act, not least because it would discourage witnesses coming forward in his defence. And in *Attorney General v Associated Newspapers Ltd*,¹⁰⁸ a man was found guilty by a jury of the murder of a young woman that had attracted a great deal of media attention. The jury announced its verdict in this case while still considering its verdict in another murder case involving the same man. While the latter was under consideration, several newspapers published an account of the conviction in the first case that included material that had never been put to the jury. This was held to be contempt, and indeed the proceedings in the second case had to be discontinued.

A number of defences are provided in the 1981 Act. The first of these is the defence of innocent publication (s 3), where the person responsible for the publication can prove that, having taken all reasonable care, he or she did not know that relevant legal proceedings were active.¹⁰⁹ The second is the contemporary reporting of legal proceedings in respect of ‘a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith’ (s 4(1)). However, a court may order that publication of reports be delayed – but not prevented indefinitely¹¹⁰ – where necessary to avoid a substantial risk of prejudice to the administration of justice (s 4(2)).¹¹¹ ‘In forming a view whether it is necessary to make an order for avoiding such a risk a court will inevitably have regard to the competing public interest considerations of ensuring a fair trial and of open justice.’¹¹² More recently, it has been said that a s 4(2) order should only be made ‘as a last resort’, and should not be used to

¹⁰⁵ *Attorney-General v Times Newspapers Ltd*, *The Times*, 12 February 1983 is one notorious case where it has been accepted that the ‘fade factor’ would not work in favour of the defence. That case concerned reports carried by newspapers about a man who had intruded into the Queen’s bedroom at Buckingham Palace. The man in question was awaiting trial on a number of counts, including the theft of a bottle of wine. It was held that a newspaper report that he had admitted the theft was a contempt, since it was difficult to see how an assertion that an accused person had admitted the very fact that was in issue could do otherwise than cause a very substantial risk that the trial might be prejudiced. It is also the case that pre-trial publicity is unlikely to be a contempt in proceedings pending before an appeal court: *Re Lonrho plc* [1990] 2 AC 154.

¹⁰⁶ See *Attorney General v Times Newspapers Ltd* [2012] EWHC 3195 (Admin).

¹⁰⁷ [2011] EWHC 2074 (Admin), [2012] 1 WLR 2408.

¹⁰⁸ [2012] EWHC 2029 (Admin).

¹⁰⁹ See also *HM Advocate v Express Newspapers plc* 1998 SCCR 471.

¹¹⁰ *BBC, Petitioners* 2002 SLT 2; *In re Times Newspapers Ltd v R* [2007] EWCA Crim 1925, [2008] 1 WLR 234.

¹¹¹ For the approach which the courts should adopt in such cases, see *MGN Pension Trustees Ltd v Bank of America* [1995] 2 All ER 355. On the right of appeal against an order issued under s 4(2), see Criminal Justice Act 1988, s 159. For Scotland, see *Scottish Daily Record, Petitioner* 1998 SCCR 626; *Galbraith v HM Advocate* 2001 SLT 465; and *BBC, Petitioners* 2002 SLT 2.

¹¹² *R v Central Criminal Court Ex p. Telegraph Plc* [1993] 1 WLR 980; [1993] 2 All ER 971, at 975. See *R v Horsham Justices, ex p Farquharson* [1982] QB 762; M J Beloff [1992] PL 92.

impose a permanent ban on the reporting of a trial, or aspects relating thereto.¹¹³ Before granting an order under s 4(2), the magistrates are entitled to hear representations from the press that the order should not be granted.¹¹⁴

The third defence is where the publication contains a good faith discussion of public affairs if the risk of prejudice to particular legal proceedings is merely incidental to the discussion (s 5). In *Attorney-General v English* Lord Diplock noted that s 5 does not take the form of an exception to s 2, but stands on an equal footing with it: ‘It does not set out exculpatory matter. Like s 2(2) it states what publications shall *not* amount to contempt of court despite their tendency to interfere with the course of justice in particular legal proceedings.’¹¹⁵

In *Attorney-General v English* the *Daily Mail* published an article in support of a woman standing for election to Parliament as an independent pro-life candidate, one of her aims being to stop the alleged practice in hospitals whereby newly born disabled babies were allowed to die. At the time the article was published a well-known paediatrician was standing trial, accused of murdering a three-day-old boy with Down’s syndrome, by allowing him to die of starvation.

The House of Lords held that this did not amount to a contempt of court; although the publication of the article on the third day of the trial was capable of prejudicing the jury, the publication was a discussion in good faith on a matter of wide public interest and the risk of prejudice was incidental to the discussion. To hold otherwise ‘would have prevented [the candidate] from . . . obtaining publicity for what was a main plank in her election programme and would have stifled all discussion in the press . . . about mercy killing from the time that [the doctor] was charged in the magistrates’ court in February 1981 until the date of his acquittal [in] November of that year.’¹¹⁶

The strict liability rule does not apply to the good faith reporting of proceedings of the Scottish Parliament or Welsh Assembly.¹¹⁷ Nor does it apply to tribunals which do not exercise the ‘judicial power of the state’.¹¹⁸

Other acts interfering with the course of justice

Nothing in the Contempt of Court Act 1981 is designed to restrict liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice

¹¹³ *R (Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434, [2013] 1 WLR 1979, at para 13. It was explained there that these orders are typically used to prevent any prejudice to proceedings in a subsequent trial involving the same parties or witnesses, or to prevent the publication of evidence or argument before the judge in the absence of the jury, or where there has been a successful appeal against conviction, to avoid prejudice to any retrial. See also *Re X and Y* [2012] EWCA Civ 1500 (no reporting of oral argument in sensitive case to prevent counsel from being inhibited in argument). But see *MGN Ltd (Application for Leave to Appeal)* [2011] EWCA Crim 100, (2011) Cr App Rep 31. For additional powers to restrict publicity, see *ITN v R* [2013] EWCA Crim 773, [2013] WLR(D) 187 (Youth Justice and Criminal Evidence Act 1999, s 46).

¹¹⁴ *R v Clerkenwell Metropolitan Magistrate, ex p The Telegraph plc* [1993] QB 462.

¹¹⁵ [1983] 1 AC 116, 141.

¹¹⁶ [1983] 1 AC 116, at 144 (Lord Diplock).

¹¹⁷ Scotland Act 1998, s 42; and Government of Wales Act 2006, s 43.

¹¹⁸ Contempt of Court Act 1981, s 19. See *Pickering v Liverpool Daily Post plc* [1991] 2 AC 370 and *General Medical Council v BBC* [1998] 1 WLR 1573. For background, see *AG v BBC* [1981] AC 303.

(s 6(2)). Many other acts are punishable as contempts, some of them also being criminal offences in their own right, for example attempts to pervert the course of justice or interference with witnesses.¹¹⁹ A prison governor who, acting under prison rules, obstructed a prisoner's communication with the High Court was held to be in contempt.¹²⁰ It is a contempt to punish or victimise a witness for evidence which has already been given, even in proceedings which have concluded, since this might deter potential witnesses in future cases.¹²¹ It may be a contempt of court for a solicitor to disclose to a journalist documents relating to litigation.

A prisoner challenged the legality of a Home Office decision to set up a 'control unit' for prisoners considered to be troublemakers. An order for discovery of documents being made against the Home Office, a large number of official documents were made available to the prisoner's solicitor. She undertook that the documents would be used only for the case in hand, but she later allowed a journalist to see documents which had been read out in open court.

The journalist published an article based on these documents. The House of Lords held (by three to two) that although the documents had been read in court, and could have been reported by journalists present, the solicitor was guilty of contempt since she had used the documents for a purpose which was not necessary for the conduct of her client's case, and had broken her implied undertaking to the court that had ordered discovery.¹²²

Interference with the work of a jury may constitute contempt, whether before, during or after a trial.¹²³ By s 8 of the Contempt of Court Act 1981, it is a contempt of court to solicit, obtain or disclose details of any statements made or votes cast by jurors during their deliberations in any legal proceedings. This reversed a decision in 1980 that a magazine article disclosing aspects of the jury's deliberations during the trial of Mr Jeremy Thorpe was not a contempt of court.¹²⁴ It is an offence under s 8 for a newspaper to publish information disclosed to it by a jury member, but the section applies only to 'what passes among the jurors while they are considering their verdict after the judge has directed them to retire to do so'.¹²⁵ It is an offence for a jury member to write to a relative of a convicted person to expose unfairness by jurors,¹²⁶ but it is not an offence to raise such concerns with the court.¹²⁷

The dynamic nature of the law of contempt has been well demonstrated by decisions arising out of important disputes between the courts and the press. It is a contempt for a

¹¹⁹ See *Peach Grey & Co v Sommers* [1995] 2 All ER 513.

¹²⁰ *Raymond v Honey* [1983] AC 1.

¹²¹ *A-G v Butterworth* [1963] 1 QB 696; *Moore v Clerk of Assize, Bristol* [1973] 1 All ER 58.

¹²² *Home Office v Harman* [1983] AC 280. Subsequent proceedings under the European Convention on Human Rights were the subject of a friendly settlement. In 1987 the decision was largely reversed by an amendment to the Rules of the Supreme Court, which released parties from any undertaking once the material has been read in open court. See *Apple Corp v Apple Computer Inc, The Times*, 10 April 1991, and *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] EWCA Civ 2, [2002] 1 All ER 842.

¹²³ See *Attorney General v Frail* [2011] EWCA Crim 1570, (2011) Cr App R 21, *Attorney General v Dallas* [2012] EWHC 136 (Admin), [2012] 1 WLR 991, and *Attorney General v Davey* [2013] EWHC 2317 (Admin).

¹²⁴ *A-G v New Statesman Publishing Co* [1981] QB 1.

¹²⁵ *Scottish Criminal Cases Review Commission, Petitioners* 2001 SLT 1198, at p 1200, and *A-G v Associated Newspapers* [1994] 2 AC 238 respectively.

¹²⁶ *A-G v Scotcher* [2004] UKHL 36, [2005] 1 WLR 1867.

¹²⁷ *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118.

newspaper to disregard a judge's directions that the names of prosecution witnesses in blackmail cases should not be published.¹²⁸ But the power to issue such directions is not limited to blackmail cases.

In *Attorney-General v Leveller Magazine Ltd* a magazine published the name of a prosecution witness at an official secrets trial, who had been described in court as Colonel B. The House of Lords held that it was contempt of court to publish a witness's name if this interfered with the administration of justice. But on the facts no contempt had occurred, since inter alia, no clear direction against publication had been given by the magistrates; and Colonel B's identity could have been discovered from evidence given in open court.¹²⁹

The uncertainties left by this decision were reduced by the Contempt of Court Act 1981. By s 11, where a court has the power to withhold evidence from the public (although the court is sitting in public) and allows the name of a witness or other matter to be withheld, it may restrict publication accordingly.¹³⁰ Although the courts should be careful about exercising this power (which should not be used to protect privacy or avoid embarrassment),¹³¹ nevertheless it would be a contempt of court to publish information, even though the identity of the witness could be discovered from evidence given in open court, as in the *Leveller Magazine* case. However, a court cannot prohibit the press from reporting names which are mentioned in court unless there has first been a direction that these names should be withheld from the public.¹³² Nor can an order be issued under section 11 to prevent speculation about what may have been said in camera, with section 11 applying only to prohibit the publication of a *name or matter*. The Court of Appeal has warned, however, that such speculation might constitute a contempt of court at common law, which is expressly preserved by the 1981 Act (s 6(c)).¹³³

It may also be contempt to publish material which has been the subject of an injunction against another party.¹³⁴ A third party who knowingly acts in breach of the terms of the injunction may be in contempt even though he or she is not a party to the proceedings and indeed may not have had an opportunity to make representations in these proceedings:

In 1986 interlocutory injunctions were granted against two newspapers, the *Guardian* and the *Observer*, restraining them from publishing material from the book *Spycatcher*, by Mr Peter Wright, pending a full trial of the action in which the Attorney General sought permanent injunctions on the ground that the information was confidential. While

¹²⁸ *R v Socialist Worker Ltd, ex p A-G* [1975] QB 637. But magistrates cannot withhold their identity from the public or the press: *R v Felixstowe JJ, ex p Leigh* [1987] QB 582.

¹²⁹ [1979] AC 440.

¹³⁰ On the circumstances in which a court has the power to withhold evidence from the public, see *In re Times Newspapers Ltd* [2008] EWCA Crim 2396, [2009] 1 WLR 1015.

¹³¹ *R v Westminster City Council, ex p Castelli, The Times*, 14 August 1995. Also *Trustor AB v Smallbone* [2000] 1 All ER 811. This applies particularly where anonymity is sought by one of the parties to litigation rather than by a witness: *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966.

¹³² *R v Arundel Justices, ex p Westminster Press* [1985] 2 All ER 390.

¹³³ *Times Newspapers Ltd v R* [2007] EWCA Crim 1925, [2008] 1 WLR 234. For full consideration of this case, see Ewing, *Bonfire of the Liberties*, ch 5.

¹³⁴ *A-G v Times Newspapers Ltd* [1992] 1 AC 191. See also *A-G v Observer* [1988] 1 All ER 385.

interlocutory injunctions were still in force, extensive extracts from the book were published in other newspapers, including the *Sunday Times*. The House of Lords held that these publications amounted to a contempt of court, even though the injunctions had not been issued against these newspapers in the first place.

In the view of the House, where a party (C) knowingly does something which would if done by B be a breach of an injunction obtained by A against B, C is guilty of contempt of court if this conduct interferes with the administration of justice between A and B. In this case the publication by C (the *Sunday Times*) did interfere with proceedings between A (the Attorney General) and B (the *Guardian* and the *Observer*). The consequence of the publication by the *Sunday Times* before the main *Spycatcher* trial was to nullify, in part at least, the purpose of such trial, because it put into the public domain part of the material which the Attorney General claimed should remain confidential.

The principle in the latter case is sometimes referred to as the ‘Spycatcher principle’, for obvious reasons. The Court of Appeal has since been unwilling to accept that ‘conduct by a third party which is inconsistent with a court order in only a trivial or technical way should expose a party to conviction for contempt’.¹³⁵ However, the importance of the principle is not to be under-estimated, nor is the willingness of the courts to enforce it:

In *AG v Punch Ltd*¹³⁶ an interlocutory injunction was granted to restrain Associated Newspapers Ltd (proprietors of the *Mail on Sunday*) from publishing any information obtained from Mr David Shayler which was obtained by him in the course of or as a result of his employment in the security service. Mr Shayler subsequently started to write a weekly column for *Punch*, the aim of the column being to criticise the performance of the security service.

Following the publication of an article about an IRA bombing in London, the Attorney General brought contempt proceedings against *Punch*. The Court of Appeal overturned the first instance decision that there had been a contempt, the court accepting that the editor ‘thought that the purpose of the [injunction] was to restrain material dangerous to national security’ which it was not his intention to publish. But on an appeal by the Attorney General, the original decision was restored.

According to Lord Nicholls, the editor of *Punch* knew that the action against Shayler raised confidentiality issues relating to national security: ‘He must, inevitably, have appreciated that by publishing the article he was doing precisely what the order was intended to prevent, namely, pre-empting the court’s decision on these confidentiality issues. That is knowing interference with the administration of justice.’¹³⁷

Reform

The current legal framework on the law of contempt was drafted in a very different era. Although the 1981 Act was a response to the decision of the Strasbourg court in the *Sunday Times* case, the law now in force pre-dates the modern human rights era, which has raised

¹³⁵ *A-G v Newspaper Publishing plc* [1997] 1 WLR 926 (Lord Bingham CJ). Also *Harrow LBC v Johnstone* [1997] 1 WLR 459.

¹³⁶ [2002] UKHL 50, [2003] 1 AC 1046.

¹³⁷ *Ibid*, at para 52.

questions about the balance struck in 1981 between competing interests. The law developed in 1981 also predates the internet and other modern means of communication, as well as what some might see as a highly competitive newspaper industry revealed by experience to be much less respectful of others than may have been the case even in 1981.

The Attorney General in the Coalition government (Dominic Grieve) appears to have taken a much greater interest in the law of contempt than his Labour predecessors, and with it a greater willingness to confront the press, which may also explain the recent spate of prosecutions for contempt covering a wide range of issues. It may also explain his request that the Law Commission should give priority to this question in its current work programme, which has already led to the removal of liability for scandalising the judiciary, a form of contempt that hitherto had been thought to have fallen into disuse.¹³⁸

In a consultation paper issued in 2012, the Law Commission identified a number of other areas of difficulty. The first relates to contempt in the face of the court, where concern was expressed about the uncertain scope of the offence, the inconsistency between courts in dealing with it, and the compatibility of existing law with ECHR, art 6. The second relates to the strict liability rule, with one of a number of concerns being whether the ‘threshold of *serious* prejudice or impediment is too high and that *any* prejudice or impediment caused by a publication should be sufficient to be in contempt’.¹³⁹ The third is that the current law was introduced in a very different era, pre-internet.

These concerns were expressed well by the Law Commission in its consultation paper on contempt. There it is cogently argued that while ‘prejudicial information may historically have faded with the newspaper print, as well as from our collective memory, as data it is now processed, archived and is retrievable for very much longer periods of time’.¹⁴⁰ Attention was also drawn to growing concern about juror ‘misconduct’ – relating particularly to the problem of jurors communicating with third parties or seeking information about defendants on the internet,¹⁴¹ and to the unequivocal nature of the restriction in the 1981 Act, s 8.¹⁴²

D. The executive and the machinery of justice¹⁴³

Questions about the court structure, the buildings in which the courts should be housed, and how the courts should be funded, are questions for the government that cannot be decided by the judges and lawyers (though they may be consulted about such decisions). Before 2007, the Lord Chancellor’s Department (latterly the Department for Constitutional Affairs) and the Home Office were the government departments principally responsible for such matters.

These matters are now the responsibility of the Ministry of Justice, which as one of the biggest departments in government inherited the duties of the Department for Constitutional

¹³⁸ Crime and Courts Act 2013, s 33. For a recent and unusual revival of this head of liability in Northern Ireland in proceedings brought against a former Cabinet minister (Peter Hain) for comments in his autobiography, see *The Guardian*, 17 May 2012. See generally on this head of liability, the 13th edn of this book, pp 378–9.

¹³⁹ Law Commission, above, para 2.45, citing *Worm v Austria* (1997) 25 EHRR 454.

¹⁴⁰ *Ibid*, para 3.1.

¹⁴¹ See respectively *Attorney General v Fraill* [2011] EWCA Crim 1570, (2011) Cr App R 21, and *Attorney General v Dallas* [2012] EWHC 136 (Admin), [2012] 1 WLR 991 (contempt of court for interfering with administration of justice). See also *Attorney General v Davey* [2013] EWHC 2317 (Admin).

¹⁴² On the compatibility of s 8 with the ECHR, art 10, see *Scotcher*, note 126 above, and now *Seckerson v United Kingdom* (2012) 54 EHRR SE 19. Although in principle there is no conflict, there may be circumstances when the absolute nature of the existing law goes beyond what art 10 would permit.

¹⁴³ See Brazier, *Constitutional Practice*, ch 12.

Affairs as well as duties performed hitherto by the Home Office.¹⁴⁴ The birth of the Ministry of Justice proved to be controversial, mainly because of the way in which the new Ministry was established, drawing criticism of the government from the House of Lords Constitution Committee (and from the House of Commons Constitutional Affairs Committee).¹⁴⁵

It was a particular concern of the foregoing critics that the government had failed to consult the judiciary in good time about its plans, the Lords Committee advising that the government must learn to treat the judges as a constitutional partner rather than merely the subjects of change. The Lord Chancellor and Secretary of State for Justice is the ministerial head of the Ministry of Justice. The position is different in Scotland, where there is a Department of Justice in the Scottish Executive.

Lord Chancellor

The office of Lord Chancellor was regarded as one of the great offices of state with an unbroken pedigree stretching back to 1068, the position having been held in that time by some notable historical figures, including Thomas Becket, Thomas Wolsey and Sir Thomas More. Apart from being a member of the Cabinet as political head of an important government department, the Lord Chancellor was also the Speaker of the House of Lords, for which a portion of his salary was paid by the House of Lords. On appointment, moreover, the Lord Chancellor took the judicial oath and was entitled to preside over the House of Lords in its judicial work and the Judicial Committee of the Privy Council.

Thus, Lord Mackay sat on 67 occasions (House of Lords and Privy Council) between 1987 and 1994, while Lord Hailsham sat 68 times as Lord Chancellor between 1979 and 1987.¹⁴⁶ Lord Irvine also took part in a number of cases,¹⁴⁷ though he was the last to do so. The role of the Lord Chancellor has been radically redefined since 2003, with the Constitutional Reform Act 2005 giving effect to a series of changes that were under way before the Act was passed. The Lord Chancellor has ceased to be a judge and no longer takes the judicial oath,¹⁴⁸ with a new oath for the Lord Chancellor being introduced by the Constitutional Reform Act 2005.¹⁴⁹ Also, the Lord Chancellor is no longer the Speaker of the House of Lords, which now elects its own presiding officer.¹⁵⁰

Unusually for a government minister, there are statutory provisions relating to eligibility for appointment of the Lord Chancellor. The Constitutional Reform Act 2005 provides that a person may not be recommended for appointment as Lord Chancellor unless ‘qualified by experience’, which includes experience as a minister, a member of either House of Parliament, a legal practitioner, a university law teacher, and anything else the Prime Minister ‘considers relevant’.¹⁵¹ None of the foregoing factors is a requirement or condition of appointment, and in particular the Lord Chancellor need no longer be legally qualified. Nor is it necessary for the Lord Chancellor now to be a member of the House of Lords, with the first incumbent under the new regime (Jack Straw) being a member of the House of Commons.

¹⁴⁴ The creation of a Ministry of Justice had been proposed by the Haldane committee on The Machinery of Government as long ago as 1918: Cd 9230, 1918.

¹⁴⁵ See HL Paper 151 (2006–07), and HC 466 (2006–07). See further A W Bradley [2008] PL 470.

¹⁴⁶ HL Deb, 24 October 1994, col 395 (WA). Also HL Deb, 20 October 1992, col 82 (WA).

¹⁴⁷ See for example *DPP v Jones* [1999] 2 AC 240 (ch 18); and *National Power plc v Carmichael* [1999] ICR 1227.

¹⁴⁸ Constitutional Reform Act 2005, s 17.

¹⁴⁹ *Ibid*, amending the Promissory Oaths Act 1868.

¹⁵⁰ Constitutional Reform Act, s 18.

¹⁵¹ *Ibid*, s 2.

Some of the responsibilities previously discharged by the Lord Chancellor have been reassigned, many going to the Lord Chief Justice whose administrative role as Head of the Judiciary in England and Wales has been greatly enhanced by the Constitutional Reform Act 2005 (as amended in 2013).¹⁵² So while the Lord Chancellor still remains concerned with virtually all judicial appointments at the level of the High Court and above, responsibility for judicial appointments below that level has been re-assigned. Although senior appointments now fall within the scope of the Judicial Appointments Commission, it remains the case nevertheless that the Lord Chancellor retains a potentially important role in advising the Queen on judicial appointments at different levels of seniority.¹⁵³

Ministry of Justice

Despite the apparent diminution in the role and status of the Lord Chancellor, he (there has yet to be a female Lord Chancellor despite the long history of the office) remains head of what is claimed to be one of the largest government departments, with a wide range of responsibilities. These relate principally to the administration of justice in its widest sense (including the courts, prisons and probation services), as well as constitutional matters (including human rights). Some of these responsibilities are underpinned by statute in the sense that the Lord Chancellor has a statutory duty to ensure that there is an efficient and effective system to support the carrying on of the business of the courts.¹⁵⁴ This includes the appointment of staff and the provision of accommodation,¹⁵⁵ and the appointment of court security officers with powers of search, as well as powers of exclusion, removal and restraint.¹⁵⁶

As pointed out, the creation of the Ministry of Justice was controversial, and led to a souring of relations between government and judiciary. One concern of the judges was that funding for the courts, tribunals and legal aid might be put at risk by having to compete in the Ministry of Justice with expenditure needed for prisons. The impasse was resolved when the Lord Chancellor and the Lord Chief Justice agreed to establish an executive agency,¹⁵⁷ Her Majesty's Courts Service. Unlike other executive agencies, the latter was to be based on a 'partnership model', an approach adopted because the courts 'are by their nature a shared endeavour between the judiciary, who are responsible for the judicial function to deliver justice independently, and the government, which has overall responsibility for the justice system'.

In April 2008, details of the agreement between the Lord Chancellor and the Lord Chief Justice were laid before Parliament in the form of H M Courts Service Framework Document.¹⁵⁸ In outline, the Lord Chancellor and the Lord Chief Justice undertook to jointly agree the aims and objectives for the Courts Service, and the priorities for funding within the Service. The Courts Service was replaced by H M Courts and Tribunals Service, which was established in 2011 on the same partnership model as its predecessor, though now including the Senior President of Tribunals along with the Lord Chancellor and the Lord Chief Justice.¹⁵⁹ The role of H M Courts and Tribunals Service is to 'run an efficient

¹⁵² Ibid, ss 12, 13; Sch 1, 2.

¹⁵³ See above, section A. Some responsibilities have been assigned to the Senior President of Tribunals: see ch 23 A.

¹⁵⁴ Courts Act 2003, s 1.

¹⁵⁵ Ibid, s 3. Although employed as civil servants, court service staff may be regarded by the courts as part of the judicial arm of the state, as in *Quinland v Governor of Swaleside Prison* [2002] EWCA Civ 174, [2003] QB 306.

¹⁵⁶ Courts Act 2003, ss 51–7.

¹⁵⁷ See ch 11 on executive agencies.

¹⁵⁸ Cm 7350, 2008.

¹⁵⁹ Cm 8043, 2011.

and effective courts and tribunals system, which enables the rule of law to be upheld and provides access to justice for all'.¹⁶⁰

The Courts and Tribunal Service Framework Agreement makes clear that it is to be reviewed every three years, and that while it may be amended before the mandatory review, any such amendment will require the agreement of all parties. Provision is made for the Lord Chancellor to override the need for consent where it is necessary to do so to enable him to carry out duties under the Courts Act 2003 and the Tribunals, Courts and Enforcement Act 2007. On the other hand, the Lord Chief Justice may terminate the partnership if he concludes that 'it is no longer compatible with his constitutional position or the independence of the judiciary'. If the partnership is terminated, governance of the Service will revert to a conventional executive agency model reporting directly to the Lord Chancellor, until a new model is agreed.¹⁶¹

Law Officers of the Crown¹⁶²

The Attorney General and Solicitor General are the law officers of the Crown, ministerial positions to which the incumbents are appointed by the Prime Minister. Their historic role is to represent the Crown in the courts, and they now act as legal advisers to the government on important matters, though ministers may also receive legal advice from within their own departments. Serviced by the Attorney General's office, the Law Officers operate independently of the Ministry of Justice and have a number of responsibilities. These include leading for the Crown in major prosecutions (especially in trials involving state security or official secrecy) or in major civil actions to which the Crown is a party.

In other cases (the great bulk), the Law Officers will be responsible for recruiting and appointing counsel who appear on behalf of the government in legal proceedings; appointing a special advocate to represent the interests of a party who cannot for security or other reasons be fully informed of all the material relied on against him or her;¹⁶³ and lodging an appeal against sentences which are considered to be unduly lenient. The Attorney General's consent is also needed for relator actions, with decisions granting or refusing such consent not yet subject to review by the courts.¹⁶⁴ Otherwise, the Law Officers have parliamentary responsibilities, which includes giving advice to parliamentary committees (notably the Standards and Privileges Committee).

It has been said that in the exercise of these many different functions, 'the Attorney General acts not as a minister of the Crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, but as independent, unpartisan guardian of the public interest in the administration of justice'.¹⁶⁵ It had been the practice since the reign of George III for the Attorney General to be an MP, though between 1999 and 2010 the office was held by life peers.¹⁶⁶ In view of his or her duties in connection with prosecutions, it is thought preferable that the Attorney General should remain outside the Cabinet, attending particular Cabinet meetings when summoned.

After a detailed examination of the role of the Law Officers carried out in 2007–2008, the government concluded that the Attorney General should continue as the law officer and as a minister responsible to Parliament, rejecting a suggestion that the work of the Attorney

¹⁶⁰ Ibid, para 2.2.

¹⁶¹ On the relationship between the Ministry of Justice and the Lord Chief Justice, see HC 97 (2012–13), paras 115–119 (Justice Committee).

¹⁶² Edwards, *The Law Officers of the Crown*, and *The Attorney General, Politics and the Public Interest*.

¹⁶³ See *R v H* [2004] UKHL 3, [2004] 2 AC 134.

¹⁶⁴ *Gouriet v Union of Post Office Workers* [1978] AC 435; chs 10, 25.

¹⁶⁵ *R v H*, above, per Lord Bingham, at para 46.

¹⁶⁶ For a critique of this departure from long established practice, see *The Guardian*, 21 November 2005 (editorial), and for a defence see Lord Goodhart, *The Guardian*, 22 November 2005 (letter to the editor).

should be carried out by an official outside party political life. The government did, however, propose that the independence of the office should be strengthened by a new oath, committing the incumbent to uphold the rule of law, while the government also seemed open to the possibility of greater parliamentary scrutiny of the office.¹⁶⁷ The Attorney General has most recently played a prominent part in revitalising the law relating to contempt of court, appearing in a number of high-profile prosecutions.

Law Officers' advice

The invasion of Iraq in 2003 gave rise to a number of political concerns, not the least of which was the legal basis for the government's action, it being widely believed in this country that the action did not have the necessary authority under international law. Related to this were questions about the advice which the government received from the Attorney General, the extent to which that advice was made fully available to the Cabinet as a whole, and the circumstances – if any – in which it might be made available to Parliament and the public, either at the time it was given, or after the event when questions were raised about the legality of the government's conduct. Erskine May refers to a 'long-standing convention, observed by successive governments', that 'the fact of, and substance of advice from, the law officers of the Crown is not disclosed outside government'.

Erskine May also explains that 'the purpose of this convention is to enable the government to obtain full and frank legal advice in confidence'.¹⁶⁸ This is not to say that the advice may not be disclosed, but it does mean that it will not be laid before Parliament or quoted from in debate, unless a minister considers it expedient to do so,¹⁶⁹ though even then it may be appropriate to make disclosure only with the consent of the law officer concerned. According to the *Ministerial Code*, 'the fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside government without their authority'.¹⁷⁰ Breach of this principle may lead to the resignation of a minister, as during the Westland affair in 1985–86 when a Cabinet minister resigned following the leak to the media of a confidential letter of advice from the Solicitor General to other ministers.

The disclosure of the advice given by the Law Officers thus takes place very infrequently, despite the highly charged circumstances in which advice may sometimes have to be given. It has been said by one authority that there is 'an impregnable moat around the Law Officer's opinions',¹⁷¹ and acknowledged judicially that

there are only five occasions in the 40 years before 2008 when the government of the day decided that the public interest favoured disclosure of such advice. These were: 1971, when the substance of the advice was disclosed but not the actual advice relating to the United Kingdom's obligations to supply arms to South Africa under the Simonstown Agreement [sic]; 1986: the disclosure of a letter of advice in respect of issues arising under the so-called Westland Affair, there having been an unauthorised partial leak of advice; 1992: the advice of the Law Officers regarding the legal regime governing arms sales to Iraq was disclosed to the Scott Enquiry following the collapse of the Matrix Churchill trial; 1997: the advice of the Law Officers was disclosed in connection with the government's liabilities for breaching community law in the Factortame litigation; 2003 and 2006: the advice of the Attorney General on the legality of the use of force against Iraq was disclosed in March 2003 in part and subsequently in May 2006 in whole.¹⁷²

¹⁶⁷ Cm 7342, 2008, paras 91–98. Compare HC 306 (2006–07); HL Paper 93 (2007–08).

¹⁶⁸ Erskine May, above, p 447.

¹⁶⁹ See HC Deb, 17 March 2003, col 515 (WA).

¹⁷⁰ *Ministerial Code* (2010 edn), para 2.13. And see page 20 above.

¹⁷¹ Edwards, *The Attorney General, Politics and the Public Interest*, p 226.

¹⁷² *HM Treasury v Information Commissioner* [2009] EWHC 1811 (Admin), [2010] QB 563, at para [9].

The government's review of the office of Attorney General in 2007–2008 did not lead it to recommend that the current arrangements should be changed, taking the view (in accordance with a majority of respondents to its consultation exercise) that 'the benefits, which would come from regular disclosure (transparency and accountability)', would be 'vastly outweighed by the downsides (adverse impact on the openness of communications between client and lawyer)'.¹⁷³ The government would continue to provide Parliament and the public with an explanation of why a particular course of action is lawful, acknowledging that any such explanation must be consistent with the advice received, and 'must not dishonestly represent that advice'.¹⁷⁴ In 2011 the Coalition government published a summary of the Attorney General's advice in advance of the UN led invasion of Libya, but consistently with past practice refused to publish the full advice.¹⁷⁵

E. Prosecution of offenders and miscarriages of justice

In practice, the great majority of criminal prosecutions are initiated by the police; others are instituted by government departments (for example, HM Revenue and Customs for evasion of tax) or local authorities (for example, for breach of by-laws). The position regarding criminal prosecutions in England and Wales was overhauled by the Prosecution of Offences Act 1985, which introduced the Crown Prosecution Service.¹⁷⁶

The philosophy of the Act was 'to separate the functions of the investigation of crime, that being the responsibility of the police, and the prosecution of offences, that being the responsibility of a single national prosecution service'.¹⁷⁷ It has been emphasised that prosecution is a quasi-judicial act which requires 'the evaluation of the strength of the evidence and also a judgment about whether an investigation and/or prosecution is needed in the public interest'.¹⁷⁸ Prosecutors are thus expected to take decisions in 'a fair and impartial way, acting at all times in accordance with the highest ethical standards and in the best interests of justice'.¹⁷⁹

In principle, private persons may institute prosecutions in English law for any criminal offence unless by statute this has been excluded,¹⁸⁰ a potentially important safeguard against abuse on the part of the prosecuting authorities. The position has traditionally been very different in Scotland where prosecutions are under the control of the Lord Advocate and where private prosecutions are extremely rare.

Crown Prosecution Service

The Crown Prosecution Service is, 'an autonomous and independent agency' though 'not a body corporate but a collection of individuals with statutory functions to perform'.¹⁸¹ It is under the central direction of the Director of Public Prosecutions, an office created in 1879. A barrister or solicitor of not fewer than ten years' standing, the DPP is appointed by the

¹⁷³ Cm 7342, 2008, para 66.

¹⁷⁴ *Ibid*, para 68.

¹⁷⁵ See HC 950 (2010–12), para 24 (Defence Committee).

¹⁷⁶ See Report of Royal Commission on Criminal Procedure, Cmnd 8092, 1981, part II.

¹⁷⁷ *Elguzouli-Daf v Metropolitan Police Commissioner* [1995] QB 335, at p 346.

¹⁷⁸ Protocol between the Attorney General and the Prosecuting Departments (2012), para 4.1.

¹⁷⁹ *Ibid*.

¹⁸⁰ For the procedural rights of a private prosecutor, see *R v George Maxwell (Developments) Ltd* [1980] 2 All ER 99; *R v DPP, ex p Hallas* (1988) 87 Cr App Rep 340.

¹⁸¹ *Elguzouli-Daf*, above, at pp 346, 351. It is in fact a non-ministerial department (ch 11), unlike HM Courts and Tribunals Service (above), which is an executive agency (ch 11).

Attorney General to work under his or her general superintendence. Apart from the DPP, other key personnel in the Crown Prosecution Service are the Chief Crown Prosecutors (appointed by the DPP to supervise the work of the CPS in geographical areas), and Crown Prosecutors (barristers or solicitors who conduct proceedings under the direction of the DPP).¹⁸² The CPS reviews cases submitted by the police for prosecution and conducts prosecutions on behalf of the Crown.

The Service also institutes proceedings in difficult or important cases and gives advice to the police on all matters relating to criminal offences. Although the CPS is under a duty to take over all legal proceedings instituted by the police, it is not required to but may take over proceedings begun by others (such as private prosecutions). Having taken over such proceedings the CPS may discontinue them if the evidence is insufficient, if the proceedings would be contrary to the public interest, to avoid duplication, or for any other good reason.¹⁸³ If it is too late to discontinue, the prosecutor may offer no evidence, so that an acquittal automatically follows. The Attorney General has a separate prerogative power to stop a prosecution on indictment by issuing a *nolle prosequi*. This power is rarely used today,¹⁸⁴ and the government has proposed that it should be abolished.¹⁸⁵

The Prosecution of Offences Act 1985 requires the DPP to issue a Code for Crown Prosecutors,¹⁸⁶ an initiative acknowledged judicially as being important to ensure consistency in prosecuting decisions.¹⁸⁷ In setting out the principles governing prosecutions, the Code for Crown Prosecutors makes it clear that there is no duty to bring criminal proceedings against a person suspected of having committed an offence.¹⁸⁸ Although the Code has been revised, it is still the general rule that proceedings will be brought only when (a) there is enough evidence to provide a realistic prospect of conviction, and (b) it is in the public interest to prosecute; the Code gives guidance on the factors to be weighed in making this judgment.¹⁸⁹ As a document issued under statutory authority, the Code has been said by the House of Lords to constitute ‘law’ for the purposes of the ECHR, which means that it must meet Convention standards of accessibility and foreseeability.

Although the Code appears generally to meet these standards, it was held in one case attracting great media interest to have given insufficient information about prosecution decisions in the case of assisted suicide. As a result, the DPP was instructed by the House of Lords to issue a policy to identify the facts and circumstances he would take into account in deciding whether to consent to a prosecution for assisting a suicide.¹⁹⁰ While there is no duty to prosecute in every case, equally the DPP does not have the power to grant an immunity from prosecution: ‘The power to dispense with and suspend laws and the execution of laws without the consent of Parliament was denied to the Crown and its servants by the Bill of

¹⁸² Perhaps surprisingly, the dismissal of a Crown Prosecutor from his or her employment is not normally subject to judicial review: *R v Crown Prosecution Service, ex p Hogg*, *The Times*, 14 April 1994.

¹⁸³ See *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52, [2012] 3 WLR 1227.

¹⁸⁴ For examples of its use in relation to customs prosecutions (where the Attorney General had no duty of superintendence), see HC 115 (1995–6) (Scott Report), para C.3.10.

¹⁸⁵ Cm 7342, 2008, paras 93–94.

¹⁸⁶ CPS, Code for Crown Prosecutors (2013 edn). The DPP may also make a public statement on his or her prosecuting policy other than in the Code for Crown Prosecutors: *R (Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800, at para 39; *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345, at para 54. The Lord Advocate exercises such a power in Scotland: *Pretty*, above, esp Lord Hope at paras 79–82.

¹⁸⁷ *Purdy*, above.

¹⁸⁸ As explained by Sir Hartley Shawcross QC when Attorney General: ‘It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution’ (HC Deb, 29 January 1951, col 681). See *Smedleys Ltd v Bred* [1974] AC 839.

¹⁸⁹ CPS, Code for Crown Prosecutors, above, para 4.1.

¹⁹⁰ *R (Purdy) v DPP*, above.

Rights 1688.¹⁹¹ A decision not to prosecute is subject to judicial review,¹⁹² although the power of judicial review in such circumstances is ‘sparingly exercised’.¹⁹³

Role of the Attorney General in prosecutions

What opportunities are there for political considerations to be brought to bear in the prosecution of offenders? The question arises because (i) prosecution policy generally is under the superintendence of a government minister (the Attorney General) and therefore liable in principle to interference; (ii) some prosecution decisions require the consent of the Attorney General, for example under the Official Secrets Act 1911, the Theatres Act 1968, and the Public Order Act 1986; and (iii) the Attorney General has the power to intervene to discontinue prosecutions. Concern about the appearance of possible opportunities for political interference is compounded by the fact that in recent years some very high profile investigations of a highly political nature have not been followed through to the stage of prosecution, these including the cash for honours affair in 2005–6 and the investigation of alleged corruption by a British company in 2007.

In the first case, prosecutions under the Honours (Prevention of Abuses) Act 1925 did not require the consent of the Attorney General, and in any event the CPS had been unable to find sufficient evidence on which to base a prosecution. But it would have been acutely embarrassing for the Attorney General if those for whom he was accountable (the CPS) were in a position of having to decide whether it was in the public interest to prosecute members of the governing political party, including the Prime Minister.¹⁹⁴ In the second case, an investigation by the Serious Fraud Office into allegations of corruption by a British company was brought to an end, following intervention by the Prime Minister who advised that the proceedings would damage national security, and could lead to a refusal by the Saudi government to provide sensitive information needed for counter-terrorism purposes. The investigation was discontinued, the House of Lords holding that the SFO was entitled to bring it to an end in such circumstances.¹⁹⁵

It is perhaps unsurprising that proposals should be made from time to time to remove ministerial involvement in prosecution decisions. However, although it has been suggested that the Attorney General’s consent should no longer be required for prosecutions, it has also been proposed that it should be retained for cases involving national security.¹⁹⁶ The current guidelines emphasise that ‘it is a constitutional principle’ that the Attorney General ‘acts independently of government’ when taking decisions about prosecutions, but that unless expressly required to do so by statute he or she should not normally be consulted about decisions which are politically sensitive (because they relate to MPs, political parties, or the conduct of elections). They also make it clear that the Attorney may exceptionally direct that a prosecution is not started or discontinued where such intervention is necessary ‘for the purpose of safeguarding national security’.¹⁹⁷

¹⁹¹ *R (Pretty) v DPP*, above, at para 39 (Lord Bingham).

¹⁹² *R v DPP, ex p C* (1995) 1 Cr App R 136. But the decision to prosecute is not, ‘absent dishonesty, mala fides or an exceptional circumstance’: *R (Pretty) v DPP* above, at para 67, applying *R v DPP, ex p Kebeline* [2000] 2 AC 326. See also *Pretty v United Kingdom* (2002) 35 EHRR 1.

¹⁹³ *R v DPP, ex p Manning* [2001] QB 330, at p 343.

¹⁹⁴ See CPS Decision: ‘Cash for Honours’ Case – Explanatory Document (2007). The Attorney had previously intervened under the Contempt of Court Act 1981 to restrain the publication of evidence relating to the case that had been leaked to the BBC: *Attorney-General v BBC* [2007] EWCA Civ 280.

¹⁹⁵ See *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756. Although the decision was that of the Director General, the Attorney General was also involved.

¹⁹⁶ Cm 7342 (2008), paras 85–89.

¹⁹⁷ Protocol between the Attorney General and the Prosecuting Departments (2012), para 4(b)1.

The procedures adopted in such circumstances were fully canvassed in the *Corner House* case,¹⁹⁸ where it was pointed out that before intervening to prevent or discontinue a prosecution, the Attorney may engage in what is called a ‘Shawcross exercise’, so called because it is based on a statement made to the House of Commons in 1951 by the then Attorney General (Sir Hartley Shawcross).¹⁹⁹ The essence of the statement is that ‘when deciding whether or not it is in the public interest to prosecute in a case where there is sufficient evidence to do so the Attorney General may, if he chooses, sound opinion among his ministerial colleagues, but that the ultimate decision rests with him alone and he is not to be put under pressure in the matter by his colleagues’.²⁰⁰ Where the Attorney General intervenes in this way, a statement will be made to Parliament giving reasons for his or her action.²⁰¹

Accountability of the Crown Prosecution Service

The creation of the Crown Prosecution Service in 1988 brought into prominence both the scope for central influence over the criminal justice system, which had previously been exercised without publicity, and the question of accountability for the abuse of power by public prosecutors. It has been acknowledged judicially that ‘by convention the Attorney General is answerable to Parliament for general prosecution policy and for specific cases where the Attorney General and the Director of Public Prosecutions intervenes’.²⁰² But because both the Attorney and the DPP should be free from extraneous political interference in their work, there is inevitably a limit to what Parliament can do,²⁰³ and it may not, for example, give directions to the Law Officers about the conduct of particular cases.

Nevertheless, parliamentary accountability is not to be under-estimated: it was an alleged political interference in a prosecution decision in 1924 that led to the defeat of the first Labour government on an opposition vote of no confidence.²⁰⁴ In brief, the Attorney General, Sir Patrick Hastings, who was experienced in advocacy but not in ministerial work, authorised the prosecution of J R Campbell, acting editor of the *Workers’ Weekly*, for having published an article which apparently sought to seduce members of the armed forces from their allegiance to the Crown. A few days later, the prosecution was withdrawn in circumstances suggesting that political pressure had been brought to bear on the Attorney General. The true facts are not easy to establish, but the Cabinet appears thereafter to have courted further controversy by requiring the Attorney to seek its prior approval before initiating prosecutions of a political character, a requirement that was of doubtful constitutional propriety.

But although the work of the Law Officers may thus have dramatic and far-reaching consequences, rarely will accountability lead to the fall of a government as it did in 1924. Apart from parliamentary accountability on this or a less dramatic scale, there are other ways of holding the prosecuting authorities to account. The role of the Attorney General in the Matrix Churchill affair in the 1990s was closely reviewed and sharply criticised by

¹⁹⁸ Above, note 195.

¹⁹⁹ HC Deb, 29 January 1951, col 681. See *R (Corner House Research) v Director of the Serious Fraud Office*, above, para 6.

²⁰⁰ *Corner House*, *ibid*, para 6.

²⁰¹ It is in order for questions to be asked in Parliament about particular decisions made by the Attorney General: how much information the Attorney General gives in reply is a matter for his or her own discretion. Cf Edwards, *Law Officers of the Crown*, p 261.

²⁰² *Elgouzouli-Daf v Metropolitan Police Commissioner* [1995] QB 335, at p 346.

²⁰³ ‘Parliament can usually only call the Attorney General to account after a prosecution has run its course’ (*ibid*).

²⁰⁴ Edwards, *Law Officers of the Crown*, chs 10 and 11; Edwards, *The Attorney General, Politics and the Public Interest*, pp 310–17; F H Newark (1969) 20 NILQ 19; Ewing and Gearty, *The Struggle for Civil Liberties*, ch 3. For the censure debate, see HC Deb, 8 October 1924, col 581.

Sir Richard Scott's inquiry into the export of arms for Iraq. Sir Richard found that the decision to prosecute three executives of the company was taken by the Commissioners of Customs and Excise (now HM Revenue and Customs) following the advice of Treasury counsel. In this decision the Attorney General was not consulted and indeed he was not kept informed of important Customs prosecutions, having no duty of superintendence of such prosecutions, although he did have 'an overall purview of prosecutions brought by the Crown by any authority'.

The Attorney's position was nevertheless called into question as a result of his conduct in relation to public interest immunity (PII) certificates dealing with the granting of export licences to Matrix Churchill and other companies. Although a number of ministers had signed such certificates, the President of the Board of Trade (Mr Heseltine) refused to do so, on the ground that the interests of justice required the disclosure of many of the documents in question. Yet although he had not read them, the Attorney General informed Mr Heseltine that he was under a legal duty to sign the certificates,²⁰⁵ but that his reservations could be put to the judge. In the event Mr Heseltine's reservations were not even disclosed to the prosecution legal team, an omission that drew a strong rebuke from Sir Richard Scott. Sir Richard also repudiated the belief of the Attorney General that he was personally, as opposed to constitutionally, blameless for the inadequacy of the instructions sent to prosecuting counsel.²⁰⁶

Miscarriages of justice

One of the most regrettable features of the criminal justice system in the 1970s and 1980s was the number of miscarriages of justice, particularly the number of people who were wrongly convicted for offences they did not commit.²⁰⁷ Some of these cases arose out of terrorist incidents, most notably the pub bombings at Guildford and Birmingham in 1974,²⁰⁸ although there were many other cases unrelated to acts of terrorism, including that of the so-called 'Bridgewater Three'.²⁰⁹ A number of different factors were responsible for these events, not the least significant of which were the serious shortcomings of the police and the prosecuting authorities.²¹⁰ The matter was reviewed by the Royal Commission on Criminal Justice appointed in 1991, with terms of reference that required it to consider 'whether changes were needed in the arrangements for considering and investigating allegations of miscarriages of justice when appeal rights have been exhausted'.²¹¹

The procedures then in force were governed by the Criminal Appeal Act 1968, s 17, which authorised a reference to the Court of Appeal by the Home Secretary. According to the royal commission, however, the Home Secretary operated within 'strict self-imposed limits', and would not refer cases to the Court of Appeal merely to enable it to reconsider matters it had already considered; but would 'normally only refer a conviction if there is new evidence or some other consideration of substance which was not before the trial court'. The Home

²⁰⁵ *Makanjuola v Metropolitan Police Commissioner* [1992] 3 All ER 617. On the law of public interest immunity, see ch 26 D and especially *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, where the House of Lords overruled *Makanjuola*. Compare HC 115 (1995–6) (Scott Report), para G 59.

²⁰⁶ See further A W Bradley [1996] PL 373.

²⁰⁷ For a wider definition of the term, see HC 419 (1993–4). For a detailed examination of miscarriages of justice, see Nobles and Schiff, *Understanding Miscarriages of Justice*.

²⁰⁸ See *R v Richardson*, *The Times*, 20 October 1989; *R v McIlkenny* [1992] 2 All ER 417; *R v Maguire* [1992] QB 936. And note *R v Ward* [1993] 1 WLR 619.

²⁰⁹ See *The Times*, 21–22 February 1997.

²¹⁰ See on specific aspects, I H Dennis [1993] PL 291.

²¹¹ Cm 2263, 1993.

Office adopted this approach ‘not only because they have thought that it would be wrong for ministers to suggest to the Court of Appeal that a different decision should have been reached by the courts on the same facts’, but also because there was ‘no purpose’ in referring a case where there was ‘no real possibility of the Court of Appeal taking a different view than it did on the original appeal because of the lack of fresh evidence or some other new consideration of substance’.²¹²

These arrangements were criticised both by Sir John May (who had been asked to inquire into two miscarriages of justice)²¹³ and by the Royal Commission on Criminal Justice,²¹⁴ and a new procedure was proposed for the referral of cases. This would require the creation of a new body, independent of both the government and the courts, for dealing with allegations that a miscarriage of justice had occurred, reflecting concern that the Home Secretary should not be ‘directly responsible for the consideration and investigation of alleged miscarriages of justice as well as being responsible for law and order and for the police’.²¹⁵ The Criminal Appeal Act 1995 addressed the incompatibility of these procedures ‘with the constitutional separation of powers as between the courts and the executive’,²¹⁶ and made provision for the appointment by the Queen (on the advice of the Prime Minister) of a Criminal Cases Review Commission (s 9).

The Commission is empowered to refer to the Court of Appeal (following the conviction of an offence on indictment) any conviction or sentence where it considers that ‘there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made’ (s 13): this is a ‘judgment entrusted to the Commission and to no one else’.²¹⁷ The Act also introduces for the first time a power (on the part of the Commission) to refer convictions or sentences arising from cases tried summarily (s 11), in this case to the Crown Court, subject to the same conditions as apply in the case of references to the Court of Appeal following a conviction on indictment. The Commission has wide powers to obtain documents and to appoint investigating officers to carry out inquiries in relation to a case under review, although these will generally be carried out by the police rather than by the Commission’s own officers (ss 17–20).²¹⁸

F. Conclusion

The courts play a critical constitutional role in a democracy in upholding the rule of law, and in ensuring that governments do not exceed the limits of the powers granted to them by Parliament. In performing this role it is important that judges command public confidence, and are seen to be independent of the governments by whom they are appointed. Concerns

²¹² Cm 2263, 1993, pp 181–2. The propriety of this approach was called into question in *R v Home Secretary, ex p Hickey (No 2)* [1995] 1 All ER 490 where it was suggested that the Secretary of State should ask another question: could the new material reasonably cause the Court of Appeal to regard the verdict as unsafe? If it could, the matter should then have been referred without more ado.

²¹³ HC 296 (1992), pp 93–4.

²¹⁴ Cm 2263, 1993, pp 181–2.

²¹⁵ *Ibid*, p 182.

²¹⁶ *Ibid*. And see HC Deb, 6 March 1995, col 32.

²¹⁷ *R v Criminal Cases Review Commission, ex p Pearson* [1999] 3 All ER 498, at p 505. For concerns that the Commission may be applying the test too strictly, see HC 106 (1998–9), para 30. For clarification of the powers of the Commission, see Criminal Cases Review (Insanity) Act 1999.

²¹⁸ For an inside account of the work of the Commission, see G Zellick (2005) *Amicus Curiae*, May/June, p 2; and [2005] Crim LR 937. For an account of the work of its Scottish counterpart, see P Duff (2009) 72 MLR 693. See also R Nobles and D Schiff (2008) 71 MLR 464.

about judicial independence have led to the creation of new procedures for the selection of judges, at a time when the judiciary is being invited to address other principles of general constitutional importance. Questions about the representativeness of the judiciary have led to growing awareness of the need for diversity on the bench, a matter now taken more seriously than in the past. At the same time, questions about accountability of the judiciary are leading to more light being shed on the way in which the courts operate.²¹⁹

In a democracy it is right that citizens should have a full understanding of the way legal and political institutions operate. To this extent the televising of Supreme Court proceedings is welcome.²²⁰ It is right also that people should know more about those who sit in judgment of disputes between fellow citizens, or between citizens and the State. But as has been shown in this chapter, judges are only one (albeit one essential) cog in the much larger machinery that sustains the courts and the administration of justice generally. It is thus also fundamental to the rule of law that the government plays its part not only in obeying the law, but also in ensuring that there is proper support and funding for the courts, whose duty it is to ensure that governments meet their legal obligations. Although the foregoing may seem rich in irony, the rule of law also requires the government to ensure that the law is applied equally to everyone; there should be no political indulgence.²²¹

²¹⁹ See Paterson, *Final Judgment: The Last Law Lords and the Supreme Court*. Also B Dickson (2007) 123 LQR 571.

²²⁰ Crime and Courts Act 2013, s 31, amending Contempt of Court Act 1981, s 9.

²²¹ But see *R (Corner House Research) v Director of the Serious Fraud Office*, above.

PART III

Personal liberty and human rights

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CHAPTER 14

Human Rights Act

This chapter is concerned with the protection of human rights. The first task is to determine what is meant by human rights: there is a great deal of terminological inconsistency in this area, with a number of terms frequently used – human rights, civil liberties, fundamental rights – often referring to the same thing.

For our purposes, human rights take two forms. On the one hand, there are the classical civil and political rights – the right to liberty of the person, the right to form political parties and to participate in elections, and the rights to freedom of conscience, religion and expression. On the other hand, there are social and economic rights – the right to employment, health care, housing and income maintenance during periods of ill health, unemployment or old age. Human rights lawyers have traditionally confined their concerns to the former category, to the exclusion of the latter even though social and economic security is indispensable to effective participation in the civil and political life of the community.

Yet although there are several international treaties promoting social and economic security,¹ the boldness of their aspirations is generally matched only by the difficulties in their enforcement, and few democracies in the common law tradition take them seriously as fundamental rights. The position is different with regard to so-called civil and political rights. One international treaty in particular – the European Convention on Human Rights² – has had a significant influence on British law and practice, with the British government having been held in violation of its terms on numerous occasions and having been required on many occasions now to introduce legislation to give effect to specific rulings of the European Court of Human Rights.

Many countries give constitutional protection to civil and political rights, often in a Bill of Rights with which in some cases both executive and legislative measures must comply, failing which they may be struck down by the courts. Legal protection of human rights in Britain is now to be found in the Human Rights Act 1998, which enables the Convention rights to be enforced in the British courts.³

A. The classical approach

The traditional British approach to the protection of civil liberties and human rights has been greatly influenced by Dicey.⁴ For him there was no need for any statement of fundamental principles operating as a kind of higher law, because political freedom was adequately

¹ These include the Conventions of the International Labour Organization, a United Nations agency based in Geneva, set up to promote the interests of working people. Also important is the Council of Europe's Social Charter of 1961 and the Revised Social Charter of 1996, while the EC Charter of the Fundamental Social Rights of Workers of 1989 has contributed to the development of social law. There is also the EU Charter of Fundamental Rights, adopted at Nice in December 2000. On the Council of Europe's Social Charter, see Harris and Darcy, *The European Social Charter*. On the EC Charter, see Bercusson, *European Labour Law*, and on the EU Charter, see ch 6 above.

² Cmd 8969, 1953.

³ See section C below.

⁴ Dicey, *The Law of the Constitution*. And see ch 4.

protected by the common law and by an independent Parliament acting as a watchdog against any excess of zeal by the executive.⁵

Under the common law, a wide measure of individual liberty was guaranteed by the principle that citizens are free to do as they like unless expressly prohibited by law. So people already enjoy the freedom of religion, the freedom of expression and the freedom of assembly, and may be restrained from exercising these freedoms only if there are clear common law or statutory restrictions. This approach is illustrated most famously by *Entick v Carrington*⁶ where the Secretary of State issued a warrant to search the premises of John Entick and to seize any seditious literature. When the legality of the conduct was challenged, the minister claimed that the existence and exercise of such a power were necessary in the interests of the state. But the court upheld the challenge on the ground that there was no authority in the common law or in statute for warrants to be issued in this way.

A more recent example of liberty being protected by the common law is *A v Home Secretary (No 2)*⁷ where the issue was whether evidence obtained by torture could be admitted by the Special Immigration Appeal Commission. In a case said by Lord Hoffmann to be of 'great importance' to the 'reputation of English law', the House of Lords held unanimously that such evidence could not be admitted, with Lord Bingham saying that common law principles 'compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice'. However, the House divided on the standard of proof required before such evidence should be excluded.

Although there are thus important illustrations of the principle, it is open to question whether this approach is an adequate basis for the protection of liberty. In the first place, the common law rule that people are free to do anything which is not prohibited by law applied (it would seem) equally to the government. As a result, the government could violate individual freedom even though it was not formally empowered to do so, on the ground that it was doing nothing which was prohibited by law. So in *Malone v Metropolitan Police Commissioner*⁸ the practice of telephone tapping was exposed as being done by the executive without any clear lawful authority. But when Mr Malone sought a declaration that the tapping of his telephone was unlawful, he failed because he could not point to any legal right of his which it was the duty of the government not to invade.

A second difficulty with the traditional British approach is that the common law merely recognises the freedom to do anything that is not unlawful, but is powerless to prevent new restrictions from being enacted by the legislature. It is also the case that many restrictions on liberty are imposed by the common law, for it is sometimes convenient for the executive to avoid seeking new powers from Parliament.⁹ In this way the authorities may seek a decision of the courts that will develop the law restrictively and create a precedent of general application.

⁵ For a vivid expression of this view, see *Wheeler v Leicester City Council* [1985] AC 1054, at 1065 (Browne-Wilkinson LJ). For a powerful critique, see Craig, *Public Law and Democracy*.

⁶ (1765) 19 St Tr 1030; ch 4. See also *Beatty v Gillbanks* (1882) 9 QBD 308, on which see ch 18.

⁷ [2005] UKHL 71, [2006] 1 All ER 575. See also *Al Rami v Security Service* [2011] UKSC 34, [2012] 1 AC 531 (assertion of common law rules to prevent the use of closed procedure material in a civil claim for damages where no statutory authority; see ch 26). Compare *Home Office v Tariq* [2011] UKSC 35, [2012] 1 AC 452; see ch 26.

⁸ [1979] Ch 344.

⁹ Cf Lord Browne-Wilkinson [1992] PL 397, and Sir J Laws [1993] PL 59.

Thus in *Moss v McLachlan*¹⁰ the Divisional Court created, from the common law powers of the police to control and regulate public assemblies, an extended right to prevent people from assembling in the first place. And in the *Spycatcher* and other cases, it was held that injunctions could be granted to the Attorney General to restrain the publication of confidential government secrets.¹¹

B. European Convention on Human Rights¹²

The protection of human rights, which is primarily a matter for the state in whose territory the rights may be enjoyed, cannot today be confined within national boundaries. The European Convention on Human Rights was signed at Rome in 1950, was ratified by the United Kingdom in 1951, and came into force among those states which had ratified it in 1953. The Convention is a treaty under international law and its authority derives solely from the consent of those states who have become parties to it. Now one of a number of human rights treaties, which include the International Covenant on Civil and Political Rights of 1966,¹³ the making of the ECHR was a direct result of the movement for cooperation in Western Europe, which in 1949 led to the creation of the Council of Europe.

Inspiration for the Convention came from the wide principles declared in the United Nations Universal Declaration of Human Rights in 1948. The Convention declares certain human rights that are or should be protected by law in each state. It also provides political and judicial procedures by which alleged infringements of these rights may be examined at an international level. In particular, the acts of public authorities may be challenged even though they are in accordance with national law. The Convention thus provides a constraint under international law on the legislative authority of national parliaments, including that at Westminster. These constraints are a matter of growing controversy in the United Kingdom, as the Strasbourg process increasingly becomes the subject of political debate.

The scope of the Convention

The Convention does not cover the whole field of human rights. As already suggested, it does not expressly include economic and social rights, and is confined to certain basic rights and liberties which the framers of the Convention considered would be generally accepted in the liberal democracies of Western Europe. These rights and liberties are as follows:

the right to life (art 2);

freedom from torture, or inhuman or degrading treatment or punishment (art 3);

freedom from slavery or forced labour (art 4);

the right to liberty and security of the person (art 5), including the right of one who is arrested to be informed promptly of the reason for his or her arrest, and of any charge against him or her;

¹⁰ [1985] IRLR 76, and now *Austin v Metropolitan Police Commissioner* [2009] UKHL 5, [2009] 1 AC 564, and subsequently *Austin v UK* [2012] ECHR 459, (2012) 55 EHRR 14. See ch 18 below.

¹¹ *A-G v Guardian Newspapers Ltd* [1987] 1 WLR 1248, [1990] 1 AC 109.

¹² The extensive literature includes Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*; Jacobs, White and Ovey, *The European Convention on Human Rights*; Janis, Kay and Bradley, *European Human Rights Law: Text and Materials*; Mowbray, *Cases and Materials on the European Convention on Human Rights*. Also E Bates, *The Evolution of the European Convention on Human Rights*, and Simpson, *Human Rights and the End of Empire*.

¹³ On the ICCPR, see D Fottrell [2002] PL 485.

the right to a fair trial by an impartial tribunal of a person's civil rights and obligations and of criminal charges against him or her (art 6), including the right to be presumed innocent of a criminal charge until proved guilty, and the right to be defended by a lawyer and to have free legal assistance 'when the interests of justice so require';

the prohibition of retroactive criminal laws (art 7);

the right to respect for a person's private and family life, his or her home and correspondence (art 8);

freedom of thought, conscience and religion (art 9) and freedom of expression (art 10);

freedom of peaceful assembly and of association with others, including the right to form and join trade unions (art 11);

the right to marry and found a family (art 12).

By art 14, the rights declared in the Convention are to be enjoyed

without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

All persons within the jurisdiction of the member states benefit from the Convention regardless of citizenship, although a state may restrict the political activities of aliens.

Many of these rights are subject to exceptions or qualifications. Thus art 5 sets out the grounds on which a person may lawfully be deprived of his or her liberty; these include the lawful arrest of a person to prevent his or her entering the country without authority and the lawful detention 'of persons of unsound mind, alcoholics or drug addicts or vagrants' (art 5(1)(f)). So too the right to respect for private and family life under art 8 is protected from interference by a public authority

except such interference as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Clearly, it is essential that such restrictions should not be interpreted so widely that the protected right becomes illusory. Member states may derogate from most but not all of their obligations under the Convention in time of war or other public emergency (and the United Kingdom has on occasion done so in respect of Northern Ireland and other anti-terrorist legislation), but they must inform the Secretary General of the Council of Europe of the measures taken and the reasons (art 15).¹⁴

The scope of the Convention was extended by the First Protocol concluded as an addendum to the Convention in 1952 and ratified by the United Kingdom. By this protocol, every person is entitled to the peaceful enjoyment of his or her possessions (art 1); the right to education is protected and states must respect the right of parents to ensure education of their children in conformity with their own religious and philosophical convictions (art 2);¹⁵ and the right to take

¹⁴ See *Lawless v Ireland* (1961) 1 EHRR 15; *Branigan v UK* (1993) 17 EHRR 539; *Aksoy v Turkey* (1996) 23 EHRR 553; and *Marshall v UK* (10 July 2001, Application No 41571/98). More recently, see *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68 (esp per Lord Bingham), and *A v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29.

¹⁵ The United Kingdom accepted the latter principle 'only so far as is compatible with provision of efficient instruction and training, and the avoidance of unreasonable public expenditure'; see *Campbell and Cosans v UK* (1982) 4 EHRR 293.

part in free elections by secret ballot is declared (art 3).¹⁶ The Fourth Protocol to the Convention, concluded in 1963, guarantees freedom of movement within a state and freedom to leave any country; it also precludes a state from expelling or refusing to admit its own nationals. This protocol – which has not been ratified by the United Kingdom – has been very important in constraining the scope of ECHR, art 5, with the European Court of Human Rights drawing a contentious distinction between restrictions on liberty and restrictions on movement.¹⁷

The Sixth Protocol provides for the abolition of the death penalty, thereby qualifying the terms of art 2 of the Convention itself. Under the terms of the protocol, which is now ratified by the United Kingdom, no one is to be condemned to death or executed, with the only exception being made for times of war. The Seventh Protocol (not ratified by the UK) deals mainly with appeals procedures in criminal cases, although it also provides (in art 5) for ‘equality of rights and responsibilities of a private law character’ between spouses. Of the remaining protocols, the Eleventh and Twelfth are among the most significant. The former is dealt with below and the latter (which has not been ratified by the UK) contains a general prohibition against discrimination.¹⁸ The Thirteenth Protocol makes final provision for the abolition of the death penalty in all circumstances, and has been ratified by the UK, as has the Fourteenth, also dealt with below. Not yet in operation, the Fifteenth Protocol seeks to limit the power of the European Court of Human Rights.¹⁹

Institutions and procedure

One novel feature of the Convention was the right extended to individuals to complain of breaches of the Convention by the states party to it. The enforcement procedure initially made use both of the Committee of Ministers of the Council of Europe (a committee of political representatives of the member states) and of two institutions created by the Convention: (a) the European Commission of Human Rights, which comprised individual members, elected by the Committee of Ministers but in office acting independently; and (b) the European Court of Human Rights, comprising judges elected by the Consultative Assembly of the Council of Europe. No two members of the Commission or the Court respectively could be citizens of the same state.

Although these procedures have been replaced (see below), the decisions taken thereunder remain authoritative.²⁰ So it is necessary to have a basic knowledge of how they operated. The function of the Commission was to receive and inquire into alleged breaches of the Convention either (a) at the request of any state party to the Convention which alleged that another state had breached the Convention (known as inter-state cases); or (b) where a state had recognised the competence of the Commission to receive such petitions, on the receipt of a petition from an individual or a non-governmental organisation alleging a violation of rights by the state in question.

Although not all states recognised the right of individuals to petition to the Commission, very many more individual petitions came to the Commission than inter-state cases. When an individual petition was received, the Commission had first to decide whether it was admissible under the Convention. If a petition cleared the hurdle of admissibility, the Commission

¹⁶ See *Liberal Party v UK* (1982) 4 EHRR 106 (simple majority electoral system not a breach of Convention), *Matthems v UK* (1998) 28 EHRR 361 (exclusion of residents of Gibraltar a breach of art 3), and *Hirst v United Kingdom (No 2)* [2005] ECHR 681, (2006) 42 EHRR 41 (exclusion of prisoners from franchise a breach of art 3).

¹⁷ *Austin v UK*, above.

¹⁸ See *U Khaliq* [2001] PL 457 on the Twelfth Protocol.

¹⁹ See below, pp 368–370.

²⁰ See for example *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, [2006] ICR 55.

had then to investigate the facts fully and offer its services to the parties with a view to securing a friendly settlement of the case. If such a settlement was not secured, a report on the case was sent by the Commission to the state or states concerned and to the Committee of Ministers. Thereafter the matter might be dealt in one of two ways. First, the matter could be disposed of politically, with the Committee of Ministers deciding by a two-thirds majority. Or secondly, the matter could be dealt with judicially, having been passed by the Committee of Ministers to the European Court of Human Rights.

Before the Eleventh Protocol introduced new procedures for enforcing Convention rights, a case could be brought before the Court only where the states concerned had accepted the compulsory jurisdiction of the Court or expressly consented to the case coming before it. As a general rule, only the Commission or a state concerned could refer a case to the Court: the individual applicant had only a limited right to do so.²¹ Under the new procedures introduced by the Eleventh Protocol, however, this all changed, beginning with the abolition of the Commission and the creation of a full-time court. Although it has the same title as the old court it replaced, the new court is nevertheless ‘an entirely different body with new functions, powers and composition’.²² It is also the subject of perpetual reform.

Under the current arrangements, the court – which has made an important contribution to the development of the Convention²³ – consists of a number of judges equal to the number of states that are party to the Convention (art 20), with a judge from each country (art 22). By virtue of amendments introduced by the Fourteenth Protocol,²⁴ the judges now serve for non-renewable periods of nine years. The main effect of the Eleventh Protocol was to enable applicants complaining of a breach of the Convention to apply directly to the Court, and for this purpose (following changes introduced by the Fourteenth Protocol) the Court operates in a number of forms, the judges sitting in single-judge formation, committees of three judges, chambers of seven judges and the Grand Chamber of 17 judges (art 26).

Applications may continue to be made by one state against another (art 33) or by ‘any person, non-governmental organisation or group of individuals claiming to be the victim of a violation’ (art 34). There is still a requirement that an applicant should have exhausted all domestic remedies and have brought the complaint within six months of the final decision of the domestic authorities. The Court is required to declare inadmissible any application submitted under art 34 considered to be incompatible with the terms of the Convention, manifestly ill-founded or an abuse of the right of individual application (art 35(1)). Following the Fourteenth Protocol, it is now possible for some cases to be struck out also because the applicant has not suffered a significant disadvantage (art 35(2)).

Some of the changes introduced by the Fourteenth Protocol were a direct response to the massive increase in the workload of the Court as the Council of Europe has expanded since 1989. As a result of the changes, a single judge may now take admissibility decisions (art 27), while a committee of three judges may deal with both admissibility and the merits of a complaint at the same time, in cases where the matter in question is already the subject of well-established case-law of the Court (art 28). Otherwise, a chamber of seven judges (though there is a procedure for committees to be composed of five rather than seven judges) will consider the merits of an application (art 29). On matters of particular importance, the chamber may relinquish jurisdiction in favour of a Grand Chamber of 17 judges (art 30).²⁵

²¹ See A R Mowbray [1991] PL 353.

²² A R Mowbray [1994] PL 540 (and [1993] PL 419).

²³ For valuable accounts of the role of the Court, see C A Gearty [1993] 45 CLJ 89, and A R Mowbray [2005] 5 HRLR 57. Also important is Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights*.

²⁴ On which, see A R Mowbray [2002] PL 252; (2004) 4 HRLR 331.

²⁵ See A Mowbray [2007] PL 507 for an account of the work of the Grand Chamber.

In some cases (such as those relating to admissibility), the decisions of single judges and committees are said to be final, as are some decisions of the merits. In other cases, however, there is a procedure for the referral of a chamber decision to the Grand Chamber (art 43). This procedure may be used by either party to a chamber decision (that is to say either the complainant or the government), though the hearing of such a case by the Grand Chamber needs the approval of five judges, and is reserved for serious cases affecting the interpretation of the Convention (or its protocols) or serious questions of general importance (art 43). It is a procedure that ought to be contemplated by governments with extreme caution; not only is it possible that the Grand Chamber will reach a similar decision to that of the chamber, it is also likely that in doing so the Grand Chamber will deliver an outcome that is even more authoritative.²⁶

Cases involving the United Kingdom

Under the original scheme of the Convention, enforcement depended essentially on a state recognising both the right of individuals to apply to Strasbourg and the compulsory jurisdiction of the Court. In 1966, the British government first made the two optional declarations for which the Convention provided,²⁷ and these declarations were renewed at intervals thereafter.²⁸ One result of the changes made by the Eleventh Protocol is that member states today have no choice in these fundamental matters and must accept the right of individuals to apply to the Court. Since 1966 a wide variety of individual petitions have been brought against the UK government and there have also been inter-state references to the Commission by the Republic of Ireland. Although individuals may now enforce Convention claims before the domestic courts,²⁹ a significant number of applications continue to be made to Strasbourg from the United Kingdom.

In the period from 1975 to 1990, the Court decided only 30 cases involving the United Kingdom, in which at least one breach of the Convention was found in 21 cases.³⁰ By 2000 (when the Human Rights Act came into force (on which see below)), there had been only 64 decisions of the Court in which a violation of the Convention had been found against the United Kingdom.³¹ In the three years from 2002 to 2004, however, no fewer than 4,287 applications were lodged, of which 179 were declared admissible.³² In the same period the European Court of Human Rights held in 69 cases that the United Kingdom had violated at least one provision of the treaty, holding in only six cases that there had not been any violation, with a friendly settlement being reached in another 13 cases.³³ In other words, the United Kingdom was found in breach of the Convention in the three years between 2002 and 2004 more often than in the 25 years between 1975 and 2000.

The British cases before the Court have spanned a wide range of subjects. In *McCann v United Kingdom*³⁴ it was held that art 2 (protecting the right to life) had been violated following the use of lethal force by members of the security forces in Gibraltar. In *Jordan v*

²⁶ An outstanding example of such misjudgment is *Demir and Baycara v Turkey* [2008] ECHR 1345, (2009) 48 EHRR 54.

²⁷ For the making of the decisions involved, see A Lester [1984] PL 46 and [1998] PL 237.

²⁸ See HC Deb, 13 Dec 1995, col 647.

²⁹ Section C below.

³⁰ See A W Bradley, 'The United Kingdom before the Strasbourg Court', in Finnie, Himsworth and Walker (eds), *Edinburgh Essays in Public Law*.

³¹ See Blackburn and Polakiewicz (eds), *Fundamental Rights in Europe*, pp 972–3.

³² Council of Europe, *European Court of Human Rights – Survey of Activities 2002–04*. See now M Amos [2007] PL 655.

³³ Council of Europe, *ibid*.

³⁴ (1995) 21 EHRR 97.

*United Kingdom*³⁵ a breach of art 2 was found where there had been no effective investigation into the circumstances surrounding the death of the claimant's son, who had been killed by the police.³⁶ But in *Pretty v United Kingdom*³⁷ it was held that the right to life does not include the right to die, in a case where a terminally ill applicant sought an undertaking that her husband would not be prosecuted if he assisted her suicide. Questions concerning the interpretation of art 3 (protection against torture and inhuman or degrading treatment or punishment) arose in *Republic of Ireland v United Kingdom*³⁸ in relation to the interrogation of IRA suspects, in *Tyrer v United Kingdom*³⁹ in relation to the corporal punishment of juveniles in the Isle of Man, and in *Soering v United Kingdom*⁴⁰ in relation to the request for the extradition of a German citizen to the USA to stand trial for murder with the risk of being sentenced to capital punishment and being kept on Death Row.

In *X v United Kingdom*⁴¹ the Court held certain procedures for the compulsory detention of mental health patients to infringe art 5, a similar conclusion being reached in *Brogan v United Kingdom*⁴² in relation to the provisions of the Prevention of Terrorism (Temporary Provisions) Act 1984 authorising the detention of suspects for up to seven days without judicial authority. The automatic denial of bail for certain offences in the Criminal Justice and Public Order Act 1994 was found to breach art 5 in *Caballero v United Kingdom*.⁴³ So far as art 6 is concerned, the Court held that there had been a breach in *Murray v United Kingdom*,⁴⁴ where the applicant was denied access to a solicitor for 48 hours while in police detention. Art 6 was found to have been breached in *V v United Kingdom*⁴⁵ following the conviction of two minors (for a notorious murder of a child) after a trial conducted in the full glare of highly charged media publicity. A breach of art 6 was found in another high-profile case in which two environmental activists were denied legal aid to defend themselves in an action for libel brought by a large multinational company (McDonald's), which had the benefit of an experienced team of lawyers.⁴⁶

In *Dudgeon v United Kingdom*,⁴⁷ legislation in Northern Ireland making homosexual conduct between adult males a crime was held to infringe the individual's right to respect for his private life under art 8. The practice of telephone tapping was held to infringe art 8 in *Malone v United Kingdom*⁴⁸ and in *Halford v United Kingdom*.⁴⁹ The law of contempt of court was held to infringe freedom of expression under art 10 in *Sunday Times Ltd v United Kingdom*,⁵⁰ but the English law on obscene publications survived scrutiny in *Handyside v*

³⁵ (2003) 37 EHRR 52.

³⁶ See also *McShane v UK* (2002) 35 EHRR 593, and *Edwards v UK* (2002) 35 EHRR 487.

³⁷ (2002) 35 EHRR 1.

³⁸ (1978) 2 EHRR 25.

³⁹ (1978) 2 EHRR 1. See also *Costello-Roberts v UK* (1995) 19 EHRR 112, and *A v UK* (1998) 27 EHRR 611 (child severely beaten by stepfather).

⁴⁰ (1989) 11 EHRR 439. See also *D v UK* (1997) 24 EHRR 423 (proposed removal of drug smuggler to St Kitts under the Immigration Act 1971. Applicant had AIDS and proposed removal found to be in breach of art 3).

⁴¹ (1981) 4 EHRR 188.

⁴² (1988) 11 EHRR 117; and see ch 20.

⁴³ (2000) 30 EHRR 643.

⁴⁴ (1996) 22 EHRR 29.

⁴⁵ (2000) 30 EHRR 121.

⁴⁶ *Steel and Morris v UK* (2005) 41 EHRR 403. Cf *McVicar v UK* (2002) 35 EHRR 566.

⁴⁷ (1981) 4 EHRR 149. See also *Smith v UK* (2000) 29 EHRR 493 (discharge of military personnel because they were homosexual found to be a breach of art 8). But cf *Laskey v UK* (1997) 24 EHRR 39 (conviction of homosexual men for sado-masochistic practices conducted in private not a breach of art 8).

⁴⁸ (1984) 7 EHRR 14.

⁴⁹ (1997) 24 EHRR 523.

⁵⁰ (1979) 2 EHRR 245; and see ch 13.

United Kingdom.⁵¹ In three other important cases it was held that art 10 had been violated by (i) restraints on the publication by newspapers (the *Observer*, *Guardian* and *Sunday Times*) of the contents of a book (*Spycatcher*) by a retired security service officer;⁵² (ii) a requirement imposed by a court that a journalist should disclose the confidential sources of an article he had written, publication of which had been restrained by the courts;⁵³ and (iii) the award of £1.5m damages to Lord Aldington for defamatory remarks contained in a pamphlet written by a historian.⁵⁴ Cases under art 10 have also called into question restrictions in electoral law⁵⁵ and on the freedom of peaceful protest.⁵⁶

In *Young, James and Webster v United Kingdom*⁵⁷ three former employees of British Railways, dismissed for refusing to join a trade union, established that their freedom of association had been infringed as a result of legislation on the closed shop initiated by a Labour government in 1974 and 1976: they were awarded substantial compensation. Conversely, in *Wilson v United Kingdom*⁵⁸ a former employee of the *Daily Mail* successfully claimed that art 11 had been breached in a case where he suffered discrimination because he refused to agree to new working practices whereby pay would be determined by individual rather than collective negotiation. In *Air Canada v United Kingdom*, it was held that there was no breach of art 1 of the First Protocol where an aeroplane was seized by customs officers after it was found to be carrying cannabis.⁵⁹ Conversely in *Nerva v United Kingdom*⁶⁰ it was held that there was no breach of art 1 of the First Protocol in circumstances where an employer was entitled to treat as wages the tips left by customers to waiters. More famously, in *Hirst v United Kingdom (No 2)*,⁶¹ the Court held that the total ban on prisoners voting was a breach of art 3 of the First Protocol.

These decisions have often led to changes in the law intended to prevent future infringements of the Convention. Such legislative changes include the Contempt of Court Act 1981 (regulating the circumstances in which pre-trial publicity is unlawful), the Interception of Communications Act 1985 and the Regulation of Investigatory Powers Act 2000 (regulating the circumstances in which telephone tapping may take place and giving individuals a right of redress against improper use) and the Homosexual Offences (Northern Ireland) Order 1982 (changing the law on homosexual conduct in Northern Ireland). Other significant consequences of Court decisions include the introduction of amendments to the procedures for detention and release of mental health patients following the decision in *X v United Kingdom*,⁶² the issuing of new prison rules and changing practices in prisons following decisions on prisoners' correspondence, and the amending of employment legislation to protect employees from anti-union discrimination by employers. In some cases, however, the government has been unwilling to give effect to decisions of the European Court and has taken steps to avoid doing so.

In *Abdulaziz v United Kingdom*⁶³ the Court held that British immigration rules discriminated against women permanently settled in the United Kingdom because their husbands and

⁵¹ (1976) 1 EHRR 737. See also *Wingrove v UK* (1996) 24 EHRR 1.

⁵² (1991) 14 EHRR 153, 229.

⁵³ *Goodwin v UK* (1996) 22 EHRR 123.

⁵⁴ *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442.

⁵⁵ *Bowman v UK* (1998) 28 EHRR 1; C. Gearty (2000) 51 NILQ 381. But compare *Animal Defenders International v United Kingdom* [2013] ECHR 362, (2013) 57 EHRR 21.

⁵⁶ *Steel v UK* (1999) 28 EHRR 603; and *Hashman v UK* (1999) 30 EHRR 241.

⁵⁷ (1981) 4 EHRR 38.

⁵⁸ (2002) 35 EHRR 523 (K D Ewing (2003) 32 ILJ 1).

⁵⁹ (1995) 20 EHRR 150.

⁶⁰ (2003) 36 EHRR 31.

⁶¹ [2005] ECHR 681, (2006) 42 EHRR 41.

⁶² (1981) 4 EHRR 188.

⁶³ (1985) 7 EHRR 471.

fiancés were not entitled to enter, whereas the wives and fiancées of men settled here were entitled to enter. The government responded to this decision by amending the Immigration Rules to remove the entitlement of wives and fiancées to enter, thereby removing the source of discrimination. In *Brogan v United Kingdom*,⁶⁴ the government responded to the Court's decision, that the detention powers of the Prevention of Terrorism (Temporary Provisions) Act 1984 violated art 5, by declaring that the power was necessary on security grounds and by depositing at Strasbourg a limited derogation from the Convention to the extent that the legislation violated art 5. Government resistance to Strasbourg rulings is emerging as a more persistent problem, with the Court issuing a number of high profile decisions against the government in recent years. There is a marked phenomenon of government delay in implementing decisions, in governments seeking to have Chamber decisions reconsidered by the Grand Chamber, and of minimalist implementation by legislation.⁶⁵

The continuing importance of the Strasbourg process

As already pointed out, the Human Rights Act means that it is now possible to enforce Convention rights in the domestic courts without having to travel to Strasbourg. It is thus possible that many of the cases that went to the Strasbourg court in the past would now be resolved at 'home'. It is not always the case, however, that the Strasbourg process has been rendered redundant by the Human Rights Act. A recent study has revealed that there has been a significant surge in the number of complaints to Strasbourg since the Human Rights Act came into force,⁶⁶ though because of the long delays in the Strasbourg system it may be some time before a confident judgment can be made about the true extent to which the filtering of complaints by the Human Rights Act leads to a long-term decline in (i) the number of complaints found to be admissible, and (ii) the number of admissible complaints found to yield at least one breach of the Convention by the European Court of Human Rights.

There are a number of reasons why – despite the enactment of the Human Rights Act – applications will still have to be made to Strasbourg. The first is that because of the limitations of the Human Rights Act the domestic courts are not in a position to enforce Convention rights. This is most likely to arise where the action complained of is authorised by legislation, which under the Human Rights Act the domestic courts are bound to enforce. An example is *ASLEF v United Kingdom*,⁶⁷ where the trade union alleged that its art 11 rights had been breached by statute. The latter prohibited trade unions from excluding or expelling from membership individuals who were members of the British National Party, in accordance with the policy of the union. In this case a BNP member successfully sued the union for wrongful expulsion, the employment tribunal being bound to uphold the statute notwithstanding its possible impact on the Convention rights of the union. A complaint to Strasbourg was upheld, and the law changed.⁶⁸ It is a striking feature of that case that the Strasbourg application was made following a decision of an employment tribunal (this being a sufficient exhaustion of domestic remedies for the purposes of the Convention).

In most cases where a conflict arises between Convention rights and a domestic statute, it will be open to the domestic court in some cases (though not employment tribunals in the above example) to make a declaration that the relevant provisions of the statute in question

⁶⁴ (1988) 11 EHRR 117. See now ch 20.

⁶⁵ For consideration of the implementation of Strasbourg jurisprudence, see HL Paper 112, HC 555 (2006–7); HL Paper 173, HC 1078 (2007–08); and HL Paper 85, HC 455 (2009–10). There have been no similar reports published during the Parliament elected in 2010.

⁶⁶ M Amos [2007] PL 655.

⁶⁷ [2002] IRLR 568 (K D Ewing (2007) 36 ILJ 245).

⁶⁸ Employment Act 2008, s 19 (K D Ewing (2009) 38 ILJ 50).

are incompatible with Convention rights. Although this may lead eventually to the statute in question being amended or repealed, it will not enable the applicant to secure redress for the violation of his or her Convention rights. For this purpose it will be necessary to proceed to Strasbourg to seek a remedy, as in the landmark *A v Home Secretary*.⁶⁹ There the House of Lords was confronted with the Anti-terrorism, Crime and Security Act 2001, which provided for the indefinite detention without trial of suspected international terrorists. It was held that these powers violated art 5 together with art 14, and a declaration of incompatibility was made. But the declaration had no legal effect on the validity of the statute, which remained in force, and it was necessary for the applicants to proceed to Strasbourg to vindicate their rights. The Strasbourg court agreed with the House of Lords and the applicants were awarded compensation and costs.⁷⁰

The foregoing are examples of cases where the relevance of Strasbourg continues because of the limitations of the Human Rights Act. A second and more important reason why Strasbourg continues to be important is because the domestic courts and the Strasbourg courts may disagree on the meaning of Convention rights. This is likely to be a common problem: a study of the jurisprudence of the House of Lords calculated that only one in three human rights cases leads to a finding that Convention rights have been violated.⁷¹ Although it does not follow that the Strasbourg court will take a different view, it is understandable that disappointed litigants will want to take their case further. In *S and Marper v United Kingdom*,⁷² the two applicants had been arrested by the police in unrelated incidents, after which they each had samples taken and entered on the DNA database. In one case the charges were dropped, and in the other the applicant (who was a child) was found not guilty. The House of Lords held that the retention of the DNA data did not violate Convention rights, even in the case of people who had not been convicted.⁷³ The Strasbourg court took a different view, the Grand Chamber holding unanimously that there had been a breach of art 8.⁷⁴

Also falling into this category are high-profile cases such as *Hirst v United Kingdom (No 2)*,⁷⁵ where the domestic courts held the ban on voting by prisoners did not violate Convention rights. As we have seen, the Strasbourg court disagreed, being required to repeat its findings in the face of government defiance. In *Gillen and Quinton v United Kingdom*,⁷⁶ the House of Lords held that the wide police powers of stop and search in the Terrorism Act 2000 were Convention compliant. Again, the Strasbourg court disagreed, holding that there had been a breach of art 5, and on this occasion the law was changed. In *Abu Qatada v United Kingdom*,⁷⁷ the House of Lords held that there was no violation of Convention rights when the Home Secretary ordered the removal of the applicant to Jordan despite fears that he might be arrested and put on trial in circumstances where evidence obtained by torturing third parties might be used against him. The Strasbourg court held that removal in these circumstances would violate the applicant's rights under art 6, and the Home Secretary was prevented from proceeding with the removal until credible assurances were given by the Jordanian government that evidence obtained in such circumstances would not be used.

Finally, the Strasbourg applications will continue to be important in dynamic areas where the domestic courts appear reluctant to follow the lead of the Strasbourg court, or want more

⁶⁹ *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68.

⁷⁰ *A v United Kingdom* [2009] ECHR 301. For other examples see Amos, note 60 above.

⁷¹ T Poole and S Shah [2009] PL 347.

⁷² [2008] ECHR 1581, (2009) 48 EHRR 50.

⁷³ *R (S) v South Yorkshire Chief Constable* [2004] UKHL 39, [2004] 1 WLR 2196. See ch 16.

⁷⁴ *S and Marper v United Kingdom* [2008] ECHR 1581, (2009) 48 EHRR 50.

⁷⁵ [2005] ECHR 681, (2006) 42 EHRR 41. And see subsequently, *Greens v United Kingdom* [2010] ECHR 868.

⁷⁶ [2010] ECHR 28, (2010) 50 EHRR 45.

⁷⁷ *Othman (Abu Qatada) v UK* [2012] ECHR 56, (2012) 55 EHRR 1.

guidance or certainty before doing so. As with any other court, the jurisprudence of the European Court of Human Rights is not static but continues to evolve. It is not unknown for the Court formally to overrule previous decisions, a step which the Court nevertheless takes reluctantly because of rule of law concerns relating to ‘legal certainty, foreseeability and equality before the law’.⁷⁸ But where the Court does take this step in a complaint against one country, its decisions will have implications for the rest of the Council of Europe, and domestic courts will understandably be concerned about the extent to which national law may have to change to adapt to any new line of authority. These concerns are most likely to arise when the question before them is not quite on point and where there is a perceived lack of clarity in the Strasbourg jurisprudence. Unlike EU law, there is currently no procedure under the ECHR whereby a domestic court can seek a preliminary ruling on a point that is unclear, though such a procedure is proposed.

This problem has arisen in relation to art 11 (freedom of association) where the Strasbourg court has most recently repudiated an established line of authority in which it had been held that the right to freedom of association did not include the right to bargain collectively or the right to strike. In a decisive rejection of that view, the Grand Chamber of the Strasbourg court unanimously changed its mind in 2008, holding that the right to freedom of association includes the right to bargain collectively in line with international labour standards.⁷⁹ In subsequent decisions, other chambers of the Court have extended protection to the right to strike under the umbrella of freedom of association, though they did not unequivocally state that the right to strike was protected.⁸⁰ When these developments were put to the Court of Appeal, it expressed some unease, especially in relation to the argument that art 11 now includes the right to strike, in view of what it regarded as a ‘summary discussion of the point’ in the case law.⁸¹ It may thus require a Strasbourg application by a British trade union to make the domestic courts feel confident that art 11 should be construed in the manner they contend.

The incorporation of Convention rights into domestic law (described perhaps optimistically as ‘bringing rights home’) may thus have the paradoxical impact of enhancing the role of the Strasbourg court in British law, for the three reasons suggested above: the limitations of the HRA, the gap between national and European standards, and the evolving nature of the Strasbourg case law. The continuing importance of the Strasbourg court is all the more likely for the fact that the House of Lords and the Supreme Court positioned themselves after the introduction of the HRA in such a way as to follow the standards set by the ECtHR rather than to develop an approach independently of it, despite a clear opportunity to do so presented by the Act itself. The growing presence of the Strasbourg court in British law has become a matter of acute political controversy, with the Conservative party in particular appearing to support proposals that some feel could lead to the removal of the United Kingdom from its jurisdiction, if implemented.

Controversy and change

There is thus strong political opposition to the ECHR generally (and to the Strasbourg court in particular) in some quarters, opposition that has largely centred on the evolving case law. The latter appears to raise the standard of human rights protection, and is claimed by some to go beyond what the authors of the treaty intended.⁸² An extreme response to this view

⁷⁸ *Demir and Baykara v Turkey*, above, para 153.

⁷⁹ *Demir and Baykara*, *ibid*.

⁸⁰ See K D Ewing and J Hendy QC (2010) 39 ILJ 2 for full details.

⁸¹ *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2009] IRLR 851. Compare *RMT v Serco Ltd* [2011] EWCA Civ 226, [2011] 3 All ER 913.

⁸² See *Daily Telegraph*, 2 November 2013. Lord Chancellor accusing judges of the European Court of Human Rights of taking the Convention ‘to places that the authors of the convention would never have imagined’. And see Straw, *Aspects of Law Reform – an Insider’s Perspective*, ch 2.

would be for the United Kingdom to denounce the ECHR, though for many reasons this must be a highly unlikely event. The politicisation of the Convention is, however, only one of the problems confronting the Court. The other is the backlog of cases and the time taken for cases to be dealt with. It has been estimated that there are well over 100,000 cases waiting to be heard. Both of these questions are thought to lead inexorably to the same answer, which is that more decisions on Convention rights should be taken by national courts, as proposed by the ‘Brighton Declaration’ in 2012.⁸³

One of the main thrusts of the High Level Conference on the Future of the European Court of Human Rights (the ‘Brighton Declaration’) was that national courts should deal with human rights cases, though this in turn may mean a dilution of human rights standards and protection. The objective was to be met in a number of ways, including revising the admissibility criteria, and by amending the Treaty to reinforce the Court’s obligation to reinforce the principle of subsidiarity and the doctrine of the margin of appreciation in its jurisprudence, said to reflect the fact that ‘the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions’.

From the point of view of constitutional principle, however, particularly noteworthy was the proposal for ‘dialogue’ between the Court and State parties ‘as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention’. This is to include ‘dialogues between the Court and:

- (i) the highest courts of the States Parties;
- (ii) the Committee of Ministers, including on the principle of subsidiarity and on the clarity and consistency of the Court’s case law; and
- (iii) Government Agents and legal experts of the States Parties, particularly on procedural issues and through consultation on proposals to amend the Rules of Court’.

It remains to be seen how this process of dialogue evolves. Will it be transparent? Will it take place in public? Will an adequate account of the meetings be published? There may be a case for saying that if any dialogue is to take place between ministers and the Court, it should only be in the open forum of legal proceedings, not least because this would be a most one-sided dialogue, with the Brighton Declaration making no provision for NGO’s or victims’ groups to be party to this conversation on the treaty. It is in any event unclear how far such an ‘open dialogue’ is consistent with the spirit of the Council of Europe’s Recommendation on Judicial Independence of 2010,⁸⁴ an admirable document produced by the very governments who now appear to be unhappy with the Strasbourg court.

While some of the concerns addressed by the Brighton Declaration are unexceptional, it is perhaps thus unsurprising that the manner by which others were addressed were reported to have irritated the President of the Court, offended by politicians with a direct interest in the decisions of the ECtHR telling the judges how to carry out their duties.⁸⁵ As already suggested, some of the proposals for treaty ‘clarification’ certainly revealed a poor understanding of the principle of judicial independence, and it is perhaps surprising that some of these proposals have not attracted more criticism from others. While the backlog in the Strasbourg court provides a compelling case for radical procedural reform on which a start has already been made, there is also a compelling need to ensure that administrative expediency is not advanced at the cost of constitutional principle.

⁸³ <http://hub.coe.int/20120419-brighton-declaration>. For discussion see, M Elliott [2012] PL 619.

⁸⁴ Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities: <https://wcd.coe.int/ViewDoc.jsp?id=1707137>.

⁸⁵ J Rozenberg, ‘Draft Brighton Declaration is a Breath of Fresh Air’, *The Guardian*, 19 April 2012.

Nevertheless, some of these outcomes of the Brighton Declaration were adopted in the Fifteenth Protocol which was drafted quickly thereafter. This includes in Art 1 the introduction of the following passage to the preamble to the ECHR:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.⁸⁶

This embraces two ideas (subsidiarity and the margin of appreciation), designed to encourage the Court to leave more room to the national authorities in the application of the Convention.⁸⁷

The Fifteenth Protocol includes a number of other changes, notably the reduction from six to four months (from the date of the final decision of the domestic courts) for the bringing of applications (art 4). This was welcomed by the Court itself, which was surprisingly relaxed about the other changes. It approved the reference to subsidiarity, this having been ‘a fundamental theme of the reform’, which reflected ‘the Court’s pronouncements on the principle’. Although initially it had reservations about the reference to the margin of appreciation, in an opinion on the draft protocol the Court was content that ‘there clearly was no common intention of the High Contracting Parties to alter either the substance of the Convention or its system of international, collective enforcement’.⁸⁸

Quite whether this will be enough to stem the flow of cases to Strasbourg remains to be seen. The political pressure to which the Strasbourg court is now exposed may induce some self-restraint by the Court in the interests of self-preservation, which some commentators already claim to have detected. That same political pressure, however, may be a symptom of a body politic that needs more rather than less external scrutiny of the kind only the Strasbourg court can provide. There is no reference in the Fifteenth protocol to the ‘dialogue’ referred to in the Brighton Declaration (as there is the Lisbon treaty to a parallel process of dialogue between the judges of the Strasbourg and Luxembourg courts), though it does already appear to be taking place.⁸⁹ Moreover, the Fifteenth Protocol will not come into force until it has been ratified by all states that are party to the ECHR.

C. The Human Rights Act 1998⁹⁰

The Human Rights Act 1998 provides that Convention rights may now be enforced in the domestic courts. For the purposes of the Act, Convention rights are defined to mean

⁸⁶ These treaty changes will have implications for the nature of human rights protection in the United Kingdom via the Human Rights Act (below), though it appears that they will not require implementing legislation.

⁸⁷ There is evidence of both of these principles at work in recent case law, *Austin v United Kingdom*, note 10 above, on the police practice of detaining protestors being a notable example.

⁸⁸ The Court’s position is expressed in Opinion of the Court on Draft Protocol No 15 to the European Convention on Human Rights, 6 February 2013: http://www.echr.coe.int/Documents/2013_Protocol_15_Court_Opinion_ENG.pdf.

⁸⁹ On 25 November 2013 government agents (those who represent governments before the court) attended a seminar with the president, vice president, and registrar of the court. This was designed to enable the agents to express their concerns and indicate any problems they encountered in their work. It is reported that various procedural and practical matters were discussed.

⁹⁰ There is a very full literature on the Act. The leading practitioners’ works are Clayton and Tomlinson, *The Law of Human Rights* and Lester, Pannick and Herberg, *Human Rights Law and Practice*. Notable academic studies include Brady, *Proportionality and Deference under the UK Human Rights Act*; Gearty, *Principles of Human Rights Adjudication*; Kavanagh, *Constitutional Review under the UK Human Rights Act 1998*; Leigh and Masterman, *Making Rights Real*; and Young, *Parliamentary Sovereignty and the Human Rights Act*. Notable academic articles include A Young [2011] PL 773, and J Hiebert [2012] PL 27.

arts 2–12 and 14 of the ECHR, arts 1–3 of the First Protocol and art 1 of the Thirteenth Protocol (s 1(1)). These are to be read with arts 16 and 17 of the Convention: the former permits the imposition of restrictions on the political activities of aliens; the latter deals with the abuse of rights by providing that no state, group or person has any right to engage in any activity or perform any act aimed at the destruction of any of the Convention rights. The main exclusions are thus arts 1 and 13.

Article 1 imposes a duty on the ‘High Contracting Parties’ to ‘secure to everyone within their jurisdiction’ the rights and freedoms set out in the Convention, an obligation that the government considers to have been met by the enactment of the Human Rights Act. The exclusion of art 13 in contrast was more controversial, this providing that everyone whose Convention rights and freedoms are violated ‘shall have an effective remedy before a national court’. Not everyone is prepared to accept that the contents of the Act fully satisfy this requirement, as the government also claimed.⁹¹

Convention rights and the Strasbourg case law

The incorporation of Convention rights raises questions about the substance of these rights, which are brought to life and given meaning by the case law of the European Court of Human Rights. Section 2 of the Human Rights Act requires a domestic court or tribunal when considering Convention rights to ‘take into account’ judgments, decisions, declarations or advisory opinions of the European Court of Human Rights. They must also take into account any opinion or decision of the now defunct European Commission of Human Rights as well as any decision of the Committee of Ministers (a political body). It is important to note that unlike decisions of the CJEU, which are binding on British courts on matters of EU law,⁹² decisions of the Strasbourg bodies are only to be taken into account.

There has been much discussion about the impact of section 2, with Lord Irvine (who as Lord Chancellor was one of its authors) pointing out that its plain meaning does not require the courts to be bound by the Strasbourg jurisprudence.⁹³ This has emerged in the context of criticism that the domestic courts are too willing to follow the Strasbourg case-law, rather than develop their own solutions more suited to national conditions, which may not require the same level of protection. But although the Strasbourg court could not object to the domestic courts setting higher human rights standards than the Convention requires, for obvious reasons it would be difficult for the domestic courts to set standards below those required by Strasbourg: to do so would be simply to invite litigants to proceed to Strasbourg. It is perhaps nevertheless surprising just how much weight is given to the Strasbourg jurisprudence, the domestic courts appearing unwilling to set higher standards of protection, and only exceptionally willing to set lower standards of protection.⁹⁴

The leading case is *R (Ullah) v Special Adjudicator*⁹⁵ where Lord Bingham said that while ‘not strictly binding’ on the domestic courts, the courts should, ‘in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court’.⁹⁶ According to Lord Bingham, this was said to reflect the fact that the Convention is an international instrument, ‘the correct interpretation of which can be authoritatively expounded

⁹¹ See HL Deb, 18 Nov 1997, cols 475–7. For a fuller discussion of points raised during the passing of the Act, see K D Ewing (1999) 62 MLR 79.

⁹² Ch 6 above.

⁹³ [2012] PL 237. But compare P Sales (2012) LQR 253, R Clayton [2012] PL 639.

⁹⁴ Compare J Wright [2009] PL 595 who fails to make good her claim that the courts have developed an indigenous meaning of Convention rights.

⁹⁵ [2004] UKHL 26, [2004] 2 AC 323 (R Masterman [2004] PL 725; J Lewis [2007] PL 720).

⁹⁶ Citing *R (Alconbury Developments Ltd) v Environment Secretary* [2003] 2 AC 295, para 26.

only by the Strasbourg court', with the result that 'a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law'. On the other hand, although – as explained above – it may be open in principle to member states to provide for rights more generous than those guaranteed by the Convention, according to Lord Bingham any such provision 'should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it'.

In Lord Bingham's view (and in the view of other judges) '[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'. To the same effect, Baroness Hale said in a later case that 'we must interpret the Convention rights in a way which keeps pace with rather than leaps ahead of the Strasbourg jurisprudence as it evolves over time'.⁹⁷ *N v Home Secretary*⁹⁸ is a case that takes this to considerable lengths, the claimant having entered the country illegally and seeking asylum. Her application was refused and she was to be deported, despite the fact that she had AIDS for which she was being treated in the United Kingdom. The effect of her deportation to a country where she would not have had access to appropriate drugs would have been dramatically to shorten her life. Following a close textual analysis of the Strasbourg jurisprudence, it was found that there was no breach of the claimant's art 3 rights.⁹⁹

Although reluctant to set a higher standard than Strasbourg requires,¹⁰⁰ the courts may be more willing to set what may appear to be a lower standard. In *R v Horncastle*,¹⁰¹ the Supreme Court was faced with jurisprudence prohibiting the conviction of a suspect on the basis of hearsay evidence, where the latter was the 'sole or decisive' evidence against the accused. This was said to violate the right to a fair trial (art 6), and in particular the guarantee that the accused should have the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him' (art 6(3)(d)). Although the Strasbourg court's decision had been most recently affirmed in a case from the United Kingdom only a few months earlier, the Supreme Court refused to follow it and upheld the convictions of appellants secured principally on the basis of hearsay evidence in circumstances clearly authorised by statute.

A unanimous bench of seven judges took the view that the existing procedures for the admission of such evidence adequately protected the right to a fair trial, and expressed concern that the rejection of hearsay evidence which was 'sole or decisive' would have drastic implications for the English criminal justice system. In rejecting the Strasbourg jurisprudence, Lord Philips said that

The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg

⁹⁷ *R (S) v South Yorkshire Chief Constable* [2004] UKHL 39, [2004] 1 WLR 2196, at para 78. Also *Brown v Scott* [2003] 1 AC 681; *R (Al Skeini) v Defence Secretary* [2007] UKHL 26, [2008] 1 AC 153; *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356, at para [56]; *R (RJM) v War Pensions Secretary* [2008] UKHL 63, [2009] 1 AC 311; *R (Black) v Justice Secretary* [2009] UKHL 1, [2009] 1 AC 949; *Smith v Ministry of Defence* [2013] UKSC 41, [2013] 3 WLR 69.

⁹⁸ [2005] UKHL 31, [2005] 2 AC 296. Compare *EM (Lebanon) v Home Secretary* [2008] UKHL 64, [2009] 1 AC 1198.

⁹⁹ The harshness of the *N* decision was compounded by the concession by Lord Nicholls that the Strasbourg jurisprudence 'lacks its customary clarity': *ibid*, at para 14.

¹⁰⁰ But see *Al Rami v Security Service*, above, note 7.

¹⁰¹ [2009] UKSC 14, [2010] 2 AC 373. For an earlier and much less high profile example, see *R v Spear* [2002] UKHL 31, [2003] 1 AC 734.

Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.¹⁰²

In *Al-Khamaja v United Kingdom*,¹⁰³ the ECtHR Grand Chamber appeared subsequently to relax the ‘sole and decisive’ test, to ‘permit a conviction to be based on [hearsay] evidence [but] only if it is sufficiently reliable given its importance in the case’.¹⁰⁴

Since *Horncastle*, there is evidence that some judges may not feel quite so constrained to follow the Strasbourg jurisprudence as *Ullah* might otherwise suggest (though the evidence should not be exaggerated). The willingness not to be constrained is reflected not only in dicta from the bench but also in extra-judicial writings of judges who seem keen to engage with arguments that the Strasbourg court is over-reaching itself and that in doing so it is reaching too far into British law.¹⁰⁵ So far as dicta from the bench are concerned, *Horncastle* was followed by *Manchester City Council v Pinnock*,¹⁰⁶ where Lord Neuberger said that the Supreme Court is not bound to follow every decision of the ECtHR. ‘Not only would it be impractical to do so’, but in his view ‘it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law’.¹⁰⁷

The issue arose again in *R(Chester) v Justice Secretary*,¹⁰⁸ in which the Supreme Court was faced with the ban on prisoners’ voting that had been held by the Strasbourg court on a number of occasions to be in breach of Convention rights.¹⁰⁹ In considering whether it was bound by the Strasbourg jurisprudence on the matter, the Supreme Court repeated the line of argument developed in *Horncastle* and *Pinnock*, and said that there will ‘be rare occasions’ where the domestic court has concerns as to whether a decision of the Strasbourg court ‘sufficiently appreciates or accommodates particular aspects of our domestic process’.¹¹⁰ But although it was accepted that in these cases ‘it is open to the domestic court to decline to follow the Strasbourg decision’,¹¹¹ there are limits particularly where the matter has been already to a Grand Chamber (or in this case to two Grand Chambers). In these cases (of which *Chester* was not one):

It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.¹¹²

¹⁰² *R v Horncastle*, *ibid*, para 11.

¹⁰³ [2011] ECHR 2127, (2012) 54 EHRR 23.

¹⁰⁴ *Ibid*, para 147. The safeguards in English law were said to ensure that such evidence was used only when reliable, and in *Al-Khawaja* it was held that there was no breach of ECHR, art 6 where the decisive evidence was a witness statement by someone who had died before the trial and who therefore could not be cross-examined.

¹⁰⁵ Notable interventions have been made by Sir John Laws (*The Guardian*, 27 November 2013) and Lord Judge (*The Guardian*, 4 December 2013). See also Lord Sumption (speech delivered in Malaysia, <http://www.supremecourt.gov.uk/docs/speech-131120.pdf>).

¹⁰⁶ [2010] UKSC 45, [2011] 2 AC 104.

¹⁰⁷ *Ibid*, para 48.

¹⁰⁸ [2013] UKSC 63, [2013] 3 WLR 1076.

¹⁰⁹ See ch 7 A.

¹¹⁰ *R (Chester) v Justice Secretary*, above, para 25, quoting Lord Phillips in *Horncastle*, above.

¹¹¹ *Ibid*.

¹¹² *Ibid*, para 27.

The Human Rights Act and parliamentary sovereignty

The structure of the Human Rights Act reflects the government's desire that 'courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention'. This was based on the continuing importance 'which the government attache[d] to parliamentary sovereignty'.¹¹³ In practice many of the cases that had gone to Strasbourg in the past were not concerned with legislative action, so much as with executive or administrative action, and in some cases judicial action (relating to the operation of the common law). Nevertheless, this continuing commitment to parliamentary sovereignty distinguishes the regime established by the Human Rights Act from the practice in many other liberal democracies (including those in the Westminster tradition), where the courts have the power to strike down legislation on the ground of its incompatibility with constitutionally guaranteed fundamental rights or freedoms.

But it does not follow from the foregoing that the courts have no powers in relation to statutes. In the first place, they are required to interpret legislation (primary and secondary) where possible in a manner consistent with the Convention (s 3(1)).¹¹⁴ Section 3 has been considered by both the House of Lords and the Supreme Court on a number of occasions, and there has been a vigorous debate about the meaning of a provision accepted as 'a new rule of construction',¹¹⁵ which applies if the Court has decided that there would otherwise be a breach of Convention rights.¹¹⁶ It has been said judicially that s 3 is a 'strong adjuration',¹¹⁷ and that it is 'a powerful tool whose use is obligatory'.¹¹⁸ Thus, 'it is not an optional canon of construction. Nor is its use dependent on the existence of ambiguity'.¹¹⁹ As a result, s 3 has been said by some to be a 'radical tool';¹²⁰ and by others to contain a power that is a significant limitation of Parliament's sovereign will.¹²¹

The mainstream position on the effect and proper scope of s 3 is best captured by *Ghaidan v Godin-Mendoza*¹²² According to Lord Nicholls, the courts may be required to construe legislation consistently with Convention rights even where there is no ambiguity in the legislation. That is to say, to give the statute a construction which is contrary to its clearly expressed meaning, and the 'unambiguous meaning the legislation would otherwise bear'.¹²³ This may mean that the courts must depart from the intention of Parliament in interpreting any contentious legislation, though this will only be permissible to the extent that in doing so the courts give effect to the intention 'reasonably to be attributed to Parliament' in enacting s 3 of the Human Rights Act. However, in determining what interpretation of legislation

¹¹³ Cm 3782, 1997, para 2.13. See A W Bradley, in Jowell and Oliver (eds), *The Changing Constitution*, ch 2; and Young, *Parliamentary Sovereignty and the Human Rights Act*.

¹¹⁴ See A Lester [1998] EHRLR 520 and F Bennion [2000] PL 77.

¹¹⁵ *R (Wardle) v Leeds Crown Court* [2001] UKHL 12, [2002] 1 AC 754.

¹¹⁶ See A Lester [1998] EHRLR 665.

¹¹⁷ *R v DPP, ex p Kebeline* [2000] 2 AC 326, at p 373 (Lord Cooke of Thorndon).

¹¹⁸ *Re S (FC)* [2002] UKHL 10, [2002] AC 291, at para [37].

¹¹⁹ *Ibid*, Lord Nicholls, para [37]. See also *R v A* [2001] UKHL 25, [2002] 1 AC 45, para [44] (Lord Steyn).

¹²⁰ F Klug and K Starmer [2001] PL 654, at p 664.

¹²¹ T Campbell, in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights*, ch 2. Leading cases include *R v A*, above; *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545; *Re S (FC)*, above; *R (Anderson) v Home Secretary* [2002] UKHL 46, [2003] 1 AC 837; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

¹²² [2004] UKHL 30, [2004] 2 AC 557.

¹²³ *Ibid*, at para 31. See *R v A*, note 119 above; and *R (Baiai) v Home Secretary* [2008] UKHL 53, [2009] 1 AC 287 (reading words into the Youth Justice and Criminal Evidence Act 1999, s 41), and the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, s 19. Compare *R v Briggs-Price* [2009] UKHL 19, [2009] 1 AC 1026.

is possible notwithstanding its clear and unequivocal terms, Parliament is not to be taken to have empowered the courts to adopt a meaning inconsistent with a fundamental feature of the legislation.

In seeking to do what is possible, the courts are thus not empowered to construe legislation compatibly with the Convention at all costs. In an important passage, Lord Nicholls reminds the reader that Parliament has retained the right to enact legislation that is not Convention compliant. As a result, according to Lord Hope in *Hounslow LBC v Powell*,¹²⁴ ‘for the courts to adopt a meaning inconsistent with a fundamental feature of legislation would be to cross the constitutional boundary that section 3 of the 1998 Act seeks to demarcate and preserve’.¹²⁵ But although s 3 must not be used to amend rather than construe legislation,¹²⁶ the power of interpretation has nevertheless been exercised on at least multiple occasions, according to one valuable study.¹²⁷ The power has been invoked by courts at all levels, in a number of areas of the law over a wide range of statutes.¹²⁸ In recent years the power has often been used to constrain the scope of discretionary authority, to ensure that the exercise of the latter is compatible with Convention rights.

Where it is not possible to construe legislation in a manner which is consistent with Convention rights, the High Court and superior courts (but not tribunals or inferior courts), after giving the Crown an opportunity to take part in the proceedings (s 5),¹²⁹ may make a declaration of incompatibility (s 4(2)). Such a declaration is stated not to be binding on the parties and does not affect the validity or operation of primary legislation (s 4(6)). By 2012, 19 statutory provisions had been declared incompatible, and another eight declarations had been overturned on appeal.¹³⁰ The House of Lords made four of these declarations; others were made by the Court of Appeal (six), the High Court (seven), and the Registration Appeal Court (which deal with electoral matters in Scotland) (one). Most of the declarations deal with legislation passed before the Human Rights Act was passed, though the power has now been used on five occasions in relation to post-HRA legislation.¹³¹

It is a striking feature of this power, that the courts will go to considerable lengths to avoid using it.¹³² According to Lord Steyn in *Ghaidan v Godin-Mendoza*, ‘resort to s 4 must always be an exceptional course’,¹³³ though it has been emphasised subsequently that the making of a declaration of incompatibility is for the discretion of the court.¹³⁴ Similarly, in *Home Secretary v Nasser*,¹³⁵ Lord Hoffmann said that such a step should be a ‘last resort’, though he also raised the possibility of a declaration being made in cases where the respondent was

¹²⁴ [2011] UKSC 8, [2011] 2 AC 186.

¹²⁵ *Ibid*, at para 62.

¹²⁶ *Re S (FC)*, above. See also *R (Anderson) v Home Secretary*, above (D Nicol [2004] PL 274 and A Kavanagh [2004] PL 537).

¹²⁷ C Crawford (2014) 25 KLJ 34.

¹²⁸ *Ibid*.

¹²⁹ *Wilson v First County Trust (No 2)* [2003] UKHL 40; [2004] 1 AC 816 (intervention by the Secretary of State for Trade and Industry).

¹³⁰ HL 151, 2006–7. App 6; see also *Ghaidan v Godin-Mendoza*, above (Appendix to Lord Steyn’s speech for an earlier account).

¹³¹ See *R (Wright) v Health Secretary* [2009] UKHL 3, [2009] 1 AC 739 (Care Standards Act 2000, s 82(4) – royal assent shortly before the Human Rights Act was brought into force); and *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68.

¹³² See notably *Home Secretary v MB* [2007] UKHL 47, [2008] AC 440 (K D Ewing and J-C Tham [2008] PL 668).

¹³³ Note 119 above. See also *R v A*, note 121 above; *Wilson v First County Trust*, note 129 above; and *R (Nasser) v Home Secretary* [2009] UKHL 23, [2010] 1 AC 1, at para [18].

¹³⁴ *R (Rusbridger) v Attorney-General* [2003] UKHL 38, [2004] 1 AC 357. See also *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367.

¹³⁵ Note 133 above.

not acting in breach of the applicant's Convention rights.¹³⁶ The discretionary and exceptional nature of the remedy was also emphasised in *R (Chester) v Justice Secretary*,¹³⁷ where the Supreme Court refused to make a declaration in circumstances where there would be 'no point' in doing so,¹³⁸ given that such a declaration had already been made by a Scottish court.

The highly risk-averse decision of the Supreme Court on this point in *Chester* – which won plaudits from the Prime Minister¹³⁹ – is open to criticism on a number of grounds, not least for giving the appearance that the Court had ducked a fast ball. Where, however, a declaration is made, it is for the government and Parliament to decide how to proceed – whether to amend the legislation or not. These procedures go about as far as possible without undermining Parliament's sovereignty and, in introducing the Human Rights Bill, the Home Secretary indicated that there were circumstances where the government would be unwilling to bring forward amending legislation to give effect to a declaration of incompatibility, citing abortion as an example.¹⁴⁰ It was probably not anticipated at the time of enactment of the Human Rights Act that prisoners' voting would be the issue on which government and Parliament would take a stand to protect the sovereignty of the latter.

When making declarations of incompatibility, judges have resisted requests to advise on what needs to be done to bring legislation into line with the Convention. Baroness Hale took the view that it is not for the judges to 'attempt to rewrite the legislation',¹⁴¹ thereby tending to debunk the currently fashionable theory that judges and Parliament are engaged in some kind of 'dialogue' on Convention rights. When a declaration of incompatibility has been made, and the minister considers that there are 'compelling reasons' for doing so, the Human Rights Act empowers the minister to make a 'remedial order' for amending primary legislation so as to remove the incompatibility (s 10 and Sch 2). Although it is the practice for the government to respond to declarations of incompatibility by amending the legislation, this is not invariable and it seems wishful thinking to suggest that there is now a convention that requires the government to seek by legislation to remove the incompatibility.

The Human Rights Act and public authorities

Sections 6 and 7 of the Human Rights Act are particularly important for the enforcement of Convention rights in the courts. The Act makes it unlawful for public authorities (including courts and tribunals) to act in a way incompatible with Convention rights, unless primary legislation permits no other course of action (s 6). This also applies to acts of persons other than public authorities, where those acts are done in exercise of 'functions of a public nature' but not if the 'nature of the act' is private (s 6(3)(b), (5)). A distinction between public and private bodies arises in other aspects of public law, notably in determining whether a body is subject to judicial review, and whether a body is an 'emanation of the State' for the purposes of the vertical direct effect of EU law.¹⁴² However, the House of Lords counselled against relying on the jurisprudence under these different jurisdictions to guide the application of the Human Rights Act.¹⁴³

¹³⁶ Ibid, para 18.

¹³⁷ [2013] UKSC 63, [2013] 3 WLR 1076.

¹³⁸ Ibid, para 39 (Lord Mance).

¹³⁹ *The Guardian*, 16 October 2013.

¹⁴⁰ HC Deb, 21 October 1998, col 1301.

¹⁴¹ *R (Wright) v Health Secretary*, [2009] UKHL 3, [2009] 2 WLR 267.

¹⁴² See chs 25 and 6 respectively.

¹⁴³ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546. See D Oliver [2000] PL 476, [2004] PL 329, and Supperstone, Goudie and Walker (eds), *Judicial Review*, ch 4.

Although the case law on judicial review may be ‘helpful’, the EU jurisprudence is ‘not’, and the matter must be examined under the Human Rights Act ‘in the light of the jurisprudence of the Strasbourg court as to those bodies which engage the responsibility of the State for the purposes of the Convention’.¹⁴⁴ In the leading case on this question, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,¹⁴⁵ it was acknowledged that s 6 applies to bodies ‘whose nature is governmental in the broad sense of that expression, and would include government departments, local authorities, the police and the armed forces’.¹⁴⁶ But in addition to these ‘core’ public authorities, the Act is said to apply to ‘hybrid’ public authorities, that is to say non-governmental bodies carrying out governmental functions. Examples would include prisons run by private companies, though there is no clear test to decide if a body is public or private for these purposes.

The issue in the *Aston Cantlow* case was whether the applicants were liable as lay rectors to meet the costs of repairs to their parish church. Resisting the demand from the church, the Wallbanks argued that it was a violation of their Convention rights (private property – Protocol 1, art 1) on the part of a public authority (the parochial church council of the Church of England – the established church). However, the House of Lords held that the parochial parish council was not a core public authority, by reference to the text of the Convention itself and jurisprudence relating to religious bodies. It was also held that the parochial church council was not a hybrid public authority either, though this was a matter that had to be dealt with on a case-by-case basis. In this case the council was seeking to enforce the duty of the respondents to pay for repairs to the church, which according to Lord Hope was effectively a ‘civil debt’, an obligation said to be private rather than public.

The idea that the established church is not a public authority is perhaps a surprising one, not least because the Church if not a law-making body has obvious public functions. According to Lord Nicholls, however, this narrow approach is based on the idea that a core public authority is one ‘established with a view to public administration as part of the process of government’. There was clearly a concern that if the Church were to be treated as a public authority for the purposes of an action brought against it by private parties like the Wallbanks, it would not then have been possible for the Church subsequently to rely on the Convention in an action brought to enforce violations of its Convention rights by the government. Under the scheme of the Convention, it appears that it is not possible to be both a core public authority for some purposes and a non-governmental organisation for others. This is an argument developed from the wording of ECHR, art 34, and the Human Rights Act, s 7.

The main concern with the meaning of public authority, however, arises as a result of the growth of the private sector and voluntary agencies to provide public services, under contract with public authorities. Some alarm was caused by a developing body of case law in which the Court of Appeal appeared to exclude the operation of the Act in such cases.¹⁴⁷ This line of authority was nevertheless confirmed in *YL v Birmingham City Council*,¹⁴⁸ a case concerned with a nursing home run by a large private company (Southern Cross), which cared for residents under a contract with a local authority. The issue arose when it was alleged that Southern Cross had violated the art 8 rights of an elderly resident by giving her 28 days’ notice to quit following a disagreement with her family. The House of Lords held

¹⁴⁴ *Aston Cantlow*, para [52] (Lord Hope).

¹⁴⁵ [2003] UKHL 37, [2004] 1 AC 546.

¹⁴⁶ *Ibid*, para [7] (Lord Nicholls).

¹⁴⁷ See *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936; *R (Johnson) v Havering London Borough Council* [2007] EWCA Civ 26, [2008] QB 1. Compare *Poplar Housing Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48.

¹⁴⁸ [2007] UKHL 27, [2008] 1 AC 95.

by a majority of 3:2 that even though most residents were placed in the company's nursing homes by local authorities under contract with the company, this did not make the company a public authority for the purposes of s 6.

This decision was a disappointment to the then government, which had expressed concerns about the narrow construction of s 6, even before the *YL* decision was published.¹⁴⁹ Nevertheless, the position was expressed clearly by Lord Scott who said that Southern Cross was

a company carrying on a socially useful business for profit. It is neither a charity nor a philanthropist. It enters into private law contracts with the residents in its care homes and with the local authorities with whom it does business. It receives no public funding, enjoys no special statutory powers, and is at liberty to accept or reject residents as it chooses (subject, of course, to anti-discrimination legislation which affects everyone who offers a service to the public) and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors.¹⁵⁰

The decision was also a disappointment to the Joint Committee on Human Rights which had twice reviewed the meaning of public authority, expressing criticism of the lower courts, and concern that the decisions would undermine the purpose of the Human Rights Act in 'bringing rights home'.¹⁵¹

In both of these reports the JCHR explored a number of options to overcome the impact of the decisions, initially placing faith in litigation as a strategy in the hope that the House of Lords would reverse what were seen to be the unhelpful decisions of the Court of Appeal on the scope of the Convention. But after *YL* that strategy was in disarray, though it would be possible to seek a decision of the Strasbourg court, which for reasons considered above would have a decisive effect in resolving the matter. In the meantime, however, legislation now provides that private nursing homes are to be treated as public authorities for the purposes of the Human Rights Act where they provide care on behalf of public bodies.¹⁵² But this is a sticking plaster solution to the *YL* case, which does not extend human rights protection to all those in care,¹⁵³ far less produce a long-term settlement of the wider questions raised by the decision, and the earlier decisions of the Court of Appeal.¹⁵⁴

It has been pointed out that the amendment in the Health and Social Care Act 2008 had only a limited impact in extending human rights principles to the care of the elderly. It would of course have no impact on social housing, another major area where the private or third sectors provide public services. Although the *YL* decision reinforced doubts about the application of the Human Rights Act here too, the Court of Appeal revisited the matter in *R (Weaver) v London and Quadrant Housing Trust*.¹⁵⁵ There it was held (by a majority) that the Act applied in principle to the termination of a tenancy by the trust, which provided social housing supported by a public subsidy as part of the government's policy of providing low cost housing. True, the tenancy agreement was governed by contract. But

if an act were necessarily a private act because it involved the exercise of rights conferred by private law, that would significantly undermine the protection which Parliament intended to

¹⁴⁹ HC Debs, 15 June 2007, col 1045 (Solicitor General).

¹⁵⁰ *YL v Birmingham City Council*, above, para [26].

¹⁵¹ See HL Paper 39, HC 382 (2003–04), HL Paper 77, HC 410 (2006–07). And see section D below.

¹⁵² Health and Social Care Act 2008, s 145.

¹⁵³ See HL Debs, 21 May 2013, col 758.

¹⁵⁴ A private members' bill introduced by the then Chairman of the JCHR in 2007 would have extended the scope of the Act by providing that 'a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function'. But the bill made no progress.

¹⁵⁵ [2009] EWCA Civ 587, [2009] 4 All ER 865.

afford to potential victims of hybrid authorities. Public bodies necessarily fulfil their functions by entering into contractual arrangements. It would severely limit the significance of identifying certain bodies as hybrid authorities if the fact that the act under consideration was a contractual act meant that it was a private act falling within section 6(5).¹⁵⁶

The courts as public authorities

By virtue of s 7, an actual or potential victim of an unlawful act may bring proceedings in respect of the unlawful act or may rely on Convention rights in any legal proceedings (for example, as a defence to a prosecution). In particular, the actual or potential victim may apply for judicial review of the public authority's decision (s 7(3), (4)). So far as s 7 is concerned, an applicant is a victim only if he or she would be regarded as a victim for the purposes of ECHR, art 34. This provides that the ECtHR may receive applications from 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'. As pointed out above, this has been read to mean that applications may not be made by core public authorities, which cannot be victims. However, hybrid public authorities can be both perpetrator and victim.

By restricting applications to victims or potential victims, the Act effectively bars some public interest groups and others with standing (a 'sufficient interest') in judicial review proceedings from bringing claims that public authorities are violating Convention rights. A court or tribunal may provide 'such relief or remedy or make such order within its jurisdiction as it considers just and appropriate' (s 8(1)). However, damages for breach of Convention rights are available only in a civil court which otherwise has the power to award damages; and, in assessing damages, the civil court must take account of Strasbourg decisions awarding 'just satisfaction' under the Convention (s 8(2), (3)).¹⁵⁷ According to the House of Lords, 'the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg'.¹⁵⁸

Courts and tribunals are expressly stated to be public authorities. This means that courts and tribunals must conduct their affairs in a way that is consistent with Convention rights (such as the right to a fair trial (art 6) and the right to freedom of expression (art 10)). But it means much more, for it applies also to the remedies a court may order. So it would not be possible for a court to issue an injunction if to do so would violate the Convention rights of the defendant; or to fail to issue an injunction if to do so would violate the Convention rights of the applicant. This of course is unless the court is required to violate Convention rights as a result of an Act of Parliament, in which case a declaration of incompatibility may be appropriate. But subject to that proviso, the Act may thus have implications for the common law and indeed for litigation between private parties. So, although Convention rights are directly enforceable against only public authorities, it is impossible to rule out their enforcement indirectly by one private party against another.¹⁵⁹

This question – the so-called horizontal status of the Convention – gave rise to a great deal of analysis in the literature, particularly in the period shortly after the Human Rights Act

¹⁵⁶ *Ibid*, para 77 (Elias LJ). As in the case of social care, not all tenants would enjoy the benefit of the Human Rights Act; as Elias LJ pointed out it would depend on the lottery of their position being underpinned by the state in some way. This would mean that different tenants of the same landlord would be treated differently.

¹⁵⁷ See A R Mowbray [1997] PL 647. And see ch 26 A.

¹⁵⁸ *R (Greenfield) v Home Secretary* [2005] UKHL 14, [2005] 1 WLR 673, at para [19] (Lord Bingham). See now *R (Faulkner) v Justice Secretary* [2013] UKSC 23, [2013] 2 All ER 1013.

¹⁵⁹ *Cf RSPCA v Attorney-General* [2001] 3 All ER 530, at p 547 (Lightman J).

came into force.¹⁶⁰ The better view appears to be that (i) Convention rights may not be directly enforced by one private party against another, but that (ii) Convention rights may be relied on in an established cause of action to extend the rights of either party. An example would be where the applicant brings an action against the defendant for breach of confidence and relies in the course of these proceedings on the art 8 right to privacy in order to extend the boundaries of the protection which the common law otherwise provides.¹⁶¹ By these means, the values embodied in art 8 are made applicable ‘in disputes between individuals or between an individual and a non-governmental organisation’, as well as in disputes between ‘individuals and a public authority’.¹⁶² In this example in particular, the courts have stretched common law boundaries by some distance to accommodate Convention rights.¹⁶³

Concerns that the Act might be used to extend existing or develop new causes of action in litigation between private parties gave rise to special measures relating to freedom of expression. There was concern in particular from the newspaper industry and its self-regulators (the Press Complaints Commission) about the possible implications of the right to privacy in art 8. These and other concerns led to the inclusion of s 12, which applies where a court is considering whether to grant any relief that might affect the exercise of the Convention right to freedom of expression. In these cases, s 12 limits the circumstances in which a court may make interim injunctions, though in view of the inclusion of the courts as public authorities it may be questioned whether these special measures were strictly necessary. The principal author of this provision has, however, complained that it has not been effective in preventing injunctions against the press in privacy cases, and has argued that the best way forward would be to amend the Human Rights Act to remove the press from the supervision of the courts.¹⁶⁴

This, however, would be to give the press an immunity from legal liability and would be difficult to reconcile with constitutional principle. Short of such an immunity, the newspaper industry must make do with the special protection for freedom of expression enjoyed by everyone else. So, unless there are compelling circumstances, no interim injunction is to be granted without the respondent having been notified (s 12(2)), which means that there should be not normally be any *ex parte* injunctions to restrain freedom of expression. Moreover, no interim relief is to be granted – whether *ex parte* or *inter partes* – unless the court is satisfied that the applicant is likely to succeed at the full trial (s 12(3)). This qualifies the normal rules relating to interim injunctions as set out in *American Cyanamid Ltd v Ethicon Co*,¹⁶⁵ where the House of Lords held that in order to obtain interim relief the applicant need only show a serious issue to be tried and that the balance of convenience lies in favour of granting the injunction sought.

In typical civil proceedings the interim injunction thus ‘holds the ring’ until the full trial of the action, which may not take place until some considerable time in the future. In these interim proceedings, there is no need to show that a court is likely to grant the remedy sought at the eventual trial of the action, with questions of legality being weighed against other factors in the balance of convenience. This means that individuals may be restrained from doing something not because it is unlawful but because it may be unlawful and subsequently shown to be lawful. Such a procedure gives rise to questions about the compatibility of procedural law with the rule of law, quite apart from its implications for human rights. It is

¹⁶⁰ See M Hunt [1998] PL 423; G Phillipson (1999) 62 MLR 824; R Buxton (2000) 116 LQR 48; W Wade (2000) 116 LQR 217; A Young [2002] PL 232.

¹⁶¹ *Douglas v Hello!* [2001] QB 967; *Venables v News Group Newspapers Ltd* [2001] Fam 430; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457. See ch 16.

¹⁶² *Campbell v MGN Ltd*, above, at para 17.

¹⁶³ See *Mosley v NGN Ltd* [2008] EWHC 1777 QB, [2008] EMLR 20.

¹⁶⁴ Lord Wakeham, *Daily Telegraph*, 24 May 2011.

¹⁶⁵ [1975] AC 396.

thus important that a high bar is set for the likelihood of success test in s 12(3) to restrict the circumstances in which interim relief can be granted and to ensure that interim injunctions are not granted on flimsy grounds.

Section 12(3) has been read by the House of Lords at the higher end of the scale to mean that the applicant must show that he or she would probably (more likely than not) succeed at trial, in preference to the Court of Appeal's approach at the lower end of the scale that the applicant need only show a real prospect of success.¹⁶⁶ In addition, section 12(4) addresses in particular the threat to freedom of expression created by the right to privacy and is a remarkable testament to concerns about the latter. Thus a court is to have particular regard to the importance of the Convention right to freedom of expression and in proceedings relating to journalistic material to 'any relevant privacy code'. The idea here is that no injunction should be granted to restrain a publication on the ground that it violates the privacy of the applicant if the respondent can show that it complies with 'relevant' privacy codes, intended to mean the Codes of Practice of the Press Complaints Commission and OFCOM respectively.¹⁶⁷

Section 13 contains special protection for religious bodies from the application of Convention rights that might undermine their doctrine and practices.¹⁶⁸

Territorial scope of the Act

An important question to have arisen under the Human Rights Act is its scope of application. This has arisen particularly in the context of recent military activity involving the British armed forces overseas, and the liability if any of the British government for (i) the actions of military personnel and (ii) injuries suffered by military personnel while on active service. These questions are not likely to engage all Convention rights, and in the circumstances of military engagement or peace-keeping, the provisions most likely to be engaged are arts 2 (right to life), 3 (torture or inhuman or degrading treatment or punishment), 4 (forced labour), 5 (right to liberty), and 6 (right to a fair trial).

The legal starting point is ECHR, art 1 which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention'. This is said to have given rise to the principle that liability under the Convention can arise only in respect of conduct within the territory of the State in question.¹⁶⁹ In *Bankovic v Belgium* (where the victims of NATO bombing raids in the former Yugoslavia unsuccessfully sought relief under the Convention),¹⁷⁰ the Strasbourg court held that it was only in the most exceptional circumstances that a State could be liable under the Convention for extra-territorial events. These exceptions would arise where 'through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, the respondent exercises all or some of the public powers normally to be exercised by that Government'.¹⁷¹

This principle was applied by the House of Lords in *Al-Skeini*,¹⁷² where a number of Iraqi civilians were killed by British soldiers, one in a British military prison, and the others in circumstances following encounters with British troops in Basra. The question was whether under ECHR, art 2, the government was required to conduct an investigation into each of

¹⁶⁶ *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253.

¹⁶⁷ See further ch 16.

¹⁶⁸ See P Cumper [2000] PL 254.

¹⁶⁹ *Soering v United Kingdom* [1989] ECHR 14038/88, (1989) 11 EHRR 439.

¹⁷⁰ [2001] ECHR 890, (2007) 44 EHRR SE5.

¹⁷¹ *Ibid*, para 71.

¹⁷² *Al Skeini v Defence Secretary* [2007] UKHL 26, [2008] 1 AC 153.

the deaths. Following the Strasbourg jurisprudence applicable at the time, the House of Lords held that there was no duty to conduct such an investigation in relation to the latter group of individuals, with Lord Brown holding that it would be ‘too much’ to accept that ‘whenever a contracting state acts (militarily or otherwise) through its agents abroad, those affected by such activities fall within its article 1 jurisdiction’.¹⁷³ The position was different in relation to the civilian (Baha Mousa) killed while in custody, in respect of whom the Convention was said to have been engaged ‘only on the narrow basis’ that it was analogous with the extra-territorial exception for embassies.¹⁷⁴

But that was not the end of it, the defeated applicants taking their case to Strasbourg, where the Court extended the circumstances in which the extra-territorial scope of the Convention would apply.¹⁷⁵ It acknowledged the principle that liability under the Convention may arise where ‘as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory’.¹⁷⁶ And it held that having entered Iraq with the United States to remove the administration then in power, the British government was in effective control of the area where the alleged violations took place. Not only had the United Kingdom ‘assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government’, but it had ‘assumed authority and responsibility for the maintenance of security in South East Iraq’, sufficient to establish a jurisdictional link between the deceased and the United Kingdom.¹⁷⁷

On the same day it issued the *al-Skeini* decision, the Grand Chamber also announced its decision in the parallel *al-Jedda* decision.¹⁷⁸ In that case the applicant complained of his internment for more than three years by British forces in Iraq, which he said was a violation of his right to liberty as protected by ECHR, art 5. This too followed an unsuccessful attempt to obtain relief in the domestic courts. It is true that the House of Lords (by a majority) rejected the argument of the government that the Convention did not apply because the British forces were under the effective control of the United Nations; this was simply not the case, the House of Lords noting that when they became occupying powers in Iraq, the coalition forces had no UN mandate. However, the House of Lords also held that the rights of the applicant under ECHR, art 5 were displaced by a UN Security Council resolution, which was said by the Lords to impose a duty to intern the applicant which prevailed over ECHR, art 5(1).¹⁷⁹

The Strasbourg court agreed with the Lords on the jurisdictional point, holding that the ‘internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout’.¹⁸⁰ On the substantive point, however, the Strasbourg court disagreed with the House of Lords, holding that in interpreting UN resolutions, ‘there must be a presumption that the [UN] Security Council does not intend to impose any obligation on member states to breach fundamental principles of human rights’.¹⁸¹ The Court continued by saying that ‘in the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations’.¹⁸² In the absence of

¹⁷³ *Ibid*, para 127.

¹⁷⁴ *Ibid*, para 132.

¹⁷⁵ *Al Skeini v United Kingdom* [2011] ECHR 1093, (2011) 53 EHRR 18.

¹⁷⁶ *Ibid*, para 138.

¹⁷⁷ *Ibid*, para 149.

¹⁷⁸ *Al-Jedda v United Kingdom* [2011] ECHR 292, (2011) 53 EHRR 23.

¹⁷⁹ *R(Al-Jedda) v Defence Secretary* [2007] UKHL 58, [2008] 1 AC 332.

¹⁸⁰ *Al-Jedda v United Kingdom*, above, para 85.

¹⁸¹ *Ibid*, para 102.

¹⁸² *Ibid*.

any explicit or implicit obligation to detain people indefinitely without charge, the obligations under ECHR, art 5 were not displaced.

These cases raised questions about the liability of the United Kingdom to the citizens of an occupied country.¹⁸³ But what about the liability to the soldiers or families of soldiers who are injured or killed while on active service in other countries, such as Iraq? This is an issue that has arisen in the context of ECHR, art 2, where the question is not only the duty to investigate the circumstances of someone's death but also the more far-reaching claim that art 2 is engaged by a failure of the military authorities to provide adequate equipment that would reduce the risk of being killed while in the theatre of war. The first case to reach the Supreme Court on this matter was *R (Smith) v Defence Secretary*,¹⁸⁴ a case involving a soldier who had died of heat stroke in Iraq. The issue was whether there was an obligation to investigate the death in a manner that met the procedural requirements set by ECHR, art 2. The Supreme Court held (by a 6:3 majority) that the Convention had no application in these circumstances.

The majority took this view on the ground that 'none of the exceptions recognised by the Strasbourg court, and there is no basis in its case law, or in principle, for the proposition that the jurisdiction which states undoubtedly have over their armed forces abroad both in national law and international law means that they are within their jurisdiction for the purposes of article 1'.¹⁸⁵ In *Smith v Ministry of Defence* three years later, however, the position had to change in the light of *al-Skeini*, the Supreme Court reversing the earlier *Smith* decision.¹⁸⁶ True, *al-Skeini* was not directly in point, while the Supreme Court also rehearsed concerns about not going beyond what Strasbourg requires. But it was recognised that the Convention was a 'living instrument', and it was admitted that the earlier *Smith* case was 'inconsistent with the guidance that the Grand Chamber [had] now given in *al-Skeini*'.¹⁸⁷ As a result, 'the jurisdiction of the United Kingdom under art 1 of the Convention extends to securing the protection of art 2 to members of the armed forces when they are serving outside its territory'.¹⁸⁸

D. Enhanced Parliamentary scrutiny

Although the courts are given significant powers by the Human Rights Act 1998, important questions also arise about the role of Parliament in scrutinising legislation on human rights grounds.¹⁸⁹ While lawyers tend to focus on the role of the courts, it is important that the contribution of Parliament is not overlooked, and indeed the nature of parliamentary scrutiny is a matter that will have legal consequences. The ECtHR has indicated that the extent of parliamentary scrutiny is a matter to be taken into account in deciding whether or not there has been a breach of Convention rights in contentious cases. This extensive scrutiny was an important factor in the decision of the majority in *Animal Defenders International v UK*,¹⁹⁰ that the ban on political advertising was consistent with ECHR, art 10.

¹⁸³ On the continuing consequences of which in relation to ECHR, art 2 in particular, see *R (Mousa) v Defence Secretary* [2013] EWHC 1412 (Admin).

¹⁸⁴ [2010] UKSC 29, [2011] 1 AC 1.

¹⁸⁵ *Ibid*, para 307.

¹⁸⁶ *Smith v Defence Secretary* [2013] UKSC 41.

¹⁸⁷ *Ibid*, para 55 (Lord Hope).

¹⁸⁸ *Ibid*.

¹⁸⁹ See M Ryle [1994] PL 192; Kinley, *The European Convention on Human Rights*; and K D Ewing, in Ziegler, Baranger and Bradley (eds), *Constitutionalism and the Role of Parliaments*, ch 14.

¹⁹⁰ [2013] ECHR 362, (2013) 57 EHRR 21. But see *R (Chester) v Justice Secretary*, above.

So far as parliamentary scrutiny on human rights is concerned, the starting point is the Human Rights Act, s 19. This provides that a minister in charge of a Bill must make a statement to the effect that the Bill is either (i) in his or her view compatible with Convention rights; or (ii) the government wishes the Bill to proceed even though he or she is unable to make a statement of compatibility.¹⁹¹ In practice, Bills generally contain a statement of compatibility on their face, though it is not unknown for a Bill to declare that the minister is unable to make a statement that it is compatible, as in the case of the Communications Bill 2002, which the government was concerned might breach art 10 of the Convention because of the ban on political advertising on television and radio.¹⁹² In this case, however, both the House of Lords and (as we have seen) the ECtHR subsequently held that the ban was consistent with the right to freedom of expression.¹⁹³

Also important in terms of parliamentary oversight is the creation of the Joint Committee on Human Rights, a select committee that came into operation in February 2001. This all-party committee has members drawn from both Houses of Parliament with terms of reference which include (i) an examination of ministerial statements of compatibility and (ii) remedial orders made under the HRA, s 10. A remedial order may be made following a declaration of incompatibility, or after a decision by the Strasbourg court in proceedings against the United Kingdom has indicated that primary legislation is incompatible with the Convention (s 10). In both cases a remedial order may be made only where a minister considers that there are ‘compelling reasons’ for doing so (s 10 and Sch 2).

The remedial order procedure is a controversial one that allows primary legislation to be amended by ministerial order, even though the order must be approved by a resolution passed by both Houses of Parliament, and even if the purpose appears to be benign, namely to incompatibility with a Convention right to be removed from the statute book more quickly than if an amending Act of Parliament were needed.¹⁹⁴ However, the procedure is not heavily used despite a number of declarations by the domestic courts and rulings from Strasbourg, and in the first four years of the Parliament elected in 2010 it was used only three times.¹⁹⁵ It is open to governments to use conventional legislative procedures to deal with declarations of incompatibility or rulings of the Strasbourg court, and there will be occasions where this is the more appropriate course of action.

As a result most of the work of the JCHR has been concerned with examining ministerial statements, and most of the Committee’s time spent is examining bills (and occasionally statutory instruments) to determine whether they met Convention requirements. The Committee has been willing to challenge or to question ministers’ claims that bills are compatible with the ECHR,¹⁹⁶ and it has been prepared to test proposed legislation for compatibility with other international instruments,¹⁹⁷ drawing to the attention of Parliament any

¹⁹¹ Earlier versions of the *Ministerial Code* required ministers to consider the impact of the ECHR in preparing business for Cabinet.

¹⁹² See HL Paper 50, HC 397 (2002–03).

¹⁹³ *R (Animal Defenders’ International) v Culture, Media and Sport Secretary* [2008] UKHL 15, [2008] 2 WLR 781; *Animal Defenders International v UK*, above.

¹⁹⁴ For fuller details, see Ewing, note 91 above.

¹⁹⁵ In the Parliament elected in 2010, see HL Paper 54, HC 599 (2010–12), HL Paper 192, HC 1483 (2010–12), HL Paper 8, HC 166 (2012–13).

¹⁹⁶ See HL Paper 37, HC 372 (2001–02) (Anti-terrorism, Crime and Security Bill); HL Paper 68, HC 334 (2004–05) (Prevention of Terrorism Bill); and HL Paper 35, HC 283 (2004–5) (Identity Cards Bill).

¹⁹⁷ See HL Paper 30, HC 314 (2001–02) (Homelessness Bill: consideration given to compatibility with International Convention on the Elimination of all Forms of Racial Discrimination, and International Covenant on Economic, Social and Cultural Rights); HL Paper 96, HC 787 (2005–06) (Health Bill: consideration given to compatibility with the European Social Charter and the ICESCR).

concerns that it may have.¹⁹⁸ But while its reports may inform debates in the House, the Committee is not always able to convince the government, which will have acted on legal advice of its own, legal advice that in all probability will have seen no reason for questioning the government's proposed action.

Nevertheless, the Committee has been particularly vocal about legislation proposed by the government to deal with the problem of terrorism, and has produced powerful critiques of the control order regime introduced by the Prevention of Terrorism Act 2005.¹⁹⁹ A more recent report of the Committee was notable for its trenchant criticism of the Transparency of Lobbying, Third-Party Campaigning and Trade Union Administration Bill in 2013.²⁰⁰ The Committee expressed strong concern as much about parliamentary procedure as about the substance of the Bill, reporting that it was 'unacceptable' that it had been unable to report on the Bill until after it had left the Commons, particularly as there were no grounds for believing that it was an emergency measure.

In view of 'the rushed legislative time-table and lack of consultation and pre-legislative scrutiny', the Committee's primary recommendation was that the passage of the Bill should be 'paused' to allow for further scrutiny and consultation with interested parties who had expressed serious concerns about its contents.²⁰¹ These concerns – which the Committee also addressed – related principally to Part 2 of the Bill, which proposed far-reaching restrictions on political campaigning in the period before an election by organisations other than political parties. Part 2 of the Bill was in fact 'paused' briefly,²⁰² raising questions about whether the House of Commons Standing Orders should be amended formally to give to the Committee the formal power in all cases to delay measures on procedural and perhaps even substantive grounds.

Apart from its work in scrutinising legislation, the Committee has also conducted inquiries into topical issues and in this sense has operated like other select committees.²⁰³ Among a number of notable reports are those dealing with (i) the rendition of terrorist suspects and the alleged complicity of British officials in the use of torture by foreign security and intelligence agencies;²⁰⁴ (ii) the extent to which British businesses are complying with international human rights obligations, an investigation that required consideration of a wide range of international human rights other than the ECHR, including instruments produced by the OECD and the International Labour Organization;²⁰⁵ and (iii) the human rights of unaccompanied migrant children and young people.²⁰⁶

E. Conclusion

Human rights are an area that has proved to be remarkably controversial in recent years. As we have seen, the scheme of the Act is such that within the British constitutional system the

¹⁹⁸ See J Hiebert (2005) 68 MLR 676; (2006) 69 MLR 7; (2006) 4 ICON 1; [2012] PL 27. Also D Feldman [2002] PL 323.

¹⁹⁹ Ewing, *Bonfire of the Liberties*, ch 8.

²⁰⁰ HL Paper 61, HC 755 (2013–14).

²⁰¹ The Political and Constitutional Reform Select Committee also recommended a pause: HC 601 (2013–14).

²⁰² HC Debs, 5 Nov 2013, col 109, in response to a motion moved by a cross-bench peer.

²⁰³ For background, see HL Paper 239, HC 1575 (2006–07). Its general select committee functions have also included scrutiny of the appointment of a new chair of the Equality and Human Rights Commission: HL Paper 48, HC 634 (2012–13).

²⁰⁴ HL Paper 152, HC 230 (2008–09).

²⁰⁵ HL Paper 5, HC 64 (2009–10).

²⁰⁶ HL Paper 9, HC 196 (2013–14).

legal principle of parliamentary sovereignty has been preserved, with courts having powers that fall short of invalidating legislation on human rights grounds. But the debate has moved on, and is now dominated by general concerns about the extent to which the Convention and the jurisprudence of the Strasbourg court generally are now a threat to Parliament's sovereignty in a political sense. As we have seen, this is a debate with which judges are beginning to engage,²⁰⁷ some making the case for a more flexible approach on the part of the Strasbourg court, to permit differences to develop in the application of Convention rights at national level.

The latter is a controversial position for the judges to advance extra-judicially, and will lead to concerns that the Human Rights Act will become a vehicle in domestic law for the dilution rather than the strengthening of human rights standards. However, that may be a political price that has to be paid. It is no secret that 'human rights' is a subject about which the Coalition parties are split. Many on the Conservative side of the Coalition government appear hostile to both the ECHR and the HRA; the Liberal Democrats generally appear strongly to support both. Nor is it a secret that within Whitehall the Home Office would like to diminish the operation of ECHR, art 8 in causing immigration decisions to be reversed on Convention grounds: hence the attempts made in 2012 by amendments to the Immigration Rules to provide guidance to the judges on how art 8 should be interpreted more narrowly.²⁰⁸

An attempt to address some wider aspects of the 'human rights problem' is to be found in the Coalition programme for government, in which the parties undertook to establish a Commission to investigate the creation of a British Bill of Rights that 'incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties'.²⁰⁹ During the lifetime of the Coalition government, however, the differences between the two sides appeared to harden, with some Conservatives speaking openly (if implausibly) about withdrawing from the European Convention on Human Rights. Both the ECHR and the Human Rights Act were also the subject of extraordinary venom from the newspaper industry.

Such rhetoric has been fuelled by decisions of the ECtHR with which both the government and many newspapers strongly disagree. Particularly significant have been the decisions discussed above that require a relaxation of prisoners' voting restrictions,²¹⁰ as well as the decision preventing the extradition of the radical preacher Abu Qatada.²¹¹ In this febrile atmosphere it was highly unlikely that the Bill of Rights Commission would be able to resolve the sharp differences between the parties. Chaired by a retired senior civil servant and eventually composed exclusively of nine QCs, the Commission was unable to produce a unanimous report,²¹² though seven of the nine were reported by one of their number to be 'in favour of a UK Bill of Rights written in language which reflects [our] distinctive history and heritage'.²¹³

From the perspective of the government this was probably not a bad outcome. The existence of the Commission enabled a divisive issue to be addressed and managed if not resolved.

²⁰⁷ See note 105 above.

²⁰⁸ See for example *Home Secretary v Izuazu* [2013] UKUT 45, *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, [2013] WLR(D) 380 (see chap 3 above).

²⁰⁹ The Coalition, *Our Programme for Government*, above, p 11.

²¹⁰ See above, p 367.

²¹¹ *Othman (Abu Qatada) v United Kingdom* [2012] ECHR 56, (2012) 55 EHRR 1; *Othman v Home Secretary* [2013] EWCA Civ 277.

²¹² The only non-QC member (apart from the Chair) was Dr Michael Pinto-Duschinsky. He resigned before the Commission reported: *The Guardian*, 11 March 2012. For the report, see Commission on a Bill of Rights, *A UK Bill of Rights? – The Choice Before Us* (2012).

²¹³ *BBC News*, 18 December 2012.

It also provided a blueprint for change that may be attractive to a Conservative government in the future for purely political reasons, in order to deal with what would be a largely presentational replacement of the HRA with an alternative that would be substantially similar. The impact on domestic law of a replacement for the HRA would depend to a large extent on whether the United Kingdom remained a party to the ECHR, though even if the United Kingdom were to cease being a party to the Convention there are several reasons for believing that ECtHR jurisprudence would continue to be influential in this country.²¹⁴ Future decisions about the ECHR may well be linked, whether necessarily or not, with the wider question of Britain's involvement with Europe: a strong mood of Euro-scepticism might possibly engulf the protection of human rights in the United Kingdom as well as affecting the country's association with the EU.

²¹⁴ See C Gearty, in Campbell, Ewing and Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays*, ch 23. For a good account of the complexity of some of the issues around the Commission's report and more generally, see H Fenwick, 'The Report of the Bill of Rights Commission: disappointing Conservative expectations or fulfilling them?', *UK Const L Blog* (21 March 2013) (available at <http://ukconstitutionallaw.org>).

CHAPTER 15

Right to liberty and police powers

The preservation of law and order and the prevention and detection of crime are matters of great importance to the maintenance of organised government. They are matters that are taken very seriously by British governments, it being revealed recently by the Home Affairs Select Committee that police expenditure in the UK (at 2.5% GDP) is the highest in the OECD,¹ which by any account is a remarkable distinction. But while it is clearly important that such matters are taken seriously, it is equally important that these concerns should not be used to justify equipping the police with more power than is absolutely necessary, or in conferring power that is not subject to proper legal and political scrutiny, the determination of what is proper for these purposes being one that admittedly begs many questions.

Every power conferred on police officers inevitably means a corresponding reduction in the liberty of the individual, and brings us face to face with Convention obligations. As the European Court of Human Rights reminded us, protection from arbitrary interference by the state with an individual's liberty is 'a fundamental human right' and as such it is protected by art 5 of the ECHR.² This is a measure that has assumed greater significance with the enactment of the Human Rights Act 1998, although it is by no means the only Convention right which will have a bearing on the conduct of the police. As we shall see, arts 2 (the right to life), 3 (inhuman and degrading treatment), 6 (the right to a fair trial) and 8 (respect for private life, home and correspondence) may also be directly affected.

It is of course the case that the legal protection of the citizen from the misuse of police powers pre-dates the Human Rights Act 1998, with the right to liberty ingrained in the common law. The relationship between the police and the citizen is subject to detailed statutory regulation in the Police and Criminal Evidence Act 1984 (PACE), which despite being amended on several occasions has nevertheless proved to be a remarkably robust legal framework. It is the various provisions of that Act (along with the Codes of Practice that accompany it) that form the basis of the bulk of this chapter.³ The Act regulates police powers of stop and search, police powers of arrest, police powers of detention and questioning, and police powers of entry, search and seizure, as well as much else besides.

But as already suggested, it is important that the police always act with legal authority and that chief constables and police officers should be fully accountable for their actions. It is fundamental to the rule of law that police officers should not exceed their powers in upholding the law, and that they should enjoy no immunity when they do so. In this chapter we also consider some of the remedial and accountability mechanisms in place, without which policing within the law would be difficult to maintain. As it is, there are renewed questions about the adequacy of these mechanisms, questions brought into even sharper focus by the report of the independent inquiry into the Hillsborough tragedy in 1989. This exposed not only police incompetence and corruption, but also failures in response thereto by all three branches of government.⁴

¹ HC 364 (2007–08), para 67.

² *Brogan v UK* (1989) 11 EHRR 117, at p 134.

³ The Codes are issued under PACE, ss 66, 67. There are in fact eight codes (A–H), each dealing with different aspects of police practice, several of which are referred to below.

⁴ Hillsborough Independent Panel, *Report*, HC 581 (2012–13).

A. Police powers short of arrest

Most police powers affecting the individual's liberty depend on an arrest having been made. At common law, the pre-arrest powers of the police are very limited, a point illustrated by *Jackson v Stevenson*,⁵ where it was held to be contrary to constitutional principle and illegal to search someone to establish whether there are grounds for an arrest.⁶ Powers of stop and search thus require statutory authority, as in the Misuse of Drugs Act 1971, s 23. This provides that a constable may search (and detain for the purpose of the search) anyone who is suspected on reasonable grounds to be in unlawful possession of a controlled drug.⁷ Similar powers apply in relation to vehicles.⁸

Wider powers to stop and search are to be found in PACE 1984 s 1.⁹ A constable may stop and search a person or vehicle, or anything which is in the vehicle, for stolen or prohibited articles. (The latter term is defined to include an offensive weapon, an article used for the purpose of burglary or related crimes, or an article for destroying or causing damage to property.) Section 1 has been amended so that the power of stop and search may also be used where someone is suspected of carrying a knife, or prohibited fireworks. Stop and search powers may be exercised only if the constable 'has reasonable grounds for suspecting that he will find stolen or prohibited articles' or any prohibited fireworks (s 1(3)), or that someone is carrying a knife or other sharp implement in a public place.

The Home Office Code A (Code of Practice on the Exercise by Police Officers of Statutory Powers of Stop and Search)¹⁰ gives some guidance as to reasonable grounds for suspicion, and emphasises that 'Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity'.¹¹ If during a search a constable discovers articles to which the Act applies, they may be seized (s 1(6)). But before exercising these powers, a constable must (inter alia) inform the person to be searched of his or her name and police station, and of the grounds for the search.

PACE 1984 also requires a police officer to provide documentary evidence that he or she is a police officer if he or she is not in uniform (s 2). Details of the search must be recorded and if requested a copy must be supplied to the person searched (s 3). Failure to do so could render the action unlawful.¹² Reasonable force may be used by the police (s 117), but during any search made before an arrest a person may not be required to remove any clothing in public except for an outer coat, jacket or gloves (s 2(9)).¹³ Stop and search powers were extended in the Criminal Justice and Public Order Act 1994 (s 60) to prevent incidents of serious violence that are reasonably anticipated to take place.

Under the Road Traffic Act 1988, s 163, a constable in uniform may require a person driving a vehicle or a cyclist to stop. Failure to do so is an offence. It has been held that in

⁵ (1879) 2 Adam 255.

⁶ See also *Kenlin v Gardner* [1967] QB 510 (no common law power to stop and question), *R v Lemsatef* [1977] 2 All ER 835 (no common law power to detain a suspect to help the police with their inquiries), and *R v Iqbal* [2011] EWCA Crim 273, [2011] 1 WLR 1541 (no power to detain pending arrest).

⁷ See *Wither v Reid* 1979 SLT 192 (on the distinction between (a) arrest and (b) detention for search).

⁸ An account of 19 pieces of legislation giving power of stop and search is to be found in the Home Office Code A (Code of Practice on the Exercise by Police Officers of Statutory Powers of Stop and Search). See below.

⁹ Note that they are powers of 'stop and search' not 'stop and account', on which see Ewing, *Bonfire of the Liberties*, pp 21–23. However, a person acting in an anti-social manner may be required to give his or her name and address to a constable in uniform (Police Reform Act 2002, s 50), a power exercisable also by designated community support officers (ibid, Sch 4, para 3).

¹⁰ This also deals with requirements on police officers and police staff to record encounters not governed by statutory powers.

¹¹ Code A, para 2.2.

¹² *Osman v DPP* (1999) 163 JP 725.

¹³ See further Code A, paras 3.1–3.7.

exercising this power the police may immobilise a vehicle by removing the keys. Where a police officer has required a vehicle to stop, he or she 'is entitled to take reasonable steps to detain it for such reasonable time as will enable him, if he suspects it to have been stolen, to effect an arrest and to explain to the driver the reason for the arrest'.¹⁴ In some circumstances, a police officer can require the driver to produce his or her driving licence and his or her name, address and date of birth.¹⁵ But otherwise the driver is under no duty to answer any questions which the police may ask.¹⁶

In addition to powers conferred by the Road Traffic Act 1988, s 4 of PACE authorises the police to set up road checks when it is believed that there is or about to be in the locality during the period of the check someone who has committed or witnessed an indictable offence, someone who is intending to commit such an offence, or an escaped prisoner. This is a considerable power, though it can be used only for the purpose of determining whether the vehicle is carrying any of the categories of person referred to. It confers no power on the police to question the driver or occupants of a vehicle and does not impose any duty on such people to respond to police questions.

B. Police powers of arrest

Arrest with a warrant

Under the Magistrates' Courts Act 1980, s 1, criminal proceedings may be initiated either by the issue of a summons, requiring the accused to attend court on a certain day, or, in more serious cases, by a warrant of arrest, naming the accused and the offence with which he or she is charged. A warrant is obtained from a magistrate after a written application (information) has been substantiated on oath.¹⁷ A warrant may be executed anywhere in England or Wales by a police constable.¹⁸ If the warrant is to arrest a person charged with an offence, it may be executed even when a constable does not have it in his or her possession, but the warrant must be shown on demand to the arrested person as soon as possible.¹⁹

Despite judicial dicta to the contrary,²⁰ a person arrested would seem entitled to know that he or she is being arrested under a warrant (for if not, how can he or she demand to see it?). Where a constable in good faith executes a warrant that seems valid on its face, he or she is protected from liability for the arrest by the Constables' Protection Act 1750 if it should turn out that the warrant was beyond the jurisdiction of the magistrate who issued it.²¹ The requirement that the warrant be issued by a magistrate is thus as much a safeguard for the police as it is for the person named on it. When an arrest warrant has been issued, a constable may enter and search premises to make the arrest, using such reasonable force as is necessary.²²

¹⁴ *Lodwick v Sanders* [1985] 1 All ER 577.

¹⁵ Road Traffic Act 1988, s 163.

¹⁶ *Lodwick v Sanders* [1985] 1 All ER 577, 581. But see later on the 'right to silence'.

¹⁷ The exercise of the power may not be delegated: *R v Manchester Stipendiary Magistrate, ex p Hill* [1983] 1 AC 328.

¹⁸ They may now be executed in Scotland: Criminal Justice and Public Order Act 1994, s 136. For the cross-border execution of warrants in the UK, see *R v Manchester Stipendiary Magistrate, ex p Granada Ltd* [2001] 1 AC 300 (C Walker [1997] 56 CLJ 114).

¹⁹ Magistrates' Courts Act 1980, s 125D; and cf *R v Purdy* [1975] QB 288.

²⁰ *R v Kulmycz* [1971] 1 QB 367, at p 372.

²¹ See also *McGrath v RUC* [2001] 2 AC 731.

²² Police and Criminal Evidence Act 1984, ss 17, 117.

Arrest without a warrant

The law on arrest without a warrant was revised and amended by the Serious Organised Crime and Police Act 2005, which generally sought to simplify the law.²³ PACE, s 24 now provides that a constable may arrest without a warrant

- (a) anyone who is about to commit an offence;
- (b) anyone who is in the act of committing an offence;
- (c) anyone whom he or she has reasonable grounds for suspecting to be about to commit an offence; and
- (d) anyone whom he or she has reasonable grounds for suspecting to be committing an offence.

There are also powers of arrest where a constable suspects an offence has been committed, and where an offence has been committed. In the former case, a constable may arrest anyone whom he or she has reasonable grounds to suspect of being guilty of the offence. In the latter case, he or she may arrest anyone who is guilty of the offence or anyone whom he or she has reasonable grounds for suspecting to be guilty of it.²⁴

These powers of arrest apply to any offence, no matter how trivial. But there is an important proviso in the sense that the arresting officer must have reasonable grounds for believing that it is necessary to make the arrest, for one of the reasons specified in s 24(5). The foregoing reasons are widely drafted and ought not to impose serious restraints on the power of summary arrest. They include the need to (i) ascertain the suspect's name or address; (ii) prevent the arrested person from causing harm to him or herself or to others, committing an offence against public decency, or obstructing the highway; (iii) protect a child or other vulnerable person from the person arrested; (iv) allow the prompt and effective investigation of the offence; and (v) prevent a prosecution from being hindered by the disappearance of the suspect.

In addition to these powers of arrest by a constable, s 24A of PACE provides that a person other than a constable may arrest without a warrant anyone who is in the act of committing an indictable offence, and anyone whom he or she has reasonable grounds for suspecting to be committing an indictable offence. Moreover, where an indictable offence has been committed, a person other than a constable may arrest without a warrant anyone who is guilty of the offence or anyone whom he or she has reasonable grounds for suspecting to be guilty of it.²⁵ The fact that this universal power of summary arrest is confined to indictable offences is an important limitation, but most people will be unaware of which offences are indictable and which are not. Further limitations on this power (which may make its use by most people unwise) are to be found in s 24A(3).

The latter provides that the power may only be exercised where the person making the arrest has reasonable grounds for believing that any of the reasons mentioned in s 24A(4) apply to make it necessary to arrest the person in question, and it is not reasonably practicable for a constable to make the arrest. Section 24A(4) provides in turn that the reasons justifying the summary arrest are to prevent the person arrested causing physical injury to himself or

²³ See *Shields v Merseyside Police* [2010] EWCA Civ 1281, for an account by Toulson LJ of the background to the 2005 amendments.

²⁴ On the meaning of reasonable grounds for suspicion, see *O'Hara v Chief Constable of the RUC* [1997] AC 286; *Buckley v Thames Valley Chief Officer* [2009] EWCA Civ 356. The latter emphasises that 'an arresting officer may rely on what he had been told by others who may be civilian informants, reliable or unreliable, or other officers, providing that the information thus assembled provides reasonable grounds for suspicion' (Hughes LJ, para [9]). Also *Metropolitan Police Commissioner v Raissi* [2008] EWCA Civ 1237, [2009] QB 564.

²⁵ See *Walters v W H Smith & Son Ltd* [1914] 1 KB 595, and *R v Self* (1992) 95 Cr App R 42.

herself or another person, suffering physical injury, causing loss or damage to property, or making off before a constable can assume responsibility for him or her. These are seriously circumscribed powers, and in practice they may empower community support officers rather than citizens with no connection with the police.²⁶

Arrest powers in operation

In one of the leading cases on PACE, s 24 (as amended), it was explained that the amended statutory scheme ‘is intended to be uniform, self-contained, clear and to strike an appropriate balance between, on one side, the need for protection of the public and proper enforcement of the criminal law and, on the other side, protection of the individual against undue interference with his liberty’.²⁷ It was also noted that the legislation ‘takes into account the principles’ of ECHR, art 5, to a sufficient extent that [art 5] does not ‘require separate consideration’.²⁸ Moreover, ‘*Wednesbury* principles are also accommodated’, in the sense that ‘where suspicion that a person is about to commit, is committing or has committed an offence, is relied on as the basis for the person’s summary arrest, there must be reasonable grounds for the suspicion’.²⁹

Continuing in this vein, it was said in the Court of Appeal that ‘a police officer who carried out an arrest in bad faith, or in circumstances where his decision was irrational in the *Wednesbury* sense, would not be able to satisfy those provisions’.³⁰ As pointed out above, however, in the normal run of events a police officer ought not to be unduly impeded by the new statutory grounds for arrest, and the courts so far do not appear to have been unduly demanding. Indeed, it has also been pointed out by the Court of Appeal in a different case that ‘the “threshold” for the existence of “reasonable grounds” for suspicion is low, meaning that the amount of material that is known to the arresting officer in order to found “reasonable grounds” for suspicion may be small, even sparse’.³¹

It is to be noted, however, that the power of arrest is not always qualified by a requirement of ‘reasonable grounds’ for suspicion. One of the most remarkable arrest powers is to be found in s 24(3) which applies ‘where an offence has been committed’, empowering a constable to arrest ‘anyone who is guilty of the offence’. This rather prejudices two questions, which only a court can determine – the fact that an offence has been committed, and the fact that the arrested person has committed it. There is clearly a danger of relying on such a power lest the arrested person be found not guilty in subsequent proceedings. It has been explained:

Just as there may be a case in which a person is not guilty of an offence but the arresting officer had reasonable cause for suspecting him of being guilty, so there may be a case where a person is guilty of an offence but the arresting officer had insufficient information about it to provide reasonable grounds for suspecting that he was guilty. Such a situation would be most likely to occur where the arresting officer acted at the request or on the instruction of another officer, but the information given to the arresting officer was too sparse to afford reasonable grounds for the necessary suspicion.³²

²⁶ Alongside the powers of arrest without a warrant under ss 24 and 24A of PACE, some residual common law powers continue in force. At common law, a police officer has a power to arrest without warrant anyone who commits a breach of the peace. For a fuller account, see 15th edition of this work, ch 21; and see ch 18 below.

²⁷ *Shields v Chief Constable of Merseyside Police* [2010] EWCA Civ 1281, para 12.

²⁸ *Ibid*, para 13.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ *Alanov v Chief Constable of Sussex Police* [2012] EWCA Civ 234, at para 25.

³² *Shields*, above, para 26, referring to *O’Hara v Chief Constable of RUC*, above.

That, however, does not answer the point about how someone can be arrested for being guilty of having committed an offence without that guilt having been established. The same power existed in the original PACE 1984, s 24 and was equally baffling. As we have seen, however, it is not enough that there should be lawful grounds for an arrest: the powers in question should only be used when *necessary* to do so. This requirement has also attracted the attention of the Court of Appeal, this time in *Hayes v Chief Constable of Merseyside Police*.³³ There, a ‘two stage test’ was proposed to determine whether an arrest was necessary: (i) the constable making the arrest must actually believe that the arrest was necessary, and for a reason prescribed by s 24(5); and (ii) objectively that belief must be reasonable. Notionally, there are thus two *Wednesbury* assessments to be completed.

*Lord Hanningfield v Essex Chief Constable*³⁴ is a notable case in the light of the scepticism expressed above about the wide powers conferred on police officers by PACE, s 24 (as amended). Not only were the limits of police powers of arrest tested, but they were found to have been exercised unlawfully.

The applicant had recently been released from prison following a conviction relating to parliamentary expenses. Shortly thereafter, he was visited at home by five police officers at 6.45 am and arrested, following which his house was searched, after which he was taken to a police station to be questioned about an offence relating to local government expenses when he had been leader of Essex County Council.³⁵

According to Eady J in upholding Hanningfield’s civil claim against the police for wrongful arrest, the proper test to be applied in determining whether an arrest is necessary for the purposes of PACE s 24 is to be found in *Hayes v Chief Constable of Merseyside Police*, above. In this case, Eady J held that ‘the requirement of “necessity” as laid down by Parliament has not, on any realistic interpretation of the word, been met’.

The summary arrest was never going to have any impact on ‘the prompt and effective investigation’ of Lord Hanningfield’s credit card expenses, and there were ‘no solid grounds to suppose that he would suddenly start to hide or destroy evidence, or that he would make inappropriate contacts’. There was no justification ‘for by-passing all the usual statutory safeguards involved in obtaining a warrant’, with the result that Lord Hanningfield succeeded in his civil claim for damages for wrongful arrest.

The wrongful nature of the arrest undermined both the legality of the search, as well as the legality of the detention at the police station.³⁶

Manner of arrest

Although the first ingredient of a lawful arrest is the existence of lawful authority to make the arrest, it is not the only one. The arrest must also be executed in a lawful manner, which means that the arrested person must be told of the fact of arrest (i.e. that he or she is under arrest) and also of the reasons for the arrest (PACE, s 28), measures ‘laid down by Parliament to protect the individual against the excess or abuse of the power of arrest’.³⁷ The origin of the latter rule (requiring reasons to be given for the arrest) may be found in *Christie v*

³³ [2011] EWCA Civ 911, [2012] 1 WLR 517.

³⁴ [2013] EWHC 243 (QB), [2013] 3 WLR 3632.

³⁵ The allegations were not pursued.

³⁶ It is reported that Lord Hanningfield was awarded damages of £3,500: *BBC News*, 15 February 2013.

³⁷ *Hill v Chief Constable of South Yorkshire* [1990] 1 All ER 1046.

Leachinsky,³⁸ where the Liverpool police had purported to exercise a power of arrest contained in a local Act when they knew that the conditions for this were not met.

When the officers concerned in the latter case were later sued for wrongful arrest and false imprisonment, it was argued that the arrest was lawful because at the time they had information about Leachinsky which would have justified his arrest for another offence. The House of Lords held that the arrest was unlawful, since it was a condition of a lawful arrest that the person arrested should be entitled to know the reason for it. An actual charge need not be formulated at the time of arrest, but ‘the arrested man is entitled to be told what is the act for which he is arrested’. Indeed, it has been said that ‘giving the correct information of the reasons for an arrest was of the utmost constitutional significance’.³⁹

This information must be given at the time of arrest or as soon as practicable thereafter.⁴⁰ Otherwise the arrest is unlawful (PACE, s 28(1), (3)) although there is nothing laid down in the Act specifying how the information should be communicated to an arrested person.⁴¹ The issue was considered by the Court of Appeal in *Taylor v Thames Valley Chief Constable*⁴² where it was said that the ‘relevant principles remain those set out in *Christie’s* case’.

In *Taylor*, a ten-year-old boy was arrested and was told that he had been arrested for violent disorder on 18 April at Hillgrove Farm (while he was attending an anti-vivisection protest with his mother). The arrest took place some six weeks later while the boy was taking part in another demonstration. It was held that the arrested person must be told ‘in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest’.⁴³ It was also held that each case must depend on its own facts but that it has ‘never been the law that an arrested person must be given detailed particulars of the case against him’.⁴⁴ In this case it was accepted that the information provided at the time of the arrest was sufficient, though it was also accepted that in some cases ‘it will be necessary for the officer to give more facts than in others’.⁴⁵

In relation to the requirements of s 28 of PACE, two interesting questions have arisen. First, what happens if the police are unable to inform the arrested person of the fact and reasons at the time of arrest and then fail to do so as soon as it becomes practicable? Does this subsequent failure mean that the earlier arrest is unlawful? In *DPP v Hawkins*,⁴⁶ the court’s answer was no:

When a police officer makes an arrest which he is lawfully entitled to make but is unable at the time to state the ground because it is impracticable to do so, . . . it is his duty to maintain

³⁸ [1947] AC 573, 593 (Lord Simonds). But note that the 1984 Act goes beyond the common law position: see *Hill v Chief Constable of South Yorkshire* (note 37 above). On the continuing importance of *Christie v Leachinsky*, see *O’Loughlin v Chief Constable of Essex* [1998] 1 WLR 374, *R v Chalkley* [1998] QB 848, and *Taylor v Thames Valley Chief Constable* [2004] EWCA Civ 858, [2004] 1 WLR 3155.

³⁹ *Edwards v DPP* (1993) 97 Cr App R 301.

⁴⁰ See *Daves v DPP* [1995] 1 Cr App R 65.

⁴¹ See *Nicholas v Parsonage* [1987] RTR 199.

⁴² See note 38 above.

⁴³ *Ibid*, at para [24] (Clarke LJ), citing *Fox v UK* (1991) 13 EHRR 157.

⁴⁴ *Ibid*, at para [35]. See also *Chapman v DPP* (1989) 89 Cr App R 190, and *Shields*, above.

⁴⁵ See *Murphy v Oxford* [1985] CA Transcript 56 (as cited in *Taylor*, above) where ‘a person arrested for burglary was told that he was being arrested on suspicion of burglary in Newquay. As Lord Donaldson MR put it, ‘no mention was made either of the fact that the premises in Newquay were a hotel or of the date on which the offence was committed’ (*ibid*).

⁴⁶ [1988] 3 All ER 673.

the arrest until it is practicable to inform the arrested person of that ground. If, when it does become practicable, he fails to do so, then the arrest is unlawful, but that does not mean that acts, which were previously done and were, when done, done in the execution of duty, become, retrospectively, acts which were not done in the execution of duty.⁴⁷

The second question relates to the position where the police have no reason to delay informing an arrested person of the fact and reasons for the arrest. Does this initial failure, rendering the arrest therefore unlawful, vitiate all the subsequent proceedings? Again, it seems not.

In *Lewis v Chief Constable of South Wales*,⁴⁸ two women were arrested for burglary but were not told why they were being arrested. They were then taken to a police station where they were informed of the reasons for the arrest, within (respectively) 10 minutes and 23 minutes after the time of arrest. Some five hours later both were released.

The women subsequently sued for wrongful arrest and false imprisonment and the question which arose was whether they were entitled to be compensated for 10 and 23 minutes respectively or for the entire five-hour period. The Court of Appeal agreed with the first instance decision that, although the initial arrest had been unlawful because the women had not been given the reasons for it, it ceased being unlawful when this was done. The court did not consider this result to be inconsistent with s 28(3) of PACE.

While a police officer may use reasonable force to make the arrest,⁴⁹ the use of unreasonable force does not necessarily make the arrest unlawful.⁵⁰ Unlike the police stop and search powers,⁵¹ there is no statutory duty on police officers (even if not in uniform) to identify themselves as such to an arrested person. This seems curious, and perhaps could be justified on the ground that the power of stop and search is a power vested only in police officers, unlike the power of arrest, which is a power that may be exercised by anyone. That, however, does not provide a complete answer, for as we have seen, the police power of arrest is much greater than the power of arrest vested in others; it may be argued that the citizen being arrested is entitled to know that the arrestor has the authority to make the arrest.

C. Detention and questioning of suspects

Detention of suspects

An arrested person must be brought to a police station as soon as practicable after the arrest (s 30), although this may be delayed if his or her presence elsewhere is necessary for immediate investigation (s 30(10)). These provisions were amended by the Criminal Justice Act 2003, which introduced an exception to the duty under s 30(1) where the arrested person has been granted bail by a police officer at any time before arriving at a police station (so-called 'street bail' (s 30A)).

⁴⁷ Ibid, at p 674.

⁴⁸ [1991] 1 All ER 206.

⁴⁹ Police and Criminal Evidence Act 1984, s 117.

⁵⁰ *Simpson v Chief Constable of South Yorkshire Police*, *The Times*, 7 March 1991. Cf *Hill v Chief Constable of South Yorkshire*, note 37 above.

⁵¹ See above, pp 389–90.

At every police station that is designated for such detention,⁵² there must be a custody officer who must be a police officer of the rank of sergeant or above (s 36).⁵³ It is the duty of the custody officer to authorise the detention of suspects if this is necessary to secure or preserve evidence relating to an offence or 'to obtain such evidence by questioning' the suspect (s 37). The custody officer is required to ensure that the detention is carried out in accordance with the 1984 Act and the Home Office Code of Practice on the Detention, Treatment and Questioning of Persons by Police Officers (Code C) (s 39), while a review officer is required by the Act to conduct regular reviews of detention.⁵⁴

PACE allows the police to detain people who have been arrested for up to 24 hours without being released or charged in the first instance (s 41). This may be extended to 36 hours by an officer of the rank of superintendent or above where the offence is an indictable offence (s 42), which includes murder, manslaughter, rape, kidnapping and much else besides. In the case of indictable offences, the period of 36 hours may be extended by a warrant of further detention for up to 36 hours, if a magistrates' court (defined as a court of *two or more* justices of the peace, a potentially important safeguard) on application by the police is satisfied that further detention is justified to secure or preserve evidence by questioning the detainee (s 43).

The detainee must be notified of the application to the magistrates, and may be legally represented at the hearing. If the court does not authorise further detention, the detainee must be released or charged. If the warrant is issued, it may be renewed, though it cannot extend beyond 96 hours from the time of arrest (or the time of arrival at a police station if earlier). The maximum period of pre-charge detention is thus 96 hours, in the case of serious offences.⁵⁵

Securing and preserving evidence

The search of arrested or detained persons is authorised by s 54 of PACE which requires the custody officer to ascertain everything which the person has in his or her possession,⁵⁶ and empowers the custody officer to make a record of such items. Any item may be seized and retained except for clothing and personal effects, which may be seized only if the custody officer has reasonable grounds to believe the item is evidence relating to the offence; or believes that the arrested person may use the items in question to cause physical injury personally or to another, damage property, interfere with evidence, or assist him or her to escape.

Under section 54A, an officer of the rank of inspector may authorise that a person detained in a police station be searched or examined (or both) to establish whether he or she has any mark that would tend to identify him or her as a person involved in the commission of an offence.⁵⁷ Section 55 authorises intimate searches, i.e. the physical examination of a person's body orifices.⁵⁸ But this may be done only if it has been authorised by an officer of the rank of inspector or above, and there are reasonable grounds for believing that the person may have concealed on him or her either a Class A drug or an article which could be used to cause physical injury to himself or herself or others.

⁵² See 1984 Act, s 35.

⁵³ On the limitations of this crucial measure designed 'to ensure that the welfare and interests of detained subjects are properly protected', see *Vince v Chief Constable of Dorset* [1993] 2 All ER 321.

⁵⁴ Failure to conduct a review at the proper time could render detention unlawful: *Roberts v Chief Constable of Cheshire* [1999] 1 WLR 662. The review may be conducted by telephone: 1984 Act, s 40A; also s 45A (video links).

⁵⁵ A separate regime for the detention and questioning of terrorist suspects is to be found in the Terrorism Act 2000. See ch 20 below.

⁵⁶ For the position at common law, see *Lindley v Rutter* [1981] QB 128; *Brazil v Chief Constable of Surrey* [1983] 3 All ER 537.

⁵⁷ Introduced by the Anti-terrorism, Crime and Security Act 2001, s 90. The new section permits any such mark to be photographed without the consent of the detainee.

⁵⁸ See *R v Hughes* [1994] 1 WLR 876 (an intimate search requires physical intrusion, not visual examination).

Section 61 of PACE allows fingerprints to be taken without consent with the authority of a police inspector in a wide range of circumstances,⁵⁹ while s 61A allows the police to take impressions of footwear.⁶⁰ By s 62, intimate samples may also be required in more limited circumstances, an intimate sample being defined to include various bodily fluids, including blood and swabs from intimate parts of the anatomy (s 65), but not now swabs taken from the mouth.⁶¹ Unlike fingerprints, however, intimate samples may be taken only with the consent of the detainee. However, a refusal without good cause to give consent may lead a court to ‘draw such inferences from the refusal as appear proper’ (s 62(10)).

A non-intimate sample (e.g. hair, a sample from under a nail, or a swab taken from the mouth) may, in contrast, be taken without consent, if authorised by an officer of the rank of inspector or above, if the offence for which the arrested person is being detained is a recordable offence (s 63). A non-intimate sample may also be taken without consent from a person who has been charged with or convicted of a recordable offence.⁶² In some cases those in police detention may also be tested for drugs,⁶³ and arrested suspects (and others) may be photographed without their consent.⁶⁴

Safeguards for suspects

The detention and questioning of suspects should be carried out in accordance with the safeguards laid down in PACE and in Code C referred to above. The Act itself provides two safeguards. The first is the right not to be held incommunicado. A person who has been arrested and is held in custody in a police station is entitled on request to have a friend or relative (or some other person who is known to him or her) informed of the arrest, as soon as reasonably practicable (s 56).⁶⁵ The other safeguard provided by the Act is that arrested persons held in custody in a police station are entitled on request to consult a solicitor privately at any time (s 58).⁶⁶ It is for the person detained and not the police to decide who would be an appropriate solicitor for the purposes of giving advice.⁶⁷

In some cases the exercise of these rights may be delayed for up to 36 hours, where the arrest is for an indictable offence and where the delay has been authorised by an officer at least of the rank of inspector. This applies particularly where there is a risk of danger to evidence or witnesses; or where the detained person has benefited from drug trafficking.⁶⁸ In other cases, both rights can be delayed for up to 48 hours and in some circumstances the right

⁵⁹ The circumstances in which prints may be taken and the nature of the prints that may be taken were extended by amendments introduced by the Criminal Justice and Police Act 2001, s 78. Fingerprints are defined to include palm-prints.

⁶⁰ Serious Organised Crime and Police Act 2005, s 118.

⁶¹ Criminal Justice and Public Order Act 1994, s 58, amending PACE, s 65. See now Serious Organised Crime and Police Act 2005, s 119.

⁶² PACE, s 63(3A), (3B). See now Criminal Evidence (Amendment) Act 1997.

⁶³ 1984 Act, s 63B.

⁶⁴ PACE, s 64A.

⁶⁵ See *R v Kerawalla* [1991] Crim LR 451.

⁶⁶ See *R v Samuel* [1988] QB 615; *R v Alladice* (1988) 87 Cr App R 380. See *R v South Wales Chief Constable, ex p Merrick* [1994] 2 All ER 560: s 58 does not apply to give the accused the right of access to a solicitor where he is in custody in a magistrates’ court following the denial of bail. But there is a common law right to this effect ‘which preceded the Act of 1984 and which [was] not abrogated by that Act’ (p 572). This apparent common law right does not extend to having the solicitor present during police interviews: *R v Chief Constable of the RUC, ex p Begley* [1997] 1 WLR 1475. On the role of the solicitor, see *R v Paris* (1993) 97 Cr App R 99.

⁶⁷ *R (Thompson) v Chief Constable of Northumbria* [2001] 1 WLR 1342.

⁶⁸ Neither of the rights in ss 56 or 58 apply to persons arrested or detained under the Terrorism Act 2000, s 41 or Sch 8. See ch 20 below.

to consult a solicitor may be subject to the condition that it is conducted within ‘the sight and hearing’ of a uniformed officer.⁶⁹ There is no right to damages where the police act in breach of the duty to permit access to legal representatives,⁷⁰ though any evidence obtained from an accused person denied such representation may be inadmissible.⁷¹

So far as the right not to be held incommunicado is concerned, Code C referred to above provides that detained persons may receive visits at the custody officer’s discretion and may speak on the telephone for a reasonable time to one person, although the call (other than to a solicitor) may be listened to and anything said used in evidence in any subsequent criminal proceedings (Code C, Part 5). As far as the right to legal advice is concerned, a person must be permitted to have his or her solicitor present while being interviewed by the police. The solicitor may be required to leave the interview only if his or her conduct is such that the interviewing officer is unable properly to put questions to the suspect (Part 6). The code also deals with such matters as the conditions of detention (Part 8), the giving of cautions to detained persons (Part 10), and the conduct of interviews (Part 11).

Regarding cautions, a suspected person ‘must be cautioned before any questions about [the suspected offence] . . . are put to [him]’. The effect of the Criminal Justice and Public Order Act 1994 is that the caution should be in the following terms: ‘You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.’ In conducting interviews, officers should neither try ‘to obtain answers or elicit a statement by the use of oppression’, nor ‘indicate, except to answer a direct question, what action will be taken by the police if the person being questioned answers questions, makes a statement or refuses to do either’ (Code C, Part 11).⁷² Interviews should be audio-recorded.⁷³

Right to silence⁷⁴

An important principle in criminal procedure is the right of a suspected or accused person to remain silent; it is for the police to obtain evidence of guilt, not for a suspect to prove his or her innocence. This principle is strengthened by the ECHR, art 6, which provides for the right to a fair trial.⁷⁵ The main control over abuse at the stage of questioning, however, is exercised by the criminal courts,⁷⁶ it having long been established that a confession or statement by an accused person is not admissible unless it is voluntary, in the sense that it has not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.⁷⁷

Although the requirement that statements should be obtained voluntarily was reinforced by the 1984 Act (by providing for the exclusion of police evidence obtained oppressively),

⁶⁹ Terrorism Act 2000, Sch 8, para 9.

⁷⁰ *Cullen v Chief Constable of the RUC* [2003] UKHL 39, [2003] 1 WLR 1763.

⁷¹ *R v Samuel*, above, and see section E below.

⁷² In any period of 24 hours, a detained person normally should be allowed a continuous period of at least eight hours for rest, free from questioning, travel or other interruption arising out of the investigation (Part 12).

⁷³ 1984 Act, s 60. See Code E (Code of Practice on Audio Recording Interviews with Suspects). There is no statutory duty to video-tape interviews, but it is encouraged by Code F (Code of Practice on Visual Recording with Sound on Interviews with Subjects).

⁷⁴ On the different meanings of the right to silence, see *R v Director of Serious Fraud Office, ex p Smith* [1993] AC 1, per Lord Mustill.

⁷⁵ Although ‘not an absolute right’, the right to silence is said by the European Court of Human Rights to lie ‘at the heart of the notion of a fair procedure under article 6’: see *Condron v UK* (2000) 31 EHRR 1, at p 20. Also *Murray v UK* (1996) 22 EHRR 29.

⁷⁶ See *Lodwick v Sanders* [1985] 1 All ER 577, at pp 580–1 (Watkins LJ).

⁷⁷ *Ibrahim v R* [1914] AC 599. See now PACE 1984, ss 76, 78.

the right to silence has, however, been subject to erosion ever since, principally by measures that challenge the position accepted from time immemorial that the burden is on the police to obtain evidence of guilt, not on the suspect to prove innocence. Indeed, an early example of that erosion is to be found in the 1984 Act itself, which permits negative inferences to be drawn from an accused's failure to provide an intimate sample.

The drawing of negative inferences was extended further by the Criminal Justice and Public Order Act 1994, which permits the court in criminal proceedings to draw such inferences as appear to it to be proper where the accused failed to mention 'any fact relied on in his defence in these proceedings' when questioned by the police or on being charged with an offence, where the fact was one which in the circumstances 'the accused could reasonably have been expected to mention' (s 34).⁷⁸ The Act also permits a court or jury 'to draw such inferences as appear proper' from the failure of the accused to give evidence at his or her trial or without good cause to answer any question.

The court or jury may, moreover, draw such inferences as appear proper in such circumstances in determining whether the accused is guilty of the offence charged. The accused is not, however, required to give evidence on his or her own behalf and is not guilty of contempt of court for failing to do so (s 35).⁷⁹ Subsequent amendments have confined the operation of these measures to situations where the accused has enjoyed the benefit of legal representation before remaining silent.⁸⁰ Although the drawing of adverse inferences is not itself a breach of the ECHR,⁸¹ 'particular caution was required before a domestic court could invoke an accused's silence against him'.⁸²

There is no breach of ECHR, art 6 when under the Road Traffic Act 1988 the owner of a vehicle is required to reveal the identity of its driver to a police officer.⁸³

D. Police powers of entry, search and seizure

Police powers of entry

'By the law of England', said Lord Camden in *Entick v Carrington*,⁸⁴ 'every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my licence, but he is liable to an action though the damage be nothing.'⁸⁵

There are, however, several circumstances in which the police may lawfully enter private property. One, as Lord Camden suggests, is with the consent of the owner or occupier.⁸⁶ Indeed, in *Robson v Hallett*⁸⁷ it was held that a police officer, like other members of the public

⁷⁸ For background to the changes, see Royal Commission on Criminal Justice, Cm 2263, 1993, which argued in favour of the right to silence. The provisions have since been extended to post-charge questioning under the Counter-Terrorism Act 2008, s 22.

⁷⁹ See *R v Cowan* [1996] QB 373.

⁸⁰ Youth Justice and Criminal Evidence Act 1999, s 58; enacted in the light of *Murray v UK* (1996) 22 EHRR 29.

⁸¹ *Averill v UK* (2001) 31 EHRR 839; *Beckles v UK* (2003) 36 EHRR 162; and *R v Knight* [2003] EWCA Crim 1977, [2004] 1 WLR 340.

⁸² *Beckles v UK*, above.

⁸³ *Brown v Stott* [2001] 1 AC 681.

⁸⁴ (1765) 19 St Tr 1030, 1066; ch 16.

⁸⁵ See also *Davis v Lisle* [1936] 2 KB 434.

⁸⁶ See Code B (Code of Practice for Searches of Premises by Police Officers), Part 5.

⁸⁷ [1967] 2 QB 939.

coming to a house on lawful business, has an implied licence from the householder to walk to the front door and to ask whether he or she can come inside; and that he or she must be allowed a reasonable time to leave the premises before he or she becomes a trespasser.

Otherwise, the police may have statutory authority to enter private property even without the consent of the owner. Under the Police and Criminal Evidence Act 1984, a police officer may enter private premises to execute a search warrant (s 8); and to execute an arrest warrant, arrest a person for an indictable offence,⁸⁸ arrest a person for certain public order or road traffic offences, recapture a person who is unlawfully at large,⁸⁹ save life and limb, or prevent serious damage to property (s 17).⁹⁰ These powers under s 17 are generally exercisable only if the officer has reasonable grounds for believing that the person whom he or she is seeking is on the premises.

There is a power to search the premises entered under the authority of s 17, but only a search that is reasonably required for the purpose for which the power to enter was exercised. So if the officer enters premises under s 17 to arrest a person, he or she may search the premises to find that person, but may not under s 17 search for evidence relating to the offence. Other provisions of PACE confer this latter power.⁹¹ Before exercising these powers of entry the police should normally inform the occupant of the reasons.⁹²

Apart from entry with consent or under statutory authority, a surviving power of entry may arise from common law. Although PACE, s 17(5), abolishes all common law rules authorising the entry of private premises by the police, it is expressly provided that this does not affect any power of entry to deal with or prevent a breach of the peace. The existence of such a power appears to have been recognised in *Thomas v Sawkins*,⁹³ although the ratio of that case is controversial.⁹⁴ The existence of the common law power has been accepted by the ECtHR as not violating Convention rights, though care needs to be taken before it is used.

In *McLeod v United Kingdom*,⁹⁵ the complainant argued that by forcibly entering her house, ostensibly to prevent a breach of peace, the police had violated her right to respect for her home and private life in art 8 of the ECHR. The police had entered to help the complainant's former husband to recover property while the complainant was absent.

The domestic courts held the entry to be lawful,⁹⁶ but the European Court of Human Rights upheld the complaint. The government argued that the entry could be justified under art 8(2). Although the Court accepted that the common law power was a power 'prescribed by law' for the purposes of art 8(2), it was held there that the exercise of the power could not be justified.

⁸⁸ *Chapman v DPP* [1988] Crim LR 843.

⁸⁹ See *D'Souza v DPP* [1992] 4 All ER 545 (no right of entry unless *in pursuit* of someone unlawfully at large).

⁹⁰ The power of entry to save life and limb or to prevent serious damage to property may also be exercised by designated community support officers: Police Reform Act 2002, Sch 4, para 8.

⁹¹ 1984 Act, s 32(2)(b). For an example of other powers of entry without a warrant, see *Whitelaw v Haining* 1992 SLT 956.

⁹² *O'Loughlin v Chief Constable of Essex* [1998] 1 WLR 374.

⁹³ [1935] 2 KB 249; and see ch 18.

⁹⁴ See A L Goodhart (1936) 6 CLJ 22, and Ewing and Gearty, *The Struggle for Civil Liberties*, ch 6. The power is not confined to meetings. See *McLeod v Metropolitan Police Commissioner* [1994] 4 All ER 553.

⁹⁵ (1998) 27 EHRR 493.

⁹⁶ *McLeod v Metropolitan Police Commissioner*, note 94 above.

Search with a warrant

The effect of decisions such as *Entick v Carrington* was that, except for the power to search for stolen goods, for which a warrant could be obtained at common law from a magistrate,⁹⁷ statutory powers were needed if the police were lawfully to search private premises. These powers are to be found in PACE, s 8, authorising a search warrant to be granted by a justice of the peace on an application by a police constable or designated investigating officer, where there are reasonable grounds for believing that an indictable offence has been committed, and that there is material on the premises that is likely to be of substantial value in the police investigation.⁹⁸

A search warrant may now take one of two forms. A ‘specific premises’ warrant is one which specifies the premises to be searched, while an ‘all premises’ warrant applies to any premises occupied or controlled by the person named in the warrant.⁹⁹ The latter thus allows premises to be searched despite not being specified in the warrant, though these may be issued only where it is not reasonably practicable to specify all the premises of the person named in the warrant that may need to be searched. A warrant may now authorise multiple entries to the premises which it specifies,¹⁰⁰ though where a warrant authorises only one entry, the police may remain on the premises until their task is complete.¹⁰¹

This power of magistrates to grant a warrant does not apply to material which consists of or includes items subject to legal privilege, ‘excluded material’ or ‘special procedure material’. Items subject to legal privilege include communications between a lawyer and his or her client (s 10),¹⁰² while excluded material is defined to cover confidential personal records, human tissue or tissue fluid taken for purposes of medical treatment and held in confidence, and journalistic material which is held in confidence (s 11).¹⁰³ Special procedure material refers to other forms of journalistic material,¹⁰⁴ and also other material that is held in confidence or subject to an obligation of secrecy, and has been acquired in the course of any business, profession or other occupation (s 14).

No warrant can be issued in relation to material subject to legal privilege, but orders may be issued by a judge under Sch 1, para 4,¹⁰⁵ following an *inter partes* hearing requiring excluded material or special procedure material to be delivered to a police constable or a designated investigating officer within seven days.¹⁰⁶ If this is not complied with, a judge may issue a warrant authorising a police officer or a designated investigating officer to enter and search premises and seize the material in question (Sch 1, para 12). A judge may issue both specific premises and all premises warrants for these purposes.

⁹⁷ See now Theft Act 1968, s 26.

⁹⁸ See also the conditions set out in PACE 1984, s 8(3), considered in *Redknapp v City of London Police Commissioner* [2008] EWHC 1177, [2009] 1 WLR 1177.

⁹⁹ 1984 Act, s 8(1A).

¹⁰⁰ 1984 Act, s 8(1C).

¹⁰¹ *Sher v Greater Manchester Police Constable* [2010] EWHC 1859 (Admin), [2011] 2 All ER 364.

¹⁰² Cf *R v Central Criminal Court, ex p Francis and Francis* [1989] AC 346. See *R v R* [1994] 4 All ER 260, and *R v Manchester Crown Court, ex p Rogers* [1999] 4 All ER 35.

¹⁰³ Hospital records of patient admission and discharge are excluded material: see *R v Cardiff Crown Court, ex p Kellam, The Times*, 3 May 1993.

¹⁰⁴ On journalistic material, see 1984 Act s 13. Also *R v Bristol Crown Court, ex p Bristol Press Agency Ltd* (1987) 85 Cr App R 190; *R v Middlesex Crown Court, ex p Salinger* [1993] QB 564; *R v Manchester Stipendiary Magistrate, ex p Granada Television Ltd* [2001] 1 AC 300; and *R v Central Criminal Court, ex p Bright* [2001] 2 All ER 244.

¹⁰⁵ A judge for this purpose means a circuit judge, or a District Judge (Magistrates’ Court): PACE 1984, Sch 1, para 17. As originally enacted, these powers were exercised only by circuit judges.

¹⁰⁶ The material may be surrendered voluntarily by the person who holds it without the consent of the person to whom it relates: *R v Singleton* (1995) 1 Cr App R 431.

In some circumstances, a warrant may be secured under Sch 1, para 12 without first seeking an order under para 4. This practice was, however, strongly deprecated in *R v Maidstone Crown Court, ex p Waite*,¹⁰⁷ where it was said: 'The special procedure under section 9 and schedule 1 is a serious inroad upon the liberty of the subject. The responsibility for ensuring that the procedure is not abused lies with circuit judges . . . The responsibility is greatest when the circuit judge is asked to issue a search warrant under paragraph 12. It is essential that the reason for authorising the seizure is made clear. The preferred method of obtaining material for a police investigation should always be by way of an *inter partes* order under paragraph 4, after notice of application has been served under paragraph 8. An *ex parte* application under paragraph 12 must never become a matter of common form and satisfaction as to the fulfilment of the conditions is an important matter of substance.'

Apart from thus extending the grounds for granting search warrants, the 1984 Act also introduced safeguards against misuse in the execution of a warrant.¹⁰⁸ These are found in ss 15 and 16, and they apply not only to search warrants issued under PACE, but also to warrants issued to a constable or a designated investigating officer 'under any enactment, including an enactment contained in an Act passed after this Act'.¹⁰⁹ An application, which is made *ex parte*, must be in writing and must explain the grounds for the application and the premises to be searched. The constable or designated investigating officer must answer on oath any question put by the justice of the peace or the judge. The warrant must specify the premises to be searched in a specific premises warrant, and so far as this is reasonably practicable in the case of an all premises warrant.¹¹⁰

A search warrant must be executed within three months from the date of its issue. The application for and execution of a warrant may be timed, however, to enable the police to kill two birds with one stone. So in *R (Pearce) v Metropolitan Police Commissioner*,¹¹¹ the police obtained a warrant to search for stolen bicycles at an address in London. The effect of executing the warrant would be to disrupt a group of protestors who in turn had planned on the following day to disrupt royal wedding celebrations. In a case that has a whiff of the discredited *Elias v Pasmore* about it,¹¹² the execution of the warrant on the day before the royal wedding was held to be lawful because the dominant purpose of the searches was the one authorised by the warrants.

In *Elias v Pasmore*, the police had raided the premises of the National Unemployed Workers' Movement (NUWM) to execute a warrant for the arrest of Wal Hannington for sedition. The police arrested Hannington and also took away a large quantity of documents, though they did not have a search warrant. The documents were later used in evidence against Sid Elias for inciting Hannington to commit sedition. The suggestion was that the police waited to arrest Hannington at the site of the NUWM in order to find evidence against Elias. Horridge J held that the 'interests of the State' justified the police in seizing

¹⁰⁷ [1988] Crim LR 384.

¹⁰⁸ Further safeguards are in Code of Practice B above.

¹⁰⁹ Police and Criminal Evidence Act 1984, s 15(1).

¹¹⁰ PACE, s 15(2A).

¹¹¹ [2013] EWCA Civ 866.

¹¹² [1934] 2 KB 164. See E C S Wade (1934) 50 LQR 354, and Ewing and Gearty, *The Struggle for Civil Liberties*, ch 5.

material that was relevant to the prosecution of any crime against any person, not only the person being arrested.

Horridge J argued that although it may at the time have been improper to seize the material, its subsequent use in evidence justified the police conduct. The Court of Appeal later disapproved these views on the ground that the legality of police conduct must be judged at the time it is done and not by what happens later. But that does not address the practice of using the power of arrest for an ulterior purpose, which was central to the facts in *Elias v Pasmore*. One unanswered question raised by *Pearce* is whether it would now be lawful for the police to wait until Hannington was at the NUWM and to enter with an arrest warrant.¹¹³ This would enable them to search for evidence against Hannington,¹¹⁴ and if in the process evidence was found of an offence by Elias, to arrest Elias.

Entry and search must be at a reasonable hour (though warrants will often be executed very early in the morning), and the police may be accompanied by non-police officers who may be required to provide technical assistance.¹¹⁵ Where the occupier of the premises is present, the police officers or designated investigating officers must identify themselves, produce the warrant, and supply a copy to the occupier.¹¹⁶ When conducting a search, the police may detain individuals in one room while searching another room, and may use reasonable force to do so, if necessary.¹¹⁷ If there is no person present, a copy of the warrant should be left in a prominent place on the premises. A search under the warrant does not authorise a general search of the premises, but only a search to the extent required for the purpose for which the warrant was issued (s 16). The police may (and do) use force to gain entry.

In *R v Longman*,¹¹⁸ police officers with a search warrant effected entry to a house by deception, as a result of difficulties they had encountered in the past. A woman police officer in plain clothes pretended to deliver flowers. When the door was opened to her, other officers in plain clothes immediately entered the house, with one shouting 'Police, got a warrant' which he held in his hand.

The Court of Appeal held that this procedure complied with ss 15 and 16 of PACE. The court rejected the contention that '*before entering* the premises a police officer must not only identify himself but must produce his warrant card and . . . also the search warrant and serve a copy of the search warrant on the householder'. It is enough that these things are done *after entry* to the premises.

To hold otherwise, said Lord Lane CJ, would mean that the whole object of the more important type of search would be stultified.

¹¹³ PACE, s 17.

¹¹⁴ *Ibid*, s 32(2)(b).

¹¹⁵ Criminal Justice Act 2003, s 2, amending PACE, s 16. See *Lord Advocate's Reference (No 1 of 2002)* 2002 SLT 1017 for the position in Scotland.

¹¹⁶ See *R v Chief Constable of Lancashire, ex p Parker* [1993] QB 577 (the warrant and any schedule must be shown; an uncertified photocopy is impermissible). See also *Redknapp v City of London Police Commissioner*, above (copy of warrant must be left).

¹¹⁷ *DPP v Meaden* [2003] EWHC 3005 (Admin), [2004] 4 All ER 75.

¹¹⁸ [1988] 1 WLR 619. See also *Linehan v DPP* [2000] Crim LR 861.

Search without a warrant

Police powers to search without a warrant arise in three circumstances. The first is the power to search a person following arrest. Section 32 allows a constable (but no one else) to search an arrested person, at a place other than a police station, ‘if the constable has reasonable grounds for believing that the arrested person may present a danger to himself or others’. A constable (but no one else) may search an arrested person for anything which might be used to escape from lawful custody, or for anything which might be evidence relating to an offence (s 32(2)), although in both these cases the power to search is a power to search only to the extent that is reasonably required for the purpose of discovering ‘any such thing or any such evidence’ (s 32(3)).

The police power of search under PACE, s 32 does not authorise the police officer conducting the search to require a person to remove any item of clothing in public, except an outer coat, jacket or gloves (s 32(4)), but it does authorise the search of a person’s mouth.¹¹⁹ A police officer conducting a search under PACE, s 32 may seize any item which may cause physical injury, might assist in an escape from lawful custody, or is evidence relating to any offence (s 32(8)). The only items which may not be seized while conducting such a search are those subject to legal privilege (s 32(9)), although no such exception applies to excluded material or to special procedure material as described above.

The second power of search without a warrant is a power to search premises ancillary to arrest. At common law, the power to search premises incidental to arrest was a power to search at the time of the arrest. So in *McLorie v Oxford*¹²⁰ it was held that after having arrested a suspect and detaining him in custody, the police had no right to return to the house to search for the instruments of crime, even of serious crime; that is to say, no right to do so unless they could get a search warrant, although that would not have been available in all circumstances where it might have been necessary. In any event, it may not have been appropriate if the delay in obtaining the warrant meant that any evidence on the premises could be removed or destroyed in the meantime.

The position is now governed by PACE, s 32, so that after making an arrest for an indictable offence, a constable (but no one else) may enter any premises in which the person was when arrested or immediately before he or she was arrested. The constable may search the premises for evidence relating to the offence for which the person was arrested (s 32(2)(b)). This would allow the police to search the premises at the time of arrest where the arrest took place within or outside the premises. It is unclear, whether having made the arrest, this authorises the police to return to the scene to look for evidence.¹²¹ Section 32 is open to the interpretation that the power of search may be, but need not be, contemporaneous with the arrest.¹²²

The third power of search without a warrant is a power to search the home of the arrested person, even though he or she was not arrested there and even though he or she was not there immediately before arrest. At common law, the courts seemed reluctant to recognise any such power, though there were suggestions that such a search might be permitted where the house search was concerned with securing evidence relating to the offence for which the person had been arrested.¹²³ PACE, s 18 permits a constable or a designated community

¹¹⁹ Criminal Justice and Public Order Act 1994, s 59.

¹²⁰ [1982] QB 1290.

¹²¹ As recently pointed out, however, the legality of a search under s 32(2)(b) will be undermined if the initial arrest is unlawful: *Lord Hanningfield v Chief Constable of Essex Police*, above, para 6 (Eady J).

¹²² The power can be used only if the police officer has reasonable grounds for believing that there is evidence on the premises for which a search is permitted, and this must be the genuine reason for the entry: *R v Beckford* (1992) 94 Cr App R 43.

¹²³ *Jeffrey v Black* [1978] QB 490.

support officer to enter and search any premises occupied or controlled by any person who is under arrest for an indictable offence, provided the statutory criteria for such a search are met.

Thus, there must be reasonable grounds to suspect that there is on the premises evidence (other than items subject to legal privilege) relating to the indictable offence for which the suspect has been arrested or to a related indictable offence. However, the power can be used only in relation to premises actually owned or controlled by the arrested person, and not premises the police reasonably believe to be so owned or controlled.¹²⁴ The exercise of the power should normally be authorised in writing by an inspector or an officer of a higher rank, although the power can be used without first taking a suspect to the police station and securing authorisation, if this is necessary for the effective investigation of the offence.

Police powers of seizure

The powers of search discussed above are generally also associated with a power of seizure. However, the nature of that power varies from case to case. In the case of entry to search for an escaped person or to make an arrest (s 17), there is no power to seize and retain property. In the case of search with a search warrant (s 8), there is a power only to seize and retain ‘anything for which a search has been authorised’.¹²⁵ The same is true of the power to enter and search an arrested person’s premises after arrest (s 18).

In the case of a search of premises where the arrested person was at or immediately before the arrest (s 32), there is no power of seizure in the section itself, although in the case of a personal search there is a right to retain anything reasonably believed to be evidence of any offence, including an offence unrelated to the grounds for the arrest. What is the position if the police are on property for any of these purposes or if they are present with the consent of the owner or occupier and they stumble across something which may suggest that an offence has been committed? In what circumstances, if any, can the police seize that evidence? Clearly, they can do so if they are present with a search warrant and the material relates to the offence for which the warrant was granted. But what if it relates to some wholly unconnected offence? Similarly, what is the position if the police enter under s 17 to make an arrest and stumble across incriminating evidence?

The power of seizure is governed at common law by the Court of Appeal decision in *Ghani v Jones*,¹²⁶ where it was held that before seizing private property in the course of an investigation, the police must have reasonable grounds for believing (a) that a serious crime has been committed; (b) that the article is the instrument by which the crime was committed or is material evidence to prove commission of the crime; and (c) that the person in possession of the article is implicated in the crime ‘or at any rate his refusal (of consent to the police) must be quite unreasonable’; while (d) the police must not keep the article longer than is reasonably necessary; and (e) the lawfulness of the conduct of the police must be judged at the time and not (as in the earlier notorious decision of Horridge J in *Elias v Pasmore*) by what happens afterwards.¹²⁷ As pointed out above, it was held in the latter case that the ‘interests of the State’ justified the police in seizing material that was relevant to the prosecution for any crime of any person, not only of the person who was arrested.

¹²⁴ *Khan v Metropolitan Police Commissioner* [2008] EWCA Civ 723; if there is any doubt, the police can apply for a warrant.

¹²⁵ See *R v Chief Constable of Warwickshire, ex p Fitzpatrick* [1998] 1 All ER 65, and *R v Chesterfield JJ, ex p Bramley* [2000] 1 All ER 411.

¹²⁶ [1970] 1 QB 693.

¹²⁷ Cf *Frank Truman (Export) Ltd v Metropolitan Police Commissioner* [1977] QB 952; *Wershof v Metropolitan Police Commissioner* [1978] 3 All ER 540.

Additional powers of seizure and retention are in PACE, ss 19–22, and now the Criminal Justice and Police Act 2001, ss 50–70. These powers supplement but do not replace the common law powers (s 19(5)).¹²⁸ So to the extent that the statute is less extensive, the police may continue to rely on their common law powers as recognised by *Ghani v Jones*¹²⁹ and in subsequent cases.¹³⁰ The powers conferred by s 19 apply where a constable or a designated investigating officer is lawfully on any premises, whether by invitation, to make an arrest (in the case of a constable), or to conduct a search with or without a warrant.

In such circumstances material may be seized where the constable or the designated investigating officer has reasonable grounds to believe *either* that it has been obtained as a result of the commission of any offence (s 19(2)); *or* that it is evidence in relation to an offence which he or she is investigating, or any other offence (s 19(3)). In either case, seizure is permitted only where this is necessary to prevent the items from being concealed, lost, damaged, altered or destroyed. The only restriction on what may be seized relates to items reasonably believed to be subject to legal privilege (s 19(6)).

By PACE, s 21, a constable or a designated investigating officer who seizes anything is required, if requested, to provide a record of what is seized to the occupier of the premises or the person who had custody of it immediately before the seizure. In addition, the person who had custody or control of the item seized has a right of access to it under the supervision of the police, although this may be refused if the officer in charge of the investigation reasonably believes that access would prejudice the investigation.¹³¹ The purpose of the changes introduced in 2001 is to enable the police to seize material so that it can be sifted elsewhere.¹³²

E. Remedies for abuse of police powers

Self-defence and self-help¹³³

At the time of interference with person or property, the citizen may have some right of self-defence and this can affect both civil and criminal liability. The point is acknowledged in the leading case, *Christie v Leachinsky*,¹³⁴ the ratio of which (as we have seen) forms the basis of what is now s 28 of PACE. There Lord Simonds said that ‘it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful’.¹³⁵ This tends to reinforce the view expressed above that police officers should be required to identify themselves as such when making an arrest.

In *Abbassy v Metropolitan Police Commissioner*,¹³⁶ Woolf LJ acknowledged that one of the reasons for the rule that a person is to be told the reason for his arrest is so that, if what he is

¹²⁸ On the continuing application of the common law, see *R (Rottman) v Metropolitan Police Commissioner* [2002] UKHL 20, [2002] 2 AC 692.

¹²⁹ [1970] 1 QB 693.

¹³⁰ See *Garfinkel v Metropolitan Police Commissioner* [1972] Crim LR 44.

¹³¹ These provisions ‘vest in the police no title to the property seized but only a temporary right to retain property for the specified statutory purposes’: *Costello v Chief Constable of Derbyshire* [2001] 1 WLR 1437, at p 1441 (Lightman J).

¹³² Criminal Justice and Police Act 2001, ss 50–70. For the position before the Act, see *R v Chesterfield JJ, ex p Bramley* [2000] QB 576. For the scope of the power, see *R (El-Kurd) v Winchester Crown Court* [2011] EWHC 855 (Admin).

¹³³ See *C Harlow* [1974] Crim LR 528.

¹³⁴ [1947] AC 573.

¹³⁵ *Ibid*, at p 591.

¹³⁶ [1990] 1 All ER 193.

told is not a reason which justifies his arrest, he can exercise ‘his right to resist arrest’.¹³⁷ On the other hand, under the Police Act 1996, s 89, it is an offence to assault, resist or wilfully obstruct a constable in the execution of his or her duty. There are therefore hazards in the way of a citizen who uses force to resist what he or she believes to be an unlawful arrest by police, whether of himself or herself or of a close relative.¹³⁸

It has thus been pointed out that ‘the law does not encourage the subject to resist the authority of one whom he knows to be an officer of the law’.¹³⁹ Although in *Kenlin v Gardiner* two boys were entitled to use reasonable force to escape from two constables who were seeking to question them,¹⁴⁰ in general it is inexpedient by self-defence to resist arrest by a police officer: if the arrest is lawful, the assault on the constable is aggravated because he or she is in execution of duty. But if a defendant ‘applies force to a police or court officer which would be reasonable if that person were not a police or court officer, and the defendant believes that he is not, then even if his belief is unreasonable he has a good plea of self-defence’.¹⁴¹

Some of these issues were addressed in *R v Iqbal*,¹⁴² where the accused was wanted by the police in relation to alleged drugs offences. He was seen by a constable attending the trial of a friend and was detained and handcuffed, being told these steps were being taken with a view to his subsequent arrest. Before he could be arrested, Iqbal broke free and escaped, and was later convicted for escaping from lawful custody.

The conviction was overturned on appeal on the ground that Iqbal had not been lawfully arrested and could not therefore escape from ‘lawful’ custody. According to the Lord Chief Justice: ‘The common law offence of escape from custody does not cover those who escape from police restraint or control before they have been arrested. We cannot widen the ambit of this criminal offence by making it apply to those whose arrest has been deliberately postponed’.

Legal proceedings against the police

A person who claims to be the victim of unlawful police conduct may be able to bring an action for damages against the chief constable, who is vicariously liable for the unlawful acts committed by his or her officers.¹⁴³ An action may be for assault, wrongful arrest, false imprisonment, trespass to property or goods,¹⁴⁴ or may take the form of an action for the return of property which has been improperly seized.¹⁴⁵ Similarly, it is possible to bring an action for malicious procurement of a search warrant; but it is necessary to show malice in order to succeed.¹⁴⁶

¹³⁷ And see *Edwards v DPP* (1993) 97 Cr App R 301.

¹³⁸ *R v Fennell* [1971] QB 428.

¹³⁹ *Christie v Leachinsky* [1947] AC 573, 599 (Lord du Parcq).

¹⁴⁰ [1967] 2 QB 510. And see *Lindley v Rutter* [1981] QB 128; *Pedro v Diss* [1981] 2 All ER 59; and *Dames v DPP* (1995) 1 Cr App R 65.

¹⁴¹ *Blackburn v Bowering* [1994] 3 All ER 380, at p 384.

¹⁴² [2011] EWCA Crim 273, [2011] 1 WLR 1541.

¹⁴³ Police Act 1996, s 88. See Clayton and Tomlinson, *Civil Actions against the Police*. On the liability of police civilian staff and the staff of private companies with police powers, see Police Reform Act 2002, s 42(7)–(10) (police authority a joint tortfeasor in the former case, the employer a joint tortfeasor in the latter case).

¹⁴⁴ See *O’Loughlin v Chief Constable of Essex* (note 92 above); *Abraham v Metropolitan Police Commissioner* [2001] 1 WLR 1257; and *Wood v DPP* [2008] EWHC 1056 (Admin).

¹⁴⁵ *Webb v Chief Constable of Merseyside Police* [2000] QB 427; *Costello v Chief Constable of Derbyshire* [2001] 1 WLR 1437. See now Criminal Justice and Police Act 2001, s 57.

¹⁴⁶ *Keegan v Merseyside Chief Constable* [2003] EWCA Civ 936, [2003] 1 WLR 2187.

An action for malicious prosecution may be maintained by any person who is prosecuted for a criminal offence maliciously and without reasonable and probable cause; but it is difficult to win such an action against the police.¹⁴⁷ In principle, public officials are personally liable for their own wrongful acts. But special protection is given to some officials against certain liabilities,¹⁴⁸ while there are also severe limits on the ability of convicted persons to bring civil proceedings for trespass to the person, in which it must be shown – *inter alia* – that the conduct of the police was grossly disproportionate.¹⁴⁹

In the addition to the foregoing, the police have a duty of care to those in their custody, breach of which may give rise to liability.¹⁵⁰ It may also be possible to seek judicial review against the police,¹⁵¹ though perhaps not where there is a remedy in tort available.¹⁵² Recent developments have opened up new areas of liability, as revealed in one important case where a boy badly treated by the police recovered not only for wrongful imprisonment, but also a failure by the police to make a reasonable adjustment to their procedures in their treatment of him under the Disability Discrimination Act 1995, and a breach of Convention rights (the police violating ECHR, arts 3 and 8).¹⁵³

Civil liability may arise even where an arrest is lawful, as the subsequent detention as well as the initial arrest must be in accordance with law.¹⁵⁴ *Treadaway v Chief Constable of West Midlands*¹⁵⁵ is an extreme case, where damages of £50,000 (including £7,500 aggravated and £40,000 exemplary damages) were awarded to a claimant who had signed a confession, but ‘only after he had been handcuffed behind his back and a succession of plastic bags had been placed over his head with the ends bunched up behind his neck causing him to struggle and pass out’.¹⁵⁶ Although now somewhat dated, *Treadaway* is nevertheless a reminder of the perils of police detention.

Nevertheless, in 1997 concern about the size of damages awards in civil actions against the police led to the Court of Appeal issuing guidelines for juries on the level of exemplary damages in which an ‘absolute maximum’ of £50,000 should be awarded for particularly bad conduct by officers of at least the rank of superintendent.¹⁵⁷ This followed two cases in which awards of £302,000 and £220,000 respectively had been awarded to victims of police brutality.¹⁵⁸ Many of the actions initiated against the police are settled before they reach the court, and in these cases the settlements are rarely published though the police may feel it necessary to make a public apology.¹⁵⁹

¹⁴⁷ See *Glinski v McIver* [1962] AC 726; *Wershof v Metropolitan Police Commissioner* [1978] 3 All ER 540. Cf *Hunter v Chief Constable of West Midlands Police* [1982] AC 529.

¹⁴⁸ See e.g. Constables’ Protection Act 1750, s 6, relied on in *Williams v Dyfed and Powys Chief Constable* [2010] EWCA Civ 1627.

¹⁴⁹ Criminal Justice Act 2003, s 329; *Adorian v Metropolitan Police Commissioner* [2009] EWCA Civ 18, [2009] 1 WLR 1859.

¹⁵⁰ See *Kirkham v Chief Constable of Greater Manchester* [1990] 2 QB 283. See also *Reeves v Metropolitan Police Commissioner* [2001] AC 360 – House of Lords reduced damages by half on account of contributory negligence. But compare *Orange v Chief Constable of West Yorkshire* [2001] EWCA Civ 611, [2002] QB 347.

¹⁵¹ See *R (Thompson) v Chief Constable of Northumbria* [2001] EWCA Civ 211, [2001] 1 WLR 1342.

¹⁵² *Sher v Greater Manchester Chief Constable* [2010] EWHC 1859 (Admin), [2011] 2 All ER 364. Conversely, in some cases judicial review may be the only avenue (though to what effect?), with the House of Lords having held that there may be no liability in damages against the police who deny suspects certain statutory rights (*Cullen v Chief Constable of RUC* [2003] UKHL 39, [2003] 1 WLR 176).

¹⁵³ *ZH v Metropolitan Police Commissioner* [2013] EWCA 69, [2013] 1 WLR 3021.

¹⁵⁴ *Re Gillen’s Application* [1988] NILR 40.

¹⁵⁵ *The Times*, 25 October 1994.

¹⁵⁶ See *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122 on exemplary damages.

¹⁵⁷ *Thompson v Metropolitan Police Commissioner* [1998] QB 498.

¹⁵⁸ *The Guardian*, 20 February 1997.

¹⁵⁹ *The Guardian*, 5 August 2013 (public apology by the Metropolitan police for the ‘use of excessive and unlawful force’ by a named police officer that ‘caused’ the death of news-vendor Mr Ian Tomlinson at the G20 demonstration in 2009. On the G20 demonstration, see below, pp 416, 417.

Quite apart from civil proceedings, police forces or individual police officers may face criminal liability for unlawful conduct.¹⁶⁰ But this is unusual, and criminal wrongdoing is difficult to establish, as revealed in the case of a police constable who was acquitted on charges of manslaughter following an incident involving news-vendor Mr Ian Tomlinson at the G20 demonstration in 2009.¹⁶¹ The police constable was, however, subsequently dismissed for gross misconduct by the Metropolitan Police,¹⁶² which also issued a public apology to the family of Mr Tomlinson, who died shortly after the incident with the police constable in question.¹⁶³

Complaints against the police

Complaints about the misuse of police powers may be made to the Independent Police Complaints Commission (IPCC), which was set up by the Police Reform Act 2002 to replace the Police Complaints Authority. The creation of the IPCC appears to be due in part to political pressure for a wholly independent police complaints machinery,¹⁶⁴ and to concerns expressed by the ECtHR about the independence of the Police Complaints Authority.¹⁶⁵ It remains the case, however, that essential features of the original police complaints procedures remain in place, to the extent that in less serious cases the police investigate themselves.

The IPCC is an independent body appointed by the Home Secretary.¹⁶⁶ Its first duty is to ensure that there are suitable arrangements in place for the handling of complaints about the conduct of persons serving with the police, a term wide enough to include persons other than police constables, such as police community officers.¹⁶⁷ Thereafter the Commission is under a duty to ‘secure’ that the arrangements are ‘efficient and effective and contain and manifest an appropriate degree of independence’, as well as a duty to ‘secure’ that public confidence is ‘established and maintained’ in these arrangements as well as in their operation.¹⁶⁸ The Commission also has a duty to record deaths and serious injuries in police custody.¹⁶⁹

A complaint about the conduct of a person serving with the police may be made by a member of the public ‘in relation to whom the conduct took place’, as well as – in some circumstances – a member of the public who was adversely affected by or a witness to such conduct.¹⁷⁰ In addition to complaints, what are called ‘conduct matters’ and ‘death or serious injury matters’ may also be the subject of investigation. These are matters which are not the subject of a complaint but which (a) give rise to an indication that a person serving with the police may have committed a criminal offence or behaved in a way that would justify bringing

¹⁶⁰ One of the most remarkable prosecutions occurred following the use of lethal force in 2005 against a young man (Jean Charles de Menenez) wrongly believed to be a terrorist suspect. He was shot dead by police officers at a tube station in south London. This led in 2007 to the conviction of the Metropolitan Police for breach of the Health and Safety at Work Act 1974. No proceedings were brought against individual officers in this case.

¹⁶¹ *The Guardian*, 19 July 2012. See also *See R v DPP, ex p Duckenfield* [2000] 1 WLR 55 (private prosecutions were brought against senior police officers following the Hillsborough stadium tragedy).

¹⁶² *The Guardian*, 17 September 2012.

¹⁶³ *The Guardian*, 5 August 2013.

¹⁶⁴ HC 258 (1997–8), and *The Stephen Lawrence Inquiry* (Report by Sir William McPherson), Cm 4262, 1999, Recommendation 58.

¹⁶⁵ *Khan v UK* (2000) 8 BHRC 310.

¹⁶⁶ Police Reform Act 2002, s 9.

¹⁶⁷ *Ibid*, s 10(2)

¹⁶⁸ *Ibid*, s 10(1).

¹⁶⁹ *Ibid*, s 10(2).

¹⁷⁰ *Ibid*, s 12(1).

disciplinary proceedings;¹⁷¹ or (b) are matters which relate to the death or serious injury (referred to as DSI) of someone in police custody.¹⁷²

Both complaints, and conduct and DSI matters, may enter the system by way of complaint or notice to the chief officer the police and crime commissioner or the local policing body (including the police and crime commissioner).¹⁷³ Once in the system, an issue which is proceeded with may be dealt with in one of four ways: less serious cases may be dealt with by the police themselves by a process of ‘local resolution’, whereas more serious cases will be dealt with by the Commission. In between are cases that may be dealt with subject to Commission supervision or subject to Commission management. In the latter case the investigator is subject to Commission ‘direction and control’. Some matters (including DSI) must be referred to the Commission by the appropriate police authority for examination.

Restrictions on the power of the Commission were repealed by the Police Reform and Social Responsibility 2011.¹⁷⁴ Provision is made for appeals to the Commission against decisions by an appropriate police authority not to investigate a complaint, and against the findings of an investigation by a police body. Where an investigation reveals that a criminal offence may have been committed, the matter must be referred to the DPP who must decide whether or not to institute criminal proceedings. Where criminal action is not taken, the Commission may direct a police authority to take disciplinary action against a police officer.¹⁷⁵

Concerns have been expressed about how effectively the IPCC has carried out its duties, at a time when ‘doubt’ has been expressed about ‘police integrity and competence’.¹⁷⁶ Apart from sometimes appearing to take too narrow a view of its statutory powers,¹⁷⁷ the Commission has twice been the subject of stinging criticism by the Home Affairs Committee.¹⁷⁸ Following a period of intense reflection thereafter, the IPCC’s remit is to be extended to cover contractors and others; it is to be given new powers when investigating; and it is to be empowered to recommend and direct that steps be taken against individuals whose performance is unsatisfactory, even though not justifying disciplinary action.¹⁷⁹

Exclusion of evidence

One of the potentially most effective ways of ensuring that the police respect the rights of the citizen is for the courts to rule inadmissible any evidence obtained as a result of such a violation. The position is governed by PACE, ss 76 and 78,¹⁸⁰ with s 76 providing that a confession made by an accused person may be given in evidence against him or her so far as it is relevant and is not excluded by the court exercising powers contained in s 76(2). This requires the court to exclude evidence obtained by oppression of the person who made it,¹⁸¹ or

¹⁷¹ Ibid, s 12(2).

¹⁷² Ibid, s 12(2A)–2(D) (inserted by the Serious Organised Crime and Police Act 2005, s 160, Sch 12).

¹⁷³ Ibid, Sch 3.

¹⁷⁴ Ibid, s 14.

¹⁷⁵ Ibid, Sch 3, para 27. For a full account of the procedure, see IPCC, *Statutory Guidance to the Police Service on the Handling of Complaints* (2013).

¹⁷⁶ HC 494 (2012–13), para 42.

¹⁷⁷ *R (Reynolds) v IPCC* [2008] EWCA Civ 1160; see also *R (Saunders) v IPCC* [2009] EWCA Civ 187.

¹⁷⁸ HC 366 (2009–10), and subsequently HC 494 (2012–13).

¹⁷⁹ Anti-social Behaviour, Crime and Policing Bill 2013–14. For background, see IPCC, *Corruption in the Police Service in England and Wales* (2012), and HC 494 (2012–13). On new powers when conducting investigations, see also Police (Complaints and Conduct) Act 2012.

¹⁸⁰ For background, see Cmnd 8092, 1981, pp 112–18. Section 78 is qualified by the Criminal Procedure and Investigations Act 1996, Sch 1, para 26, in respect of proceedings before examining magistrates.

¹⁸¹ On oppression, see *R v Fulling* [1987] QB 426. See also *R v Ismail* [1990] Crim LR 109. Cf *R v Emmerson* (1991) 92 Cr App R 284.

‘in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made in consequence thereof’.¹⁸² Where a representation has been made to the court that a confession may have been secured in either of these ways, the onus is on the prosecution to establish otherwise (s 76(1)).

The term oppression is defined ‘to include torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)’ (s 76(8)).¹⁸³ In *R v Fulling*¹⁸⁴ the court said that otherwise ‘oppression’ should be given its ordinary meaning, that is to say, the exercise of authority or power in a burdensome, harsh or wrongful manner or giving rise to unjust or cruel treatment. In that case it was held that there was no oppression where a confession had been made by a woman after being told by police of her lover’s affair with another woman.¹⁸⁵ But although oppressive conduct by the police is thus discouraged by s 76, much of the impact of this is lost by s 76(4), which provides that the exclusion of a confession does not affect the admissibility in evidence of any facts discovered as a result of the confession. The fruit of the poison tree thus appears to be edible in English law.

Section 78, introduced as a result of pressure in the Lords from Lord Scarman and others, provides that in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely ‘if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it’.¹⁸⁶ Despite the lack of clarity in its drafting, there is evidence to suggest that, together with s 76, this provision has helped to induce the judges to take a more assertive approach when faced with improper police practice. Thus in *R v Canale*,¹⁸⁷ the Court of Appeal held that the trial judge should not have admitted evidence of interviews which had not been contemporaneously recorded by the police officers conducting the interviews: they had been written up afterwards.¹⁸⁸

These breaches of Code C, as it was then drafted, were described by the Court of Appeal as ‘flagrant’, ‘deliberate’ and ‘cynical’. In so holding, the Lord Chief Justice sharply observed:

This case is the latest of a number of decisions emphasising the importance of the 1984 Act. If, which we find it hard to believe, police officers still do not appreciate the importance of that Act and the accompanying Codes, then it is time that they did.¹⁸⁹

Apart from the conduct of interviews, another area where s 78 has been invoked successfully by defendants relates to the denial of access to a solicitor,¹⁹⁰ though it has been said not to be possible ‘to give general guidance as to how a judge should exercise his discretion under section 78’ on the ground that ‘each case had to be determined on its own facts’.¹⁹¹

¹⁸² On unreliability, see *R v Goldenberg* (1988) 88 Cr App R 285, *R v Silcott, Braithwaite and Raghip*, *The Times*, 9 December 1991, and *R v Walker* [1998] Crim LR 211.

¹⁸³ Confession evidence may also be excluded under s 78 (see below). See *R v Mason* [1987] 3 All ER 481.

¹⁸⁴ [1987] QB 426.

¹⁸⁵ For a disturbing example of oppression which ‘horrified’ the Court of Appeal, and in which the accused was ‘bullied and hectorred’, see *R v Paris* (1993) 97 Cr App R 99. (‘The officers . . . were not questioning him so much as shouting at him what they wanted him to say. Short of physical violence, it is difficult to conceive of a more hostile and intimidatory approach by officers to a suspect’.)

¹⁸⁶ See K Grevling (1997) 113 LQR 667 for a full account.

¹⁸⁷ [1990] 2 All ER 187.

¹⁸⁸ See also *R v Keenan* [1990] 2 QB 54.

¹⁸⁹ [1990] 2 All ER 187, 190 (Lord Lane CJ).

¹⁹⁰ *R v Samuel* [1988] QB 615; *R v Absolam* (1989) 88 Cr App R 332; *R v Beylan* [1990] Crim LR 185; *R v Chung* (1991) 92 Cr App R 314. But contrast *R v Ibrahim* [2008] EWCA Crim 880, [2009] 1 WLR 578.

¹⁹¹ *R v Smurthwaite* [1994] 1 All ER 898.

It does not follow that evidence obtained in breach of the codes of practice or in breach of the defendant's statutory rights will always be held to be inadmissible. In more recent cases the courts have taken a more cautious approach to s 78,¹⁹² emphasising the literal provisions of s 78, so that neither the 'labelling of conduct as unlawful' nor the 'application to it of the epithet oppressive' 'automatically overrides the fundamental test of fairness in admission of evidence'.¹⁹³ Particular difficulties have arisen in connection with police undercover and surveillance work, the House of Lords having held that evidence obtained by means of an illegally placed surveillance device is admissible:¹⁹⁴ the fact that the conduct of the police amounted to an apparent or probable breach of the ECHR, art 8, was simply 'a consideration which may be taken into account for what it is worth'.¹⁹⁵

Questions arise about the implications of ECHR, art 6 for the admissibility of evidence, particularly since the Human Rights Act was enacted.¹⁹⁶ But the European Court of Human Rights has also held that irregularly obtained evidence may be admitted,¹⁹⁷ and the view of the English courts is that the requirements of s 78 of the 1984 Act and art 6 are the same in this respect.¹⁹⁸ As a result, there is no need to modify s 78 in the light of the jurisprudence of the Strasbourg Court.¹⁹⁹ It is also important to note, however, that English law is now much more flexible than in the past, particularly in relation to entrapment. Referring to it as 'State-created crime' (though in a sense this is true of all crime), the House of Lords has indicated that in appropriate cases evidence obtained in this way should be excluded under s 78, or proceedings should be stayed as an abuse of process.²⁰⁰

F. Accountability and control of the police²⁰¹

Police and crime commissioners

The first source of police accountability is at local level, police forces still locally based. Local police authorities were abolished in 2012, following the creation of police and crime commissioners (PCCs).²⁰² There is a PCC for each of the 43 police areas in England and Wales. PCCs are directly elected and are therefore directly accountable to the communities they serve, in

¹⁹² A Choo and S Nash [1999] Crim LR 929.

¹⁹³ *R v Chalkley* [1998] QB 848, at p 874 (Auld LJ). Also *R v Smurthwaite* (note 191 above) and *R v Cooke* [1995] 1 Cr App R 318.

¹⁹⁴ *R v Khan* [1997] AC 558. See now Police Act 1997, Part III. See ch 16 below. On the approach of the House of Lords to s 78, see also *R v Southwark Crown Court, ex p Bowles* [1998] AC 641, and *R v P* (1995) 2 All ER 58.

¹⁹⁵ At p 582 (Lord Nolan). It has been argued that the courts should take a more robust attitude to the exclusion of evidence obtained in breach of Convention rights: see D Ormerod [2003] Crim LR 61.

¹⁹⁶ See pp 372–3 above. See for example *R v Ibrahim* [2012] EWCA Crim 837.

¹⁹⁷ *Schenk v Switzerland* (1988) 13 EHRR 242. In *Teixeira de Castro v Portugal* (1998) 28 EHRR 101, the Court said that 'the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair' (at pp 114–15).

¹⁹⁸ See *R v Looseley* [2001] UKHL 53, [2001] 4 All ER 897, and *Attorney General's Reference (No 3 of 1999)* [2000] UKHL 63, [2001] 2 AC 91.

¹⁹⁹ *Looseley*, *ibid.*

²⁰⁰ *Ibid.*

²⁰¹ On police accountability see Jefferson and Grimshaw, *Controlling the Constable*; Reiner, *The Politics of the Police*; Walker, *Policing in a Changing Constitutional Order*.

²⁰² Police Reform and Social Responsibility Act 2011, s 1.

contrast to the local police authorities whose members were either indirectly elected or appointed. As such, the PCCs have inherited a number of the functions of the local police authorities and have a statutory duty to ‘secure the maintenance of the police force’ for their area, and ‘secure that the police force is efficient and effective’.²⁰³

The PCC also has responsibility to hold the relevant chief constable to account, not only for the way in which he or she carries out his or her own functions, but also for the way in which people under the direction and control of the chief constable carry out their functions.²⁰⁴ Apart from this general duty, the 2011 Act imposes a number of specific duties of accountability on the PCC. These include holding to account the chief constable for (i) the implementation of the PCC’s crime and police plan (on which see below), (ii) the way in which he or she has regard to the Home Secretary’s strategic policing requirements, and (iii) the effectiveness of his or her engagement with local people.

Each PCC has a duty – as already indicated – to produce a local policing plan. He or she must work collaboratively with local authorities and criminal justice agencies, and consult with the local population he or she serves. The role of the PCC is very significant, and includes the power to appoint the Chief Constable, as well as the power to suspend him or her from office, along with the power to require him or her to resign.²⁰⁵ Despite being directly elected, the PCC is nevertheless subject to scrutiny in the discharge of his or her functions by police and crime panels established and maintained by local authorities. This seems a likely flash-point in local policing, as disputes between local authorities and the PCC seem inevitable.

The situation is different in London, where the Metropolitan Police Authority has been abolished, and the Mayor’s Office for Policing and Crime established. The latter position is notionally held by the Mayor and is broadly similar in function to the PCC in the other 41 police forces (excluding the City of London where different arrangements also apply). One difference, however, is that the Metropolitan Police Commissioner is appointed by the Queen on the advice of the Home Secretary, though the latter must now have regard to any recommendation by the Mayor’s Office. The power of the latter to suspend the Commissioner or require him or her to resign, are powers that may be exercised only with the Home Secretary’s consent. Police and crime panel functions are conducted by the London Assembly.

Role of the Home Secretary

Although policing in England and Wales remains a local matter, there is inevitably extensive government involvement and control, which in turn imposes high levels of accountability on the Home Office in particular. Part II of the Police Act 1996 is headed ‘Central Supervision, Direction and Facilities’ and is concerned principally with the national role of the Home Secretary in relation to local policing. It would be true to say, however, that some of the central direction and supervision of the Home Secretary has been revised following the introduction of the directly elected police and crime commissioners.

Prior to the police reforms of 2011, the Home Secretary had a duty to determine ‘strategic priorities’ for policing in all areas of police authorities, after consulting the Association of Police Authorities and the Association of Chief Police Officers.²⁰⁶ Where strategic priorities were set in this way, the Home Secretary could then direct police authorities to establish performance targets, the minister having a wide discretion to issue a direction to one or more or to all police authorities, and a power to impose different conditions on different authorities.²⁰⁷

²⁰³ Ibid, s 1(6).

²⁰⁴ Ibid, s 1(7).

²⁰⁵ The exercise of these powers was soon to cause concern: HC 487 (2013–14).

²⁰⁶ Police Act 1996, s 37A (now repealed).

²⁰⁷ Ibid, s 38 (now repealed).

He or she could also issue codes of practice relating to the discharge by police authorities of any of their functions.²⁰⁸

These powers have all gone, though the Home Secretary has a new duty introduced by the 2011 Act, to issue a document called the ‘strategic policing requirement’, which rather assumes that there will be a Home Office led strategic policing requirement. Chief constables must have regard to this document, which addresses ‘national threats’ and local capabilities to address these threats.²⁰⁹ The Home Secretary has also retained a number of powers existing pre-2011, including the power to intervene when satisfied that a police force is failing to discharge any of its functions effectively, in which case it can be directed to take ‘specified measures’.²¹⁰

The Home Secretary may make regulations for the government, administration and conditions of service of police forces, in particular with respect to ranks, qualifications for appointment and promotion, probationary service, voluntary retirement, discipline, duties, pay, allowances, clothing and equipment.²¹¹ Otherwise, the Home Secretary may prescribe by regulation the equipment to be used by police forces, as well as the require ‘particular procedures or practices’ to be adopted by all of them.²¹² Her Majesty’s Inspectors of Constabulary are appointed by and report to the Home Secretary, and may be directed by him or her to carry out an inspection of any force.²¹³

Accountability to Parliament

MPs wishing to raise police subjects in Parliament may face the problem that that there is no direct ministerial responsibility either for the acts of the police, despite the presence in the Home Office ‘team’ of a Minister for Policing. As we have seen, policing is a local matter, with responsibility through the police and crime commissioners and the police and crime panels. There are, however, now much greater opportunities for police matters to be examined in Parliament following the introduction of the select committee system and the Home Affairs Select Committee (HASC) in particular. HASC examines a wide range of policing matters, ranging from the work of the Home Office to operational decisions by chief constables.

The work of the Home Office is examined in a number of ways. The Home Secretary will be invited in each session to appear before the Committee to account for the work of her department,²¹⁴ and the legislation produced by the Home Office may now be subject to pre-legislative scrutiny. In performing this latter role, the Committee has engaged constructively with the government, and as in the case of the (then) proposed legislation on police and crime commissioners made suggestions as to how the legislation could be improved.²¹⁵ In the case of the police and crime commissioners, HASC has also conducted a number of inquiries post-enactment, to highlight problems in the operation of the legislation and to suggest operational improvements.²¹⁶

²⁰⁸ Ibid, s 39 (now repealed).

²⁰⁹ Police Act 1996, s 37A (new), inserted by Reform and Social Responsibility Act 2011.

²¹⁰ Police Act, 1996, s 40.

²¹¹ Ibid, s 50.

²¹² Ibid, s 53A. See also *R v Home Secretary, ex p Northumbria Police Authority* [1989] QB 28 (A W Bradley [1988] PL 298).

²¹³ Police Act 1996, s 54. In addition to these wide statutory powers, the Home Secretary exercises considerable financial control, with an annual grant being made for a service the cost of which rose to £12 billion nationally (HC 353 (2006–7)). In determining how much an authority receives, the Home Secretary ‘may exercise his discretion by applying such formulae or other rules as he considers appropriate’ (Police Act 1996, s 46).

²¹⁴ See for example, HC 563 (2013–14).

²¹⁵ HC 836 (2012–13).

²¹⁶ See HC 69 (2013–14), and HC 487 (2013–14).

So far as operational matters as broadly defined are concerned, in recent years the Committee's work here has taken two forms, one being to consider controversial police methods, such as undercover policing, in the course of which evidence was taken from a Deputy Assistant Commissioner in the Metropolitan Police and a former undercover police officer, as well as victims of this particular form of policing.²¹⁷ Similarly, a number of senior police officers from a number of police forces throughout the country appeared with ministers and others in a large-scale HASC inquiry into the policing of large-scale disorder following disturbances in London and elsewhere in August 2011, in the course of which a number of people died and much damage was done to property.²¹⁸

The latter report made some criticism of the police for failing to intervene early enough to prevent the situation from escalating. As such, however, it was focused more on the conduct of the police as a whole rather than individual police officers. But in terms of operational responsibility, the Committee has also been willing to examine the conduct of individual officers, who now appear regularly before it. In July 2013 the Metropolitan Police Commissioner was asked to explain a briefing he had given to the press in relation to an affair dubbed 'Plebgate',²¹⁹ in which an altercation between a government minister and police officers in Downing Street led to the resignation of the former, at a time when the police version of events was being seriously questioned.

Role of the courts

It should be clear from the foregoing that the time-worn sentiment that a police officer possesses few powers not enjoyed by the ordinary citizen is seriously inaccurate, as is the view that a police officer is only 'a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily'. Reflecting these views which were widely-held, an important royal commission on the police reporting in 1962 came to an astonishing conclusion: 'The relation of the police to the courts is not . . . of any greater constitutional significance than the relation of any other citizen to the courts.'²²⁰

The corrective to this solecism was supplied by the Court of Appeal in *R v Metropolitan Police Commissioner, ex p Blackburn*.²²¹

Under the Betting, Gaming and Lotteries Act 1963, certain forms of gaming were unlawful, and gaming clubs in London sought to avoid the Act. After legal difficulties in enforcing the Act had arisen, the Commissioner issued a secret circular to senior officers giving effect to a policy decision that no proceedings were to be taken against a gaming club for breach of the law, unless there were complaints of cheating or it had become the haunt of criminals.

Blackburn sought an order of mandamus against the Commissioner which in effect ordered him to reverse that policy decision. The circular was withdrawn before the case was concluded, but the Court of Appeal held that every chief constable owed a duty to the public to enforce the law. That duty could if necessary be enforced by the courts. Although chief officers had a wide discretion with which the courts would not interfere, the courts would control a policy decision which amounted to a failure of duty to enforce the law.

²¹⁷ HC 837 (2012–13).

²¹⁸ HC 1456 (2010–12).

²¹⁹ HC 234-1 (2013–14).

²²⁰ Cmnd 1728, p 34.

²²¹ [1968] 2 QB 118.

The court in this case left open whether Blackburn had a sufficient interest in the matter to ask for mandamus. In a later case brought by Blackburn to enforce the obscenity laws, the court held on the merits that the Commissioner was doing what he could to enforce the existing laws with the available resources and no more could reasonably be expected.²²²

The ‘clear legal duty’²²³ which the police owe the public to enforce the law is, however, subject to important limitations so far as the courts are concerned. Thus, in *Hill v Chief Constable of West Yorkshire*, it was held that the general duty of the police to suppress crime does not carry with it a liability to individuals for damage caused to them by criminals whom the police have failed to apprehend even in circumstances when it was possible to do so.²²⁴ The courts take the view that it would not be in the public interest for the police to be liable for negligence in the investigation of crime, a position that has held firm despite claims that it violated Convention rights.²²⁵

The ECHR may, however, provide some opportunity to challenge operational failures by the police. In *Osman v United Kingdom*,²²⁶ it was held that ECHR, art 2 requires the state ‘to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’. But liability for breach of art 2 is hard to establish.²²⁷ Obvious difficulties are presented by the suggestion that a court should direct a chief constable at the instance of a member of the public. It is one thing to strike down instructions by a chief constable that are plainly illegal; but another for a court to impose its own views on the use of police resources.²²⁸

G. Conclusion

Whether in the field of maintaining public order or in the work of detecting and prosecuting crime, police decisions constantly involve the exercise of discretion, choice between alternative courses of action, and the setting of priorities for the use of limited resources. In a stable society it is easier for the police to seek to play an impartial and a non-political role, but even this role has latent political significance. In less stable conditions, issues of law and order acquire a more immediate political content. In the troubled 1980s, questions were often raised about the procedures for police accountability. Problems about police reaction to racial violence, to public demonstrations, and to the events surrounding the miners’ strike

²²² *R v Metropolitan Police Commissioner, ex p Blackburn (No 3)* [1973] QB 241. See also *R v Chief Constable of Devon and Cornwall, ex p CEBG* [1982] QB 458, and *R v Oxford, ex p Levey*, *The Times*, 1 November 1986.

²²³ *R v Metropolitan Police Commissioner, ex p Blackburn* [1968] 2 QB 118, at p 138 (Salmon LJ).

²²⁴ [1989] AC 53 (unsuccessful action in negligence brought by mother of a victim of the Yorkshire Ripper). Also *Brooks v Metropolitan Police Commissioner* [2005] UKHL 24; [2005] 2 All ER 289, and *Van Colle v Hertfordshire Chief Constable* [2008] UKHL 50, [2009] 1 AC 225.

²²⁵ *Osman v United Kingdom* (2000) 29 EHRR 245; *Z v United Kingdom* (2002) 34 EHRR 97; *Van Colle v United Kingdom*, Application 7678/09, 13 November 2012.

²²⁶ (2000) 29 EHRR 245; C A Gearty (2000) 64 MLR 179.

²²⁷ *Von Colle v Hertfordshire Chief Constable*, above; *Michael v Chief Constable of South Wales Police* [2012] EWCA Civ 981.

²²⁸ See *R v Chief Constable of Sussex, ex p International Trader’s Ferry Ltd* [1999] 2 AC 418. Also *E v RUC Chief Constable* [2008] UKHL 66, [2008] WLR (D) 351.

in particular, all contributed to the concern, which persists to this day and were revealed most effectively in the report in 2012 of the independent inquiry on the Hillsborough tragedy in 1989.²²⁹

A complicating dimension is what some see as the movement towards greater centralisation of police work. There are many forms of cooperation between forces, but there is also now the potential for the development of common policies, through the activities of bodies such as the Association of Chief Police Officers (ACPO).²³⁰ This emerging centralisation raises new questions about police accountability, which the existing institutional structures may not be well suited to answer. It should not be overlooked that police investigation of individual incidents can have national implications of the greatest significance. The circumstances surrounding the police response to the murder of the London teenager Stephen Lawrence raised a number of different questions of police conduct, and to a finding of institutional racism in aspects of the police service.²³¹

²²⁹ HC 581 (2012–13).

²³⁰ For statutory recognition of ACPO, see Police Act 1996, s 37A, and Police Reform Act 2002, s 96.

²³¹ *The Stephen Lawrence Inquiry*, Cm 4262, 1999.

CHAPTER 16

Right to privacy and surveillance powers

Part of the trouble with privacy is that it is notoriously difficult to define. It is largely for this reason that the Younger Committee on Privacy recommended against the introduction of any such right as long ago as 1972, although the Committee was agreed that ‘privacy requires additional protection’.¹ This was an influential report, which was to structure the debate for almost a generation; until the Human Rights Act, there was no formal legal protection of privacy.²

A second difficulty with the protection of privacy is in determining from whom the protection is needed. Many are agreed that the intrusive tendencies of the state – which for some has lurid Orwellian tendencies – ought to be contained. But many of the problems associated with the violation of privacy are perpetrated not by the state, but by other private parties – newspapers engaged in a never-ending circulation war, or employers checking on employees (in one famous case to monitor calls to a solicitor by an employee who was suing her employer for sex discrimination).³

A third difficulty is that the fast development of new technology has provided fresh opportunities for the surveillance of individuals on a large scale by both state agencies (such as the police and security and intelligence services) and private parties (such as newspapers and employers). The risks associated with the former were brought to light by allegations in 2013, by a well-placed source, that the United Kingdom was a party with the United States to the large-scale but as yet indeterminate storage, analysis and exchange of the personal internet data of British citizens and others.

The risks associated with the latter were fully exposed in the ‘phone-hacking’ scandal, which revealed the widespread practice of ‘hacking’ into the voice-mail of media celebrities and others by some journalists. The affair was widely publicised by an inquiry led by Lord Justice Leveson, who had been appointed by the Prime Minister. It led also to the closure of the most successful Sunday newspaper, as well as to the prosecution of a number of high profile newspaper editors and journalists for alleged offences relating to the scandal in which it was alleged they had taken part.⁴

This is not to suggest of course that there must be an unqualified right to personal privacy, the invasion of which by a range of devices is now seen to be a necessary or expedient weapon in the fight against organised crime and other unlawful acts which threaten public safety and national security.⁵ But there are fewer issues that have given rise to as much controversy in recent years as the allegations that the state is intruding too much into the private lives of its citizens, and the accompanying allegations that newspapers, employers and others are not subject to proper and effective legal control.

¹ Cmnd 5012, 1972, especially paras 651–2. See also for a valuable early yet sceptical account, Wacks, *The Protection of Privacy*. Also, Wacks, *Personal Information*, especially ch 1.

² *Wainwright v Home Office* [2003] UKHL 53, [2004] AC 406.

³ *Halford v UK* (1997) 24 EHRR 523.

⁴ At the time of writing a number of former editors, journalists and others were on trial in relation to these allegations; all denied that they were guilty.

⁵ HC Deb, 6 March 2000, col 768 (Mr Jack Straw). These powers are now justified as being directed mainly at ‘drug, terrorist, paedophilia and money-laundering crimes’: *ibid*, col 834 (Mr Charles Clarke).

A. The case for protection

Privacy is a concept of indeterminate scope, closely related to concepts that might be encountered in the law of tort (trespass), equity (breach of confidence) or intellectual property (copyright). But it is important also for the public lawyer, at a time of growing anxiety about what is seen as the emergence and development of a ‘surveillance society’.⁶ Privacy is closely associated with liberty and with ideas about freedom from interference by the state.⁷ As a principle, privacy is important also as a way of reinforcing other constitutional liberties – most notably the right to freedom of association and assembly.

One of the principal means of violating the liberty of those individuals and organisations who support unpopular causes is to monitor them, to keep them under surveillance, to maintain records about their members, and to circulate information about them – to provide the fuel for oppression and discrimination.⁸ It is true that the concept of privacy as protected by the ECHR (art 8) and now the Human Rights Act 1998 extends some way beyond matters of this kind. But for the public lawyer the foregoing are core concerns which address fundamental issues about the political freedom of the individual in a democratic society.

New technologies that allow for even greater forms of surveillance make the case for some form of protection irresistible. But there can be no case for an unqualified or an unlimited right to privacy. Privacy is a restraint on freedom of expression and as such gives rise to concerns when relied on by public officials and politicians who have something to hide, and who wish to prevent the disclosure of information that may expose hypocrisy or worse. It is also a restraint on the activities of the police and other authorities in the criminal justice system who are engaged in legitimate activities in the public interest to detect the drug dealers and other traffickers in human misery.

This is not to say, of course, that there should be no right to privacy: it is a case for balancing competing rights and interests. But where rights of privacy are restricted, there is a case for violations only where there is clear legal authority and only where there is a clear need for a legitimate purpose. And while it might be expected that the state would refrain from violating the privacy of the individual except where there is good cause to do so, equally it might be expected that the state would intervene to take steps to protect that privacy, particularly of the weak and vulnerable, from commercial exploitation and other forms of abuse by global media corporations and other powerful organisations.⁹

In this chapter we consider aspects of privacy relating specifically to various forms of surveillance of the individual, as well as the storage and processing of personal data. Underlying a great deal if not all of the discussion that follows are the requirements of ECHR, art 8, which has greatly informed legislation in this field. It is important to acknowledge, however, that private life in art 8 is ‘a broad term not susceptible to exhaustive definition’, and that ‘whether there has been an interference with the right to respect for a person’s private life . . . will depend in each case on its own facts and circumstances’.¹⁰ It is important also to acknowledge that not all forms of surveillance will constitute an interference with private life.

The violation of privacy in the so-called ‘surveillance society’ has been a highly contentious issue politically in recent years, and is addressed only to a limited extent in the

⁶ See HC 58 (2007–08) (Home Affairs Select Committee); HL Paper 18 (2008–09) (House of Lords Constitution Committee).

⁷ See Lustgarten and Leigh, *In From the Cold*, p 40. See also D Feldman [2000] PL 61.

⁸ For the surveillance of the Communist Party of Great Britain, see Ewing and Gearty, *The Struggle for Civil Liberties*, ch 3.

⁹ So much is required by the ECHR: see *Spencer v UK* (1998) 25 EHRR CD105; and by the Human Rights Act: see *Venables v News Group Newspapers Ltd* [2001] EWHC 32 (QB), [2001] Fam 430.

¹⁰ *Kinloch v HM Advocate* [2012] UKSC 62, [2013] 2 WLR 141, para 18.

Protection of Freedoms Act 2012, the substance of which does not do justice to its exaggerated short title. As already pointed out, one of the gravest violations of privacy in modern times, however, was perpetrated not by the state but by news corporations, which were exposed as having ‘hacked’ personal phones on a massive scale. This is the subject of ongoing criminal investigation at the time of writing, but we also deal briefly with aspects of interference with privacy by the press at appropriate points in this chapter.

B. Surveillance: acquiring information

The first way in which the privacy of the individual may be undermined is by different techniques of surveillance in order to obtain information about him or her.¹¹ This may be done in a number of ways – by the state, by the press and by others: it may involve breaking into a home and rifling through personal effects, it may involve the use of bugging devices or it may involve the interception of communications of various kinds.

As far as the common law is concerned, the placing of someone under surveillance is not in itself unlawful. But there are circumstances where various types of surveillance may be unlawful, although only where the surveillance involves an interference with existing rights already recognised by the law. The invasion of someone’s privacy has not by itself given cause for the courts to intervene in the past.

Trespass

Perhaps the best known example of common law protection for privacy is *Entick v Carrington*,¹² where John Entick’s home was the subject of an illegal entry and his possessions the subject of an illegal search. Although clearly a violation of his home and his private life, his action for damages succeeded because it was also a trespass to his property rights. In the memorable words of Lord Camden CJ, in one of the great judgments of the common law:

No man can set his foot upon my ground without my licence, but he is liable for an action, though damage be nothing; . . . If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him.

It is true that the officers conducting the search were armed with a warrant issued by the Home Secretary. But this was no defence, because the Home Secretary had no legal authority to issue the warrant in the first place: such authority could be provided only by Parliament, save exceptionally in the case of warrants issued in relation to stolen goods. Parliament has not been slow in providing such power, it being claimed in the Explanatory Notes to the Protection of Freedoms Act 2012 that there were over 1,300 pieces of primary or secondary legislation authorising state officials to enter private premises.

In seeking to reduce the number of these provisions, the 2012 Act confers new powers on the ‘appropriate national authority’, defined to mean a Minister of the Crown or the Welsh ministers. Under these new powers, the ‘appropriate national authority’ may by order ‘repeal any power of entry or associated power which the appropriate national authority considers to be unnecessary or inappropriate’ (s 39). It may also add safeguards of various kinds to existing powers (s 40), and perhaps most remarkably ‘rewrite’ such powers (s 41). A Code of Practice is to be issued to provide guidance relating to the power of entry (s 47).

¹¹ See *Robertson v Keith* 1936 SLT 9, and *Connor v HM Advocate* 2002 SLT 671.

¹² (1765) 19 St Tr 1030.

Provision is also made in Schedule 2 to repeal a number of existing powers of entry, though like probably most governments before it, the Coalition has found that it is expedient for it too to add to the existing powers of entry, notwithstanding the provisions of the Protection of Freedoms Act 2012. Thus, the Scrap Metal Dealers Act 2013 provides that ‘A constable or an officer of a local authority may enter and inspect a licensed site at any reasonable time on notice to the site manager’ (s 16(1)). It also contains powers of entry without prior notice (s 16(2)), and additional powers of entry with a warrant (s 16(3)). Old habits die hard.

Interference with property

The law of trespass took on a new role in relation to the use of listening devices by the police to record conversations involving people who were suspected of involvement in criminal activity.

In *R v Khan*,¹³ the accused was suspected of being involved in the importation of illegal drugs. The police placed a listening device on the outside of a house which he was visiting. This was done without any statutory authority, though in accordance with Home Office guidelines relating to the use of such devices. Nevertheless, it was accepted by the Crown that the conduct of the police involved both a trespass and damage to the property on which the device was placed.

Khan was found guilty on charges relating to the importation of drugs, the evidence against him being found mainly in tape recordings acquired as a result of the listening device. He appealed against conviction and argued that the evidence should not have been admitted because it had been illegally obtained and had been obtained in breach of the ECHR, art 8. The appeal failed: in determining whether evidence should be admitted, the illegality of the means used is not decisive.

The question was whether it was secured in circumstances which tainted the fairness of the proceedings. But although the House of Lords thought not, the case nevertheless exposed the illegality of this particular practice.¹⁴

The ‘lack of a statutory system regulating the use of surveillance devices’ by the police led to an expression of astonishment from the bench.¹⁵ It was all the more remarkable for the fact that similar activity by the security service required the authority of a warrant from the Home Secretary under the Security Service Act 1989. (The position relating to the security services is now governed by the Regulation of Investigatory Powers Act 2000, which is considered in section D.) It was thus not surprising that the ECtHR should find English law and practice relating to the use of listening devices by the police to breach the ECHR, art 8.¹⁶

The use of bugging devices by the police is now governed by the Police Act 1997, Part III,¹⁷ which proved to be extremely controversial at the time it was passed.¹⁸ It provides that ‘[n]o entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by an authorisation having effect under this Part’ (s 92). Authorisation may be given to take action in respect of private property as may be specified in the authorisation,

¹³ [1997] AC 558. See now *Khan v UK* (2001) 31 EHRR 1016.

¹⁴ See also *R v Loveridge* [2001] 2 Cr App R 591, and *Teixeira de Castro v Portugal* (1998) 28 EHRR 101.

¹⁵ [1997] AC 558, at p 582 (Lord Nolan).

¹⁶ *Khan v UK*, note 13 above.

¹⁷ For a good account, see Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act*, pp 372–7.

¹⁸ See Ewing and Gearty, *A Law Too Far: Part III of the Police Bill 1997*.

where the authorising officer believes that the action is necessary ‘for the prevention or detection of serious crime’. It must also be shown that ‘the taking of the action is proportionate to what the action seeks to achieve’ (s 93).¹⁹

For these purposes, conduct is to be regarded as serious crime only if (a) ‘it involves the use of violence, results in substantial financial gain or is conducted by a large number of persons in pursuit of a common purpose’, or (b) the offence is one for which a person over the age of 18 with no previous convictions could reasonably expect to be jailed for at least three years.²⁰ (In the case of Northern Ireland, ‘preventing or detecting serious crime’ includes ‘the interests of national security’,²¹ though there is hardly any need for such powers in Great Britain given the range of powers otherwise available to the police and the security and intelligence services.)

Authorisation may be given by a chief constable, the Director General of the National Crime Agency, or by one of a number of other law enforcement agencies,²² and in some cases, will not take effect until approved by a surveillance commissioner appointed under s 91 of the Act.²³ Approval by a commissioner is required where any property specified in the authorisation is used as a dwelling or as a bedroom in a hotel or constitutes office premises. Approval is also required if it is likely to yield matters subject to legal privilege, confidential personal information or confidential journalistic material (s 97).²⁴

If a surveillance commissioner refuses to give his or her approval, or if an authorisation is quashed, the authorising officer may appeal to the chief surveillance commissioner, who must allow the appeal unless there are no reasonable grounds for believing that the statutory conditions for seeking an authorisation have been met (s 104). The other party with an interest in these proceedings is, of course, the surveillance target, and here it is provided that in some cases complaints may be made to the Investigatory Powers Tribunal by those who are the subject of a s 93 authorisation, in the unlikely event that they even know that they are the subject of surveillance.

Surveillance and undercover operations

Additional measures relating to surveillance are to be found in the Regulation of Investigatory Powers Act 2000, Part II.²⁵ This applies to surveillance activities not only by the police, but by a large number of other agencies which now play a part in law enforcement, including the intelligence services, HM Revenue and Customs and local authorities. But the Act does not by any means apply to all surveillance.²⁶ Although the RIPA 2000 deals with a wider range of activities than the use of bugging devices, it applies to this form of surveillance as well, and thus adds what is at times a confusing layer of regulation on top of the Police Act 1997, Part III, which remains in place

The RIPA 2000 deals with what are referred to as *directed surveillance*, *intrusive surveillance* and *the conduct and use of covert human intelligence sources*.²⁷ Surveillance is *directed* if it is covert but not intrusive and undertaken for the purposes of a specific operation to obtain

¹⁹ Police Act 1997, s 75(2)(b).

²⁰ As amended by the Criminal Justice and Court Services Act 2000, Sch 7.

²¹ Police Act 1997, s 93(2A).

²² RIPA 2000, s 75.

²³ This provides for the appointment of a chief commissioner and other commissioners by the Prime Minister. The persons appointed must be people who hold or have held senior judicial office.

²⁴ These terms are defined in ss 98–100.

²⁵ For a fuller treatment, see Fenwick, above, pp 377–85. For the comparable provisions in Scotland, see Regulation of Investigatory Powers (Scotland) Act 2000.

²⁶ See pp 446–7 below.

²⁷ RIPA 2000, s 26.

private information about a person.²⁸ Surveillance is *intrusive* if covert and (a) carried out in relation to anything taking place on any residential premises or in a private vehicle, and (b) involves the presence of an individual on the premises (such as a paid informer or someone who is concealed) or is carried out by means of a surveillance device. *Covert human intelligence sources* may be ‘informants, agents [or] undercover officers’.²⁹

These different forms of activity appear from time to time in the reported cases.³⁰ But until the RIPA 2000 they were conducted without formal legal authority (with the exception of intrusive surveillance conducted under the Police Act 1997). The 2000 Act is designed to ensure that practice in this area is brought into line with the ECHR by requiring that the different kinds of surveillance to which it applies are authorised in advance,³¹ the authorisation in some cases now requiring judicial approval. There is also a right to complain to the Investigatory Powers Tribunal established under the Act about any authorisation.³²

Directed surveillance may be authorised if necessary on one of several grounds (which include national security, the prevention or detection of crime, and the prevention of disorder), provided that the authorised surveillance is proportionate to the end to be achieved (s 28). The authorisation may be given internally by a designated person in one of a number of specified public authorities or types of public authority.³³ Predictably, these include the police and the intelligence services, but also various government departments (such as the Food Standards Agency), local authorities and other public bodies.

A similar regime operates for *covert human intelligence sources* (s 29), with the need for authorisation, to be given internally by a designated person. In the case of *covert human intelligence sources*, however, the authorisation may be given by agencies that do not also have the power to conduct directed surveillance, such as the Health and Safety Executive. Recent amendments require local authority authorisations (but inexplicably not others) to be approved by a justice of the peace (in England and Wales), or a sheriff (in Scotland). These amendments apply to the authorisation of both the use of covert human intelligence sources and directed surveillance.³⁴

Covert human intelligence sources is the term used for undercover police officers. The Home Affairs Select Committee examined serious concerns about the practice of undercover officers, who were revealed by legal proceedings to have infiltrated protest groups and to have become deeply embedded within them.³⁵ These concerns related in part to claims that police officers had taken the identities of dead children, had participated in unlawful activities,³⁶ and had forged close personal relationships with members of the groups infiltrated, on at least one occasion fathering a child with a partner unaware of the real identity of her lover.

²⁸ Private information is defined to include any information relating to a person’s private or family life: s 26(10). There will be circumstances where surveillance does not require authorisation: see Official Report, Standing Committee F, 30 March 2000, col 274.

²⁹ Official Report, Standing Committee F, 30 March 2000, col 274 (Mr Charles Clarke). See *Teixeira de Castro v Portugal* (1998) 28 EHRR 101.

³⁰ See *R v Smurthwaite* [1994] 1 All ER 898; *R v Latif* [1996] 1 WLR 104; *R v Khan*, above; *Connor v HM Advocate*, above; *Kinloch v HM Advocate*, above.

³¹ HC Deb, 6 March 2000, col 767 (Mr Jack Straw).

³² RIPA 2000, s 65, though the problem with this complaints procedure as well is that people will be unaware that they are or have been under surveillance; without that knowledge they will be in no position to make a complaint.

³³ SI 2003 No 3171, SI 2010 No 521.

³⁴ RIPA 2000, s 23A–23B, amended by Protection of Freedoms Act 2012, s 37.

³⁵ *R v Barkshire* [2011] EWCA Crim 1885, [2012] Crim LR 453.

³⁶ In *Barkshire*, *ibid*, it was said that the evidence ‘appeared to show him as . . . arguably, an agent provocateur’ (para 18).

Although the use of undercover officers is regulated by statute (in the sense that RIPA 2000 requires authorisation), the conduct of such officers is governed only by the Home Office Code of Practice on Covert Human Intelligence Sources. Full investigation of this matter by the Home Affairs Select Committee has been postponed pending the outcome of legal proceedings (i) by five of the ‘victims’ of undercover police officers alleging violations of Convention and common law rights;³⁷ and (ii) by an undercover officer claiming that the police as employer had failed in breach of its duty of care to him.

The Home Affairs Select Committee nevertheless insisted that undercover officers should not ‘enter into intimate, physical sexual relationships while using their false identities undercover without clear, prior authorisation, which should only be given in the most exceptional circumstances’, concluding also that it was ‘unacceptable that a child should be brought into the world as a result of such a relationship and this must never be allowed to happen again’. The use of dead children’s identities was strongly condemned as ‘ghoulish and disrespectful’ and the practice ‘must never be followed in the future’.

According to the Committee the current legal framework ‘fails adequately to safeguard the fundamental rights of the individuals affected’, concluding that ‘there is a compelling case for a fundamental review of the legislative framework governing undercover policing’, in the light of the lessons learned from these cases. Acknowledging that this would ‘require great care and will take some time’, the Committee recommended that the Government publishes a Green Paper on the regulation of investigatory powers, with a view to publishing draft legislation after the next general election.³⁸

Intrusive surveillance is different. This may be authorised only on one of three grounds: where necessary in the interests of national security; for the purpose of preventing or detecting serious crime; or in the interests of the economic well-being of the United Kingdom. Again, the authorisation must be proportionate to the end to be achieved by carrying it out (s 32). Authorising officers are chief constables, commissioners of police, provosts marshal, officers designated by HM Revenue and Customs, and the Director General of the National Crime Agency (s 33). In the case of *intrusive* surveillance by the police and revenue and customs, an authorisation does not take effect unless approved by a surveillance commissioner (s 36).³⁹

A person who is the subject of a improper surveillance may make a complaint to the Investigatory Powers Tribunal.⁴⁰ In *Kinloch v H M Advocate*,⁴¹ it was argued that unauthorised covert surveillance breached ECHR, art 8 and that evidence obtained against a person accused of money laundering should be inadmissible as a result. The Supreme Court held that the police surveillance – which took the form of following the accused in public places – did not constitute a breach of Convention rights, on the ground that he had no reasonable expectation of privacy. According to Lord Hope, the accused was watched

³⁷ *AKJ v Metropolitan Police Commissioner* [2013] EWHC 32 (QB).

³⁸ HC 837 (2012–13).

³⁹ Provision is made for *intrusive* surveillance to begin in cases of urgency, without approval. An appeal lies to the chief surveillance commissioner by an authorising officer against any refusal by a surveillance commissioner to approve an authorisation. In the case of intrusive surveillance by the intelligence services, the Ministry of Defence and the armed forces, authorisation must be given by a Secretary of State, from whose decision there is no appeal by the person seeking the authorisation.

⁴⁰ On which, see Investigatory Powers Tribunal, *Report 2010* (2011), and in particular *Paton v Poole Borough Council* (IPT/09/01, 02, 03, 04 and 05), a notorious case of directed surveillance of a family to determine whether they genuinely resided within the catchment area of a popular and over-subscribed school (ibid, p 28).

⁴¹ [2012] UKSC 62, [2013] 2 WLR 141.

in places where he was open to public view by neighbours, by persons in the street or by anyone else who happened to be watching what was going on. He took the risk of being seen and of his movements being noted down. The criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life that he was entitled to keep private.⁴²

Overlapping regimes

A great deal of the activity which is authorised by the Police Act 1997, Part III, would also fall within the definition of intrusive surveillance in the RIPA 2000 as well as the Regulation of Investigatory Powers (Scotland) Act 2000. So while the Police Act 1997 allows the use of surveillance devices in vehicles on the authorisation of the police alone, the RIPA 2000 would require such activity to be approved by a commissioner. In fact, the combined effect of the two regimes is that prior approval by a surveillance commissioner would normally be required for many forms of surveillance: in the case of dwellings, hotel bedrooms and offices it would be required by the Police Act; and in the case of vehicles it would be required by RIPA.

In practice combined warrants are issued to authorise intrusive surveillance and interference with property (as defined by the 1997 Act). Only exceptionally could bugging devices be used on the word of the police alone: one example would be the bugging of a known meeting place of suspected criminals (such as a warehouse or a pub). It should be emphasised, however, that other forms of police surveillance (such as watching someone (directed surveillance), or using informants or infiltrating organisations (covert human intelligence)) would not require the prior approval of a surveillance commissioner (or a justice of the peace or a sheriff). It is the duty of the chief surveillance commissioner to keep under review the operation of RIPA, Part II.⁴³

C. Interception of communications

The interception of communications has been recognised by government as a ‘patent invasion of individuals’ privacy, and it should occur only when it is properly justified within the law’.⁴⁴ It involves the interception of both post and telephone communications and, as technology has advanced, now includes matters such as faxes, email and mobile phones. It has long been an offence to intercept the mail without the authority of a warrant granted by the Home Secretary.⁴⁵ In 1937, the practice was adopted whereby telephone calls would be intercepted under the authority of a warrant granted to the police or the security service by the Home Secretary.⁴⁶

But the legal basis for the latter practice remained obscure.⁴⁷ Perhaps unsurprisingly a legal challenge to the procedure in *Malone v Metropolitan Police Commissioner*⁴⁸ was unsuccessful on the ground that the interception of communications did not involve the violation of any of the rights of the applicant. There was no trespass, there was no breach of confidence, and

⁴² Ibid, para 21.

⁴³ RIPA 2000, s 62.

⁴⁴ HC Deb, 6 March 2000, col 771 (Mr Jack Straw).

⁴⁵ Post Office Act 1953, s 58. But see now Postal Services Act 2000, ss 83 and 84.

⁴⁶ Cmnd 283, 1957. It has been said to be the practice of successive governments since 1966 that the telephones of MPs are not to be tapped: HC Deb, 30 October 1997, col 861 (WA), a practice robustly defended by the Home Affairs Select Committee: HC 58 (2007–8).

⁴⁷ Cmnd 283, 1957, p 15.

⁴⁸ [1979] Ch 344; C P Walker [1980] PL 184; V Bevan [1980] PL 431.

he had no enforceable right to privacy in English law. The matter was said by Sir Robert Megarry V-C to be one that ‘cries out for legislation’.⁴⁹ However, the practice was found to breach art 8 of the ECHR: although art 8(2) permits limitations on a person’s art 8(1) rights, these must be prescribed by law, a requirement which was not met by the British practice of interception at the time.⁵⁰

The statutory framework

The European Court of Human Rights did not comment on the substance of the procedures then in place for the granting of warrants by the Home Secretary to intercept communications. In effect, it merely invited the British government to introduce legislation to give these procedures statutory force. This is largely what happened, although the Interception of Communications Act 1985 also introduced a number of new safeguards to restrain any possible misuse of the new statutory procedures, addressing concerns that the practice of telephone tapping had been abused in the past.⁵¹ But the 1985 Act has had to be substantially revised, for two reasons.

The first is in response to another decision of the European Court of Human Rights, *Halford v United Kingdom*.⁵² In that case it was held that the UK was in breach of art 8 for failing to regulate the interception of communications by employers. The second is in response to new technology and new means of communication. In particular, the 1985 Act did not apply to the use of cordless phones.⁵³ These and other issues have been addressed in the Regulation of Investigatory Powers Act 2000, Part I, although doubts were expressed shortly after its enactment about whether even these new provisions were sufficiently comprehensive.⁵⁴

The RIPA 2000 repeals much of the 1985 Act, but the structure of the new regulatory framework remains largely the same.⁵⁵ This means that it is a criminal offence ‘intentionally and without lawful authority’ to intercept a communication transmitted by post or by means of a public telecommunication system (s 1(1)).⁵⁶ This would apply to interceptions by public authorities or private parties, a matter of some importance following the revelation in recent years that journalists employed by leading newspapers had ‘hacked’ the voice mail of hundreds of people in the hunt for material for a story. It is claimed that ‘hacking’ is a form of ‘interception’.⁵⁷

⁴⁹ *Malone*, *ibid*, at p 380.

⁵⁰ *Malone v UK* (1985) 7 EHRR 14.

⁵¹ On which see *R v Home Secretary, ex p Ruddock* [1987] 2 All ER 518.

⁵² (1997) 24 EHRR 523.

⁵³ *R v Effik* [1995] 1 AC 309.

⁵⁴ See Y Akdeniz, N Taylor and C Walker [2001] Crim LR 73.

⁵⁵ For a full account, see Fenwick, pp 345–70, and for a good critique, see D Ormerod and S McKay [2004] Crim LR 15.

⁵⁶ On the meaning of a public telecommunications system, see *Morgans v DPP* [2001] 1 AC 315, where it was held that call-logging devices were covered. But in *R v Effik* [1995] 1 AC 309 it was held that a cordless phone was not covered; and in *R v Taylor-Sabori* [1999] 1 WLR 858 it was held that pager messages were not covered. Both would be regarded as private communications. This means that under the 1985 Act any interception would not require a warrant and that evidence of the interceptions would be admissible in legal proceedings. A warrant is now required for the interception of private communications. The drafting of the RIPA 2000, s 1 is slightly different from the drafting of s 1 of the 1985 Act on which it is based. On the implications, see *R v Sargent* [2001] UKHL 54, [2003] 1 AC 347. On the meaning of interception, see *R v E* [2004] EWCA Crim 1243, [2004] 1 WLR 3279.

⁵⁷ In a letter to *The Guardian*, 13 March 2011, the DPP made clear his view that phone hacking was covered: he wrote that he had advised ‘the police and CPS prosecutors to assume that the provisions of RIPA mean that an offence may be committed if a communication is intercepted or looked into after it has been accessed by the intended recipient’. See now *R v Coulson* [2013] EWCA Crim 1026, [2013] 4 All ER 999.

It is now also an offence intentionally and without lawful authority to intercept a communication being transmitted on a private communications system unless liability is excluded by s 1(6). The latter excludes criminal liability where the interception is by a private telecommunications' system operator, with the consent of the person whose communication has been intercepted. Apart from criminal liability, an innovation of the RIPA 2000 is the introduction of civil liability of employers and other operators of private telecommunications systems, for interception which takes place without consent: in this case there is liability to either the sender or the recipient of the message or both.

Lawful authority

Lawful authority under the Regulation of Investigatory Powers Act 2000 will arise in one of a number of circumstances. The first is where both the sender and the recipient consent to the interception or where either has consented and the interception takes place by an undercover agent whose activities have been authorised under Part II of the Act (s 3).⁵⁸ The second is on one of the grounds specified in s 4, which gives statutory authority for interception without a warrant to certain communications intercepted for certain prescribed business practices;⁵⁹ under prison rules;⁶⁰ in high-security psychiatric hospitals; and in state hospitals in Scotland.

In addition to the foregoing the third basis for interception is with the authority of a warrant issued by the Secretary of State (s 5). There are now four grounds for the issuing of a warrant: the interests of national security, the prevention or detection of serious crime, safeguarding the economic well-being of the United Kingdom, and to give effect to an international mutual assistance agreement (s 5(3)).⁶¹ The conduct authorised by the warrant must be proportionate to the end to be achieved, and before a warrant is granted consideration should be given to the possibility of the information being obtained by other means (s 5(4)).

There is no definition of national security in the Act, although it is now 'generally understood to refer to the survival and well-being of the state and community and includes such matters as threats to the security of the nation by terrorism, espionage and major subversive activity but is not confined to these matters'.⁶² Serious crime is widely defined to mean either (a) a crime which could reasonably lead to imprisonment for at least three years if committed by someone over the age of 18 convicted of a first offence; or (b) conduct that 'involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose' (s 81(3)).

⁵⁸ The government gave the example of a kidnapper telephoning the relatives of a hostage and the police wish to record the call in order to identify or trace the kidnapper. The operation will be authorised as surveillance rather than by means of an interception warrant: RIPA 2000, Explanatory Notes. See also *R v Rasool* [1997] 1 WLR 1092, which presumably would be decided differently today, for a number of reasons.

⁵⁹ SI 2000 No 2699, SI 2011 No 1208. These have been controversial in a number of respects, not least because they allow interception without consent 'to investigate or detect the unauthorised use of telecommunications systems'. This would allow the monitoring of telephone calls and emails. Under the Human Rights Act 1998, however, any exercise of power (at least by a public authority) would have to meet the standards set by ECHR, art 8.

⁶⁰ Cf *R v Owen* [1999] 1 WLR 949.

⁶¹ According to the government, the request 'would have to satisfy the law of the requesting country as well as UK interception law': HC Deb, 6 March 2000, col 832 (Mr Charles Clarke). But that may not amount to much in practice if the law of the requesting country has few protections for foreign nationals (as where it is information about a British citizen that is requested).

⁶² Cm 4364, 1999, para 14. It has also been said that the 'normal object of a national security warrant is to assist in the build up of an intelligence picture, for example about a suspected terrorist or terrorist group' (ibid).

An application for a warrant may be made by one of a number of people specified in s 6(2): these include chief constables and the directors general of the Security Service and the National Crime Agency, as well as the director of GCHQ, the commissioners of HM Revenue and Customs, and the Chief of Defence Intelligence. This represents an extension of the previous practice under the 1985 Act,⁶³ in relation to which it was reported that warrants were obtained only by NCIS (replaced by the National Crime Agency), the Special Branch, Customs and Excise (replaced by HM Revenue and Customs), the Police Service for Northern Ireland, the Scottish police, the security service, SIS and GCHQ but ‘no other agencies’.⁶⁴

The application will be made to an appropriate minister, although the burden is carried mainly by the Home Secretary and the Scottish Ministers. Other ministers who sign warrants are the Foreign Secretary and the Secretaries of State for Defence and Northern Ireland.⁶⁵ Applications are normally granted, although there are rare cases where, despite being ‘reasonably and responsibly made’, an application is refused because the minister has decided that it does not satisfy the statutory criteria. The fact that applications are normally but not always granted is not thought to be a problem: it shows that the Secretary of State is not a ‘rubber stamp’.⁶⁶

Nevertheless, there has been a sharp increase in the number of warrants issued, from a total of 519 in 1988 to 3,372 in 2012 (with a steady increase in between).⁶⁷ This steady annual increase has been said in the past not to be ‘a cause for concern’, but to be due to the ‘continuing incidence of serious and organised crime and an increased facility to counter it’.⁶⁸ It is also the case that the most recent figures include warrants signed by the Foreign Secretary, and the Secretaries of State for Defence and Northern Ireland,⁶⁹ whereas the earlier figures apply only to the Home Secretary and the Secretary of State for Scotland. Information about the number of warrants issued to each agency is withheld.

Safeguards and supervision

The Regulation of Investigatory Powers Act 2000, Part I, contains a number of different safeguards designed to ensure that there is no abuse of the powers which it authorises. The Interception of Communications Commissioner was established under the Interception of Communications Act 1985 and the office is continued by virtue of s 57 of the RIPA. The Commissioner is a senior or former judicial figure and is appointed by the Prime Minister. The first holder of the office was Lord Justice Lloyd, who was succeeded in turn by Sir Thomas Bingham, Lord Nolan, Sir Swinton Thomas, Sir Paul Kennedy, and Sir Anthony May. The Commissioner has a number of duties to review the operation of powers under the Act and he or she must report annually to the Prime Minister regarding the discharge of these duties.

The report must then be laid before Parliament, although parts of it may be excluded in the public interest. The procedures adopted by the Commissioner are described in these reports. The practice of the Commissioner is to make twice-yearly visits to departments and agencies concerned with interception and to select a sample of warrants ‘largely at random’

⁶³ Despite the government’s concern that ‘it should be used only by a narrow and tight range of agencies’: HC Deb, 6 March 2000, col 831 (Mr Charles Clarke).

⁶⁴ Cm 4778, 2000. It is claimed that no warrant had ever been issued to anyone else: Cm 4364, 1999.

⁶⁵ HC 549 (2005–06), SE 2005/203, para 33.

⁶⁶ Cm 4001, 1998, paras 10, 11.

⁶⁷ HC 571 (2013–14), SG 2013/131, para 6.3.

⁶⁸ Cm 4778, 2000, para 14. In 1999, 2,022 warrants were signed by the Home Secretary and Scottish Ministers, which is an average of about eight every working day.

⁶⁹ HC 496 (2012–13), SG 2012/125, para 6.3.

for close inspection. In the course of these visits, the Commissioner acts as ‘an auditor retrospectively examining interception warrants’,⁷⁰ and seeks to satisfy himself that ‘the warrants fully meet the requirements of RIPA, that proper procedures have been followed, and that the relevant safeguards and codes of practice have been followed’.⁷¹ In all this time, there has been no case of a warrant being found to be unjustified, although a number of ‘errors’ are frequently acknowledged in the annual reports of the Commissioner.⁷²

The second safeguard against abuse is the provision for a tribunal to deal with a wide range of complaints that may be made about the exercise of powers under the Act. Tribunals of this kind were previously established under the Interception of Communications Act 1985, the Security Service Act 1989 and the Intelligence Services Act 1994. These different tribunals are now combined into a single tribunal, the Investigatory Powers Tribunal, and Lord Justice Mummery became its first president in 2001. The tribunal has extended powers to reflect the wider range of issues dealt with in RIPA 2000. However, the model for the new tribunal is that which was established in the 1985 Act, which authorised the Interception of Communications Tribunal to deal with complaints about the improper issuing of warrants under that Act.

Although the latter tribunal had a limited jurisdiction, it received a considerable number of applications. Between the time it was established in 1986 and 1999, it dealt with 712 complaints, not one of which was found to have breached the Act. As Lord Nolan pointed out in his 1997 report, the fact that not a single case succeeded ‘led to a measure of suspicion as to the effectiveness of the Tribunal’s work’.⁷³ But, as was pointed out, in only eight of the cases dealt with by the Tribunal at that stage was an interception carried out with the authority of a warrant, and in each case the warrant had been properly issued.⁷⁴ The Investigatory Powers Tribunal produced an annual report of the first time in 2011, where it was revealed that it received 31 interception complaints in 2010; it is not known if any succeeded.⁷⁵

In many countries judicial intervention takes place at the point of granting the warrant: it is common practice for warrants to be granted by judges rather than by politicians.⁷⁶ The enactment of the RIPA provided an opportunity to consider adopting judicial authorisation rather than judicial supervision. The then Home Secretary expressed the view that ‘it does not necessarily follow that, just because a judicial warrant is required, there is a greater safeguard for the individual’.⁷⁷ Nevertheless, no one would think it acceptable that a minister could issue search warrants, and it is unclear why it is any more acceptable that a minister should issue interception warrants. Nor is it clear why the elaborate structure of after the event ‘audit’ by Commissioners is any better than a system of proper interrogation by a judge before the warrant is issued.

One reason for the increase in the number of Home Office and (what was then) Scottish Office warrants is the revocation in 1992 of the quota system which had been in operation for

⁷⁰ Ibid, para 6.2.

⁷¹ HC 901 (2008–09), SG/2009/138, para 2.1.

⁷² On which see Fenwick, above, p 354.

⁷³ Cm 4001, 1998, para 31.

⁷⁴ It is more difficult since RIPA to give details of interception complaints. Until 2011, the Commissioner gave details of the total number of complaints to the tribunal annually, without breaking them down according to category. So it is impossible to know how many of the 136 complaints received in 2008, for example, related to interception and how many to the use of other forms of surveillance: HC 901 (2008–09), SG/2009/138, paras 6.1–6.3. Since 2011 the Commissioner has stopped providing information about the number of complaints on the ground that the IPT does so.

⁷⁵ Investigatory Powers Tribunal, *Report 2010* (2011): <http://www.ipt-uk.com/docs/IPTAnnualReportFINAL.PDF>.

⁷⁶ For Opposition proposals for the same in this country, see HC Deb, 6 March 2000, col 688.

⁷⁷ Ibid, col 770.

many years previously, whereby a restriction was imposed on the number of warrants issued to the Customs and Excise on the one hand and the police on the other. The quota system was considered by the then Commissioner (Sir Thomas Bingham) who questioned whether ‘the Secretary of State should circumscribe his discretion to authorise the issue of warrants by reference to an arithmetical norm’. There was ‘much to be said for dealing with applications . . . very strictly on their merits and without reference to numerical constraints beyond those necessarily imposed by the existence of limited facilities’.⁷⁸

The exclusion of the courts

Although senior judicial figures are thus involved as commissioners and as President of the Investigatory Powers Tribunal, there is little role for the courts in the operation of the Act. The tribunal is protected by a statutory provision that precludes judicial review of its decisions, including decisions as to jurisdiction.⁷⁹ Moreover, no evidence may be adduced in legal proceedings which tends to suggest that a warrant has been issued under the Act; or that an offence has been committed by a servant of the Crown, a police officer, a person providing a postal service or a public telecommunications operator (s 17).⁸⁰ This is designed to prevent ‘the asking of questions suggesting that a warrant to intercept communications has been or is to be issued’.⁸¹ ‘neither the existence of a telephone intercept under warrant nor the result thereof are to be disclosed in evidence’.⁸²

In this country, ‘the content of interceptions may inform police investigations but may not form part of the evidence at any subsequent trial’.⁸³ The position compares with evidence obtained from listening devices and other forms of surveillance by the intelligence services and the police, which may be disclosed not only for the purpose of preventing or detecting serious crime, but also for the purpose of criminal proceedings.⁸⁴ Although it might be thought that the total exclusion of interception evidence would normally benefit the defence, there may be circumstances where the accused is precluded from relying on evidence of the interception to rebut the case against him or her.⁸⁵ Proposals to relax the rules prohibiting the use of interception evidence in criminal prosecutions have been vigorously opposed by the Interception Commissioner.⁸⁶

⁷⁸ Cm 2173, 1993, paras 14–16. Other reasons for the increase is that there are more phones and more crime: HC Deb, 6 March 2000, col 830 (Mr Charles Clarke), though it is claimed by most recent governments that crime is falling.

⁷⁹ RIPA 2000, s 67(8).

⁸⁰ Interception evidence obtained by an unlawful interception is not admissible any more than interception evidence obtained by lawful interception. There would otherwise be ‘a remarkable and unacceptable anomaly’ (*Morgans v DPP* [2001] AC 315). See also *R v Sargent*, note 56 above. For consideration of some of the problems arising here, see *Attorney-General’s Reference (No 5 of 2002)* [2004] UKHL 40, [2005] 1 AC 167.

⁸¹ *R v Preston* [1994] 2 AC 130, at p 144 (Lord Jauncey). There are, however, qualifications in s 18 whereby a trial judge may order material to be disclosed for exceptional purposes in exceptional circumstances. See generally, Official Report, Standing Committee F, 28 March 2000, cols 228–39.

⁸² *R v Preston*, *ibid*.

⁸³ *R v E*, note 56 above, at p 3289 (Hughes J).

⁸⁴ *R v Khan* [1997] AC 558, at 576 (Lord Nolan). See also *R v E*, above.

⁸⁵ *R v Preston* (note 81 above).

⁸⁶ Cm 7324, 2008 (proposals by a Committee of Privy Counsellors chaired by Sir John Chilcot), and HC 901 (2008–09), SG/2009/138, para 2.7 (response of the Interception Commissioner). See previously HC 315 (2006–07).

D. Storing and processing information

The storage and use of information about individuals is an issue which has assumed much greater significance as a result of the computer revolution and the greater capacity now to store and process personal information:

One of the less welcome consequences of the information technology revolution has been the ease with which it has become possible to invade the privacy of the individual. No longer is it necessary to peep through keyholes or listen under the eaves. Instead, more reliable information can be obtained in greater comfort and safety by using the concealed surveillance camera, the telephoto lens, the hidden microphone and the telephone bug. No longer is it necessary to open letters, pry into files or conduct elaborate inquiries to discover the intimate details of a person's business or financial affairs, his health, family, leisure interests or dealings with central or local government. Vast amounts of information about everyone are stored on computers, capable of instant transmission anywhere in the world and accessible at the touch of a keyboard. The right to keep oneself to oneself, to tell other people that certain things are none of their business, is under technological threat.⁸⁷

But we should not overlook the fact that the storage and use of personal information in different forms had occurred for many years before the invention of the computer. Obvious examples include the files maintained by the intelligence services about people deemed to be politically subversive;⁸⁸ the disclosure of medical information to insurance companies and employers;⁸⁹ and the blacklisting of trade unionists conducted by organisations sympathetic to employers.

It goes without saying that the common law proved of little value to regulate much of this activity and indeed failed to develop any tools to deal with it. The use of this material did not attract liability for conspiracy to injure,⁹⁰ although there might be liability in defamation if the information were distributed – but only if it were untrue. The Security Service Act 1989 provided a limited opportunity for individuals to complain to the tribunal established by that Act about inquiries conducted about them by the security service, and about the disclosure of information 'for use in determining whether [they] should be employed'.⁹¹ These complaints are now made to the Investigatory Powers Tribunal, and it is not known whether any of the very few complaints ever upheld by that tribunal relates to vetting or surveillance by the security service.

Data Protection Act 1998

The need to protect personal data as an aspect of the right to privacy is recognised by the EU Charter of Fundamental Freedoms of 2000, the importance of which was enhanced by the Lisbon Treaty in 2007.⁹² Art 8(1) of the Charter provides that 'Everyone has the right to the protection of personal data concerning him or her', with art 8(2) providing further that 'such

⁸⁷ *R v Brown* [1996] 1 AC 541, at p 556 per Lord Hoffmann.

⁸⁸ See Lustgarten and Leigh, above, ch 5.

⁸⁹ See Access to Health Records Act 1990 by which the practice is now regulated, although in a manner which arguably permits access to too much information by employers and insurance companies, albeit with the 'consent' of the individual.

⁹⁰ *McKenzie v Iron Trades Employers' Insurance Association* 1910 SC 79.

⁹¹ Security Service Act 1989, Sch 1(2) and (3): see Lustgarten and Leigh, pp 153–6.

⁹² See Ch 6 above. Also important is the ECHR, art 8, the need to comply with which was emphasised in *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55, [2013] 1 WLR 2421.

data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'. As recently emphasised by the Supreme Court,⁹³ however, these measures are not unqualified with limitations expressly permitted by the Charter itself, subject to conditions of necessity and proportionality (art 52).

Art 8 of the Charter is informed in part by Council Directive 95/46/EC, which is implemented in domestic law by the Data Protection Act 1998. The latter replaces the 1984 Act of the same name, which applied only to computer-related data.⁹⁴ It has been held that the Directive does not violate Community obligations relating to freedom of expression, and that member states are expected to have regard to freedom of expression considerations when implementing the Directive.⁹⁵ At the same time, however, the Act is to be construed in a purposive way to give effect to the Directive,⁹⁶ the primary objective of which is to protect individuals' fundamental rights, notably the right to privacy and accuracy of their personal data held by others.⁹⁷

Data for the purposes of the 1998 Act are defined as 'information', which is recorded or processed by computer; as well as any other information, which is recorded as part of a relevant filing system.⁹⁸ These terms have been narrowly construed by the Court of Appeal,⁹⁹ leading the Information Commissioner to conclude that 'it is likely that very few manual files will be covered by the provisions of the [1998 Act]. Most information about individuals held in manual form does not, therefore, fall within the data protection regime.'¹⁰⁰ The Act applies to anyone who processes data (both public and private sector), though in the case of public bodies there are overlaps with the Freedom of Information Act 2000.¹⁰¹

Some data are described as being 'sensitive personal data', a subset, or a species, of 'personal data',¹⁰² and defined to mean personal data consisting of any of the following information about the data subject: racial or ethnic origin, political opinions, religious belief, trade union status, physical or mental health or condition,¹⁰³ sexual life, the commission or alleged commission of an offence, and any criminal proceedings brought against him or her (s 2).¹⁰⁴ The other key concept in the Act is 'the special purposes'. Defined to mean journalism, artistic purposes or literary purposes (s 3), data held for these purposes enjoy special protection from some of the law enforcement powers considered below.

⁹³ *Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55, [2012] 1 WLR 3333.

⁹⁴ The following is a necessarily condensed account, which highlights the main features of the Act.

⁹⁵ *Case C-101/01, Criminal Proceedings Against Lindqvist* [2004] QB 1014.

⁹⁶ *Campbell v MGN* [2002] EWCA Civ 1373, [2003] QB 633, Lord Phillips, at para 96. See also *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, [2008] 1 WLR 1550, para 7 (Lord Hope), and *Johnson v Medical Defence Union* [2007] EWCA Civ 262, [2007] BMLR 99.

⁹⁷ *Durant v Financial Services Authority* [2003] EWCA Civ 1746, [2004] FSR 28 (Auld LJ). Also *South Lanarkshire Council v Scottish Information Commissioner*, above (Baroness Hale).

⁹⁸ A relevant filing system is defined to mean 'any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible': Data Protection Act 1998, s 1(1).

⁹⁹ *Durant v Financial Services Authority*, note 97 above.

¹⁰⁰ Information Commissioner, 'The *Durant* Case and its impact on the interpretation of the Data Protection Act 1998' (2004). That said, the files in the blacklisting of trade unionists referred to below (p 437) were manual files: Ewing, *Ruined Lives: Blacklisting in the Construction Industry* (Institute of Employment Rights, 2009).

¹⁰¹ See above, pp 293–9.

¹⁰² *Common Services Agency v Scottish Information Commissioner*, above, para 37 (Lord Hope).

¹⁰³ On which see *Common Services Agency*, *ibid*.

¹⁰⁴ See *R (A) v Chief Constable of C* [2001] 1 WLR 461.

Underpinning the Act are the eight data protection principles, with which data controllers must comply (s 4(4)). These are set out in Sch 1 as follows: (i) personal data shall be fairly and lawfully processed; (ii) they shall be obtained only for a specified and lawful purpose; (iii) they shall be ‘adequate, relevant and not excessive’ in relation to the purposes for which they are processed; (iv) they shall be accurate and kept up to date; (v) they shall not be kept longer than necessary for the purpose for which the data are processed; (vi) they shall be processed in accordance with the rights of the data subject; (vii) appropriate measures are to be taken against unauthorised or unlawful processing of personal data; and (viii) they shall not be transferred outside the European Economic Area.

These principles are subject to detailed interpretation in the Act itself and, in the case of the first, it is provided additionally that at least one of the six conditions in Sch 2 must be met. This provides that data are to be processed only if the data subject consents, or if the processing is necessary for one of a number of purposes which include the administration of justice and the exercise of any functions of the Crown, a minister of the Crown or a government department. The other conditions specified are that the processing is necessary for the purposes of a contract to which the data subject is a party; to comply with any legal obligation to which the data controller is subject; to protect the vital interests of the data subject; or for ‘the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed’.¹⁰⁵

Where the data are ‘sensitive personal data’, at least one of the eleven conditions in Sch 3 (as amended) must also be met.¹⁰⁶

Data subjects and data controllers

The first of two key substantive aspects of the Act relate to the rights of the data subject, that is to say the person whose personal data are being stored and used by another. Under the Act the data subject is entitled on request and in writing to be (a) informed by any data controller whether any personal data are being processed by the data controller; (b) given a description of the personal data and the purposes for which they are being used, as well as the people to whom they may be disclosed; and (c) supplied with the information which is being processed and informed of the logic of any decision taken in relation to him or her (such as performance at work) which is based solely on the ‘processing by automatic means of personal data’ (s 7).

This last is designed to protect people excluded credit because of their postal code or workers refused employment or promotion because of psychometric testing. There are

¹⁰⁵ This last condition was considered in *South Lanarkshire Council v Scottish Information Commissioner*, above, where it was held that the test of necessity could not be used to defeat a freedom of information application about the general wage levels of the Council’s employees, in which no individual employee would be identified.

¹⁰⁶ These are (i) the data subject has given ‘his explicit consent’; (ii) the processing is necessary for the purposes of exercising any right or duty of the data controller in connection with employment; (iii) the processing is necessary to protect the vital interests of the data subject; (iv) the processing is carried out in the course of the legitimate activities of a non-profit making association; (v) the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject; (vi) the processing is necessary for purposes relating to legal proceedings; (vii) the processing is necessary for the administration of justice, the exercise of a statutory duty or the exercise of any functions of the Crown, a minister or a government department; (viii) the processing takes the form of the disclosure of sensitive personal data by an anti-fraud organisation and is necessary to prevent fraud; (ix) the processing is necessary for medical purposes and is undertaken by a health professional or another person who owes an equivalent duty of confidentiality; (x) the processing is undertaken for the purpose of ethnic monitoring; and (xi) any other circumstances specified in an order made by the Secretary of State.

a number of exceptions to this subject access request right (particularly where it would necessarily involve disclosing confidential information about another person), and provision is made as to the manner in which the information should be disclosed. In some circumstances, the data subject is entitled by giving notice in writing to require the data controller to stop processing his or her personal data. Enforcement of these rights of access provisions is by the ordinary civil courts, namely the county court or High Court in England and Wales and the sheriff court or Court of Session in Scotland (s 15).

The second of the two main substantive provisions of the Data Protection Act 1998 relates to the responsibilities of data controllers. Personal data are not to be processed unless the data controller has first registered with the Information Commissioner (s 17), a post created by the Act (s 6), on which see below. Those applying for registration with the Information Commissioner must describe the personal data to be processed, the purposes for which they are to be processed and the persons to whom the data controller intends to disclose the data (s 16). Applicants for registration must also provide a ‘general description of measures to be taken for the purpose of complying with the seventh data protection principle’ (s 18(2)(b)).

There is in addition a duty to notify the Commissioner of any material changes to the practice of the data controller with regard to personal data (s 20). It is an offence to process data without being registered and to fail to notify any relevant changes (s 21). The Secretary of State is empowered to make regulations to provide for the appointment of data protection supervisors by data controllers: the role of the supervisor would be to monitor ‘in an independent manner the data controller’s compliance with the provisions of [the] Act’ (s 23). An individual who suffers damage, as a result of a breach of the Act by a data controller is entitled to recover compensation from the latter; and in some cases it may be possible to recover also for distress suffered as a result of the breach (s 13).

Perhaps predictably there are a number of situations where the Act does not apply or where its application is diluted. There are at least ten such general categories of exempt data, the first of which are data where exemption is required for the purpose of safeguarding national security (s 28). These are exempt from all the data protection principles. A ministerial certificate stating that the exemption is required is enough for this purpose, though any person affected by the issuing of the certificate may appeal to the Administrative Appeals Chamber of the Upper Tribunal (previously the Information Tribunal National Security Appeals Panel) against the certificate (s 28(4)).

In an important decision, the then Information Tribunal – sitting to deal with national security appeals – overruled a blanket certificate of the Home Secretary exempting the Security Service from much of the Act. The Liberal Democrat MP Norman Baker wrote to the Service asking if it was processing personal data of his and if so what such data were. The Service would neither confirm nor deny.

The decision of the Tribunal was confined to the duty of a data controller under s 7(1)(a) of the 1998 Act to inform people from whom a request is made whether or not their personal data are being processed. The Tribunal held that the ministerial certificate was too wide because it would ‘exempt the Service from the obligation to respond positively to any request made to it under section 7(1)(a) of the Act, regardless of whether national security would be harmed by a positive response in a particular case’.¹⁰⁷ Following this decision the Home Secretary issued a fresh certificate under s 28 of the 1998 Act, which removed the blanket exemption of the Security Service.

¹⁰⁷ *Baker v Home Secretary* [2001] UKHRR 1275.

Individuals may now make an application to the Service, which may be refused on the grounds of national security only on a case-by-case basis. The new certificate provides that 'no data shall be exempt from the provisions of section 7(1)(a) of the Data Protection Act 1998 if the Security Service, after considering any request by a data subject for access to relevant personal data, determines that adherence to the principle of neither confirming nor denying whether the Security Service holds data about an individual is not required for the purpose of safeguarding national security'.

However, it has not proved to be any easier for individuals to determine whether the Security Service processes their personal data. In *Hitchens v Home Secretary*,¹⁰⁸ the Information Tribunal dismissed an appeal from a journalist who had asked the Security Service if it processed data about him and for access to the files he believed that it held on him about his time as 'an extreme left-wing student' in the 1970s. The tribunal upheld the Security Service's decision not to confirm or deny whether such files existed.¹⁰⁹

Special exemptions from various aspects of the Act (affecting both subject access and the duties of the data processor) apply to data processed for the prevention or detection of crime or for the assessment or collection of tax (s 29), and for personal data relating to the physical or mental health of the data subject (s 30). Other exemptions apply to the activities of regulatory bodies (s 31), journalism, literature or art (s 32),¹¹⁰ research purposes (including historical research) (s 33), and manual data held by local authorities (s 33A). Otherwise there are exemptions for personal data the data controller is obliged to make available to the public by statute (s 34), or disclose by virtue of any legal obligation or court order (s 35). Finally, there are exemptions to avoid infringing parliamentary privilege (s 35A), for personal data processed for domestic purposes (s 36), and for other miscellaneous purposes (s 37).

The section 35 exemption was considered by the Supreme Court in *Rugby Football Union v Consolidated Information Services Ltd*,¹¹¹ where it was said that 'before a Court makes an order requiring disclosure of personal data, which would attract the exemption under section 35(1), it must first take into account and weigh in the balance the right to privacy with respect to the processing of personal data which is protected by article 1(1) of the Directive'.¹¹²

The issue in the RFU case was effectively whether an order under the Data Protection Act 1998, s 35 was consistent with the EU Charter of Fundamental Rights, art 8. The RFU was concerned that tickets for rugby matches were being sold unlawfully and was granted a court order (a so-called *Norwich Pharmacal* order),¹¹³ to require a ticketing agency to disclose information that would enable the RFU to identify who had been buying and selling tickets in breach of the rules.

¹⁰⁸ [2003] UKIT NSA 4.

¹⁰⁹ See also *Hilton v Home Secretary* [2005] UKIT NSA 5.

¹¹⁰ This exemption was widely construed by the Court of Appeal in *Campbell v MGN Ltd*, note 96 above. For proposals that it should be more tightly drawn, see HC 779 (2012–13) (Leveson report). The latter report also recommended the removal of other journalistic protections.

¹¹¹ [2012] UKSC 55, [2012] 1 WLR 3333.

¹¹² *Ibid*, para 25.

¹¹³ *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, where the House of Lords recognised the right of a prospective claimant to obtain information in order to seek redress for an arguable wrong: *Rugby Football Union*, above, para 14.

The Supreme Court held that the making of such an order did not violate the EU Charter in circumstances where ‘the impact that can reasonably be apprehended on the individuals whose personal data are sought is simply not of the type that could possibly offset the interests of the RFU in obtaining that information’.¹¹⁴ The interest of the RFU lay in finding the identity of people who were buying and selling tickets in stark breach of the terms of the conditions by which it supplied them.

Information Commissioner

Enforcement of the Act is principally by means of the Information Commissioner and the First-tier Tribunal (Information Rights) (formerly the Information Tribunal) (s 6). The Commissioner is a continuation of the office of Data Protection Registrar under the Data Protection Act 1984, and is appointed by the government (‘Her Majesty by Letters Patent’ according to the statutory form) (s 6); but neither the Commissioner nor his or her staff are to be regarded as Crown servants.¹¹⁵ Following changes made by the Protection of Freedoms Act 2012, appointments are now for non-renewable fixed terms of up to seven years each.

Once appointed, a Commissioner can be removed within the term only after an address from both Houses of Parliament for one of a number of prescribed reasons. The Tribunal in contrast is appointed by the Lord Chancellor, to include a legally qualified chairman and deputy chairmen, as well as persons to represent the interests of data subjects and data controllers respectively. National security cases are now heard by the Administrative Appeals Chamber of the Upper Tribunal, a superior court of record, which consists of three judicial members for these purposes. This replaces the National Security Appeals Panel of the Information Tribunal. National security hearings will generally take place in private.¹¹⁶

The Commissioner – whose powers were enhanced by the Coroners and Justice Act 2009 – may issue an enforcement notice to a data controller if satisfied that the data controller is breaching the data protection principles (s 40). The notice may require the data controller to take steps specified in the notice or to refrain from conduct specified in the notice. This might include the erasing of inaccurate data. The new provisions of the DPA, s 41A enable the Commissioner effectively to initiate an investigation of government departments and other public authorities by way of an assessment notice, designed to enable the Commissioner to determine whether a data controller has complied or is complying with the data protection principles.

An assessment notice issued under the Data Protection Act 1998, s 41A requires the data processor to permit the Commissioner to enter specified premises and to have access to and copies of specified documents. This is in addition to the original provisions of the DPA, s 42 which permits any person directly affected by the processing of any data to seek an assessment from the Commissioner as to whether the processing is being carried out in accordance with the Act. Where such a request has been made, the Commissioner may serve the data controller with an information notice requiring the data controller to furnish the Commissioner with specified information within a specified time (s 43).

Apart from the power to issue these and other notices (which may be appealed by the recipient to the First-tier Tribunal (Information Rights)), the Commissioner may also apply to a circuit judge or a district judge (magistrates’ courts) for a warrant where there are reasonable grounds to suspect that a data controller is contravening the data protection

¹¹⁴ *Rugby Football Union*, above, para 46 (Lord Kerr).

¹¹⁵ Formally the Information Commissioner is an NDPB: see ch 12 above, esp pp 305–306.

¹¹⁶ SI 2008 No 2698 (L 15), esp regs 14(10) and 37(2A).

principles or that an offence against the Act has been committed (s 50, Sch 9). No warrant is to be issued in respect of any personal data processed for ‘special purposes’ except in limited circumstances. Unless in cases of urgency or in order not to defeat the purpose of the entry, a warrant should normally be granted only if the data processor has refused access to the Commissioner.

The Commissioner now has the power to impose monetary penalties on data controllers, where there is a serious and deliberate breach of the data protection principles (s 55A). The data controller must be given notice of intent in advance and an opportunity to make representations before the penalty is imposed (s 55B).¹¹⁷ Prosecutions under the Act may be brought only by the Commissioner or the DPP, and may be tried either summarily or on indictment (s 60). A recent high profile example was the prosecution and conviction of an individual involved in the blacklisting of trade unionists, for failing to register as a data controller.¹¹⁸ Despite the wide powers of the Commissioner, concerns have been expressed about enforcement of the Act in practice.¹¹⁹

Data protection and the RIPA 2000

Provision is made in the Regulation of Investigatory Powers Act 2000 to deal with the situation where it is deemed necessary for public authorities to secure access to ‘communications data’. Before the Act came into force, access to this information was governed by a voluntary regime set up under the Telecommunications Act 1984 and the Data Protection Act 1998. It was thought that this ‘loosely regulated’ regime was ‘unacceptable in terms of human rights and because, in certain cases, it has led to unacceptably high demands on the public telecommunications operators’.¹²⁰ As a result, Chapter II of Part I of the RIPA introduces a statutory procedure whereby the law enforcement and other agencies can require service providers to supply communications data in defined circumstances.¹²¹

These circumstances are that it is necessary to obtain the data in the interests of national security, for the purpose of preventing or detecting crime, or preventing disorder, in the interests of the economic well-being of the UK, in the interests of public safety, for the purpose of assessing or collecting taxes, in an emergency to prevent death or injury, or any other purpose specified in a ministerial order. Communications data are data about the use which the individual has made of a postal service or telecommunications system,¹²² that is to say the ‘who’, ‘when’ and ‘where’ of a communication but not the content, not what was said or what was written.¹²³ Any request for such data must now be made by an authorised officer within a relevant public authority (such as a police force, the intelligence services, HM Revenue and Customs, or a local authority).

In the reporting year 2012, public authorities as a whole are said to have made 570,135 requests for communications data to various service providers (including internet service providers).¹²⁴

¹¹⁷ See *Central London Community Healthcare NHS Trust v Information Commissioner* [2013] UKUT (AAC) 551 (first exercise of this power).

¹¹⁸ See Ewing, *Ruined Lives*, above. The affair has attracted widespread interest and was the subject of investigation by the Scottish Affairs Select Committee: HC 1071 (2012–13).

¹¹⁹ See HC 779 (2012–13) (Leveson report).

¹²⁰ HC Deb, 6 March 2000, col 773 (Mr Jack Straw).

¹²¹ RIPA 2000, s 22.

¹²² *Ibid*, s 21(4) and (6). It has been said to cover ‘billing data, subscriber data, details of numbers dialled or internet sites accessed by a given subscriber’, but not ‘for example, the content of voice calls’: W Malcolm and D Barker, *New Law Journal*, 25 January 2002. These data enable the authorities to identify the persons with whom the surveillance subject has contact.

¹²³ HC 901 (2008–09), SG/2009/138, para 3.1.

¹²⁴ HC 571 (2012–13), SG/2013/131, para 7.3.

The exercise of this power is also subject to scrutiny after the event by Interception Commissioner,¹²⁵ though again it is not clear why a magistrates' warrant is not required in advance to authorise its exercise.¹²⁶

E. Police databases

The concerns expressed above about the storage and use of information have increased in intensity in recent years as a result of the expansion of databases held by various government departments and other public authorities. These include the National Domestic Extremism Database, the DNA database, the Police National Computer, and the NHS patients' database.¹²⁷ Databases of these kinds are controversial not least because they tend to emerge without any formal legal authority or statutory mandate, and because there is a lack of confidence that the databases created will be properly managed and that the information collected about individuals will not be misused.

Otherwise, there are concerns about (i) how and why some people appear on databases, particularly those where entry will carry a stigma or have potentially adverse consequences (such as the Police National Computer), (ii) what use is made of the personal information which may be recorded on databases maintained by government departments (with whom is the information shared and under what conditions?); and (iii) the right of access to the information by the individual whose information is recorded, if only to ensure that there are no mistakes and that any mistakes are corrected.

Here we provide examples of three such databases (with an account of their function), each being progressively less exclusive.

National Domestic Extremism Database

The existence of the National Domestic Extremism Database came to public attention following the litigation in *Catt v Metropolitan Police Commissioner*,¹²⁸ where the applicant sought the removal of his personal records from the database. The database is maintained under 'statutory authority', in the sense that the Police Act 1996, s 39 and s 39A authorise the Home Secretary to issue codes of practice relating to policing. A Code of Practice on the Management of Policing Information was issued under this legislation in 2005,¹²⁹ along with accompanying guidance to police forces issued by ACPO.¹³⁰ The catalyst for these developments was not public disorder but the need for the police to improve the management of information, a need identified following the murder of two Soham school-children in 2002.

The Code provides that chief constables and other senior police officers have a duty to 'obtain and manage' information needed for 'police purposes'.¹³¹ The latter term is defined

¹²⁵ Ibid. About half of the Commissioner's annual report is now dedicated to issues relating to the use of this power, which may be exercised by a large number of public authorities in addition to the police and the security and intelligence services.

¹²⁶ The Protection of Freedoms Act 2012 inserted a new RIPA, s 23A which will require judicial approval for requests relating to communications data by local authorities: it is not clear why this should not apply to all requests.

¹²⁷ See HC 153 (2008–09) (Public Accounts Committee).

¹²⁸ [2012] EWHC 1471 (Admin), [2012] HRLR 23, overruled [2013] EWCA Civ 192, [2013] WLR(D) 108.

¹²⁹ For a copy of the Code, visit http://www.cleveland.police.uk/downloads/Code_of_Practice_on_MoPI.pdf.

¹³⁰ For a copy of the ACPO Guidance, visit <http://www.acpo.police.uk/documents/information/2010/201004INFMOP101.pdf>.

¹³¹ Home Office, Code of Practice on the Management of Policing Information (2005), para 4.1.1.

to mean '(a) protecting life and property; (b) preserving order; (c) preventing the commission of offences; (d) bringing offenders to justice; and (e) any duty or responsibility of the police arising from common or statute law'.¹³² Apparently under this authority, the NDED has been established to enable the police 'to respond and prevent, reduce and disrupt public disorder and criminal activity associated with 'domestic extremism' and single issue campaigning in England and Wales'.¹³³ Although there is no definition of 'domestic extremism', it is used by the police 'to describe the activity of individuals or groups who carry out criminal acts of direct action to further their protest campaign, outside the democratic process'.¹³⁴

The NDED was 'maintained by the National Public Order Intelligence Unit (NPOIU) under the command of the National Coordinator for Domestic Extremism (NCDE)', both of which are now 'subsumed' within the National Domestic Extremism Unit (NDEU) under the authority of the Metropolitan Police.¹³⁵ According to press reports based on freedom of information requests, there were almost 9,000 people on the database, with information based on 'surveillance techniques, including undercover police, paid informants and intercepts, against political campaigners from across the spectrum'.¹³⁶ In the *Catt* case it was held that the entry on the database of the personal details of an 85-year-old man – who had never been convicted of any offence – was a violation of his Convention rights, the Court of Appeal also concerned about the nature of the legal authority on which this database rested.¹³⁷

DNA database

The Protection of Freedoms Act 2012 introduces important changes to the law relating to the retention of fingerprints and DNA profiles of people who have been arrested by the police but not charged, or who have been charged but acquitted. It was previously the case that once taken, samples and profiles could be retained indefinitely, even in the case of those who were innocent. The *Coalition Programme for Government* included a commitment to 'adopt the protections of the Scottish model for the DNA database', a commitment to change the existing law being required as a result of the decision of the ECtHR in *S and Marper v United Kingdom*.¹³⁸ Where it was held that the English practice at the time of retaining the DNA profiles of anyone arrested or charged – as well as those convicted – with an offence failed to meet the requirements of the ECHR, art 8, the Strasbourg court contradicting the unanimous view of the House of Lords.

Before the new law was introduced, however, steps were taken to test the implications of the *S and Marper* decision of the Strasbourg court. In *R (GC) v Metropolitan Police Commissioner*,¹³⁹ one of the applicants was arrested but not charged with assault, and the other was charged but acquitted of rape. Both applicants had DNA samples taken under the authority of PACE, and both sought to have their records destroyed after the disposal of their cases. But although the Supreme Court declared the police procedures for the retention and

¹³² *Ibid*, para 2.2.2.

¹³³ *Catt v Metropolitan Police Commissioner* [2012] EWHC 1471 (Admin), [2012] HRLR 23, para 5.

¹³⁴ *Ibid*.

¹³⁵ As explained in *Catt*, *ibid*, paras 1, 5.

¹³⁶ *The Guardian*, 26 June 2013.

¹³⁷ *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2013] EWCA Civ 192, [2013] 1 WLR 3305. The ACPO Guidance above also raises questions about the implications of the *Marper* decision on the DNA database (below) for police databases more generally.

¹³⁸ [2008] ECHR 1581, (2009) 48 EHRR 50.

¹³⁹ [2011] UKSC 21, [2011] 1 WLR 1230. See also *R (RMC) v Metropolitan Police Commissioner* [2012] EWHC 1681 (Admin) (retention of photographs).

use of DNA data to be unlawful, it nevertheless refused to order the destruction of the samples in view of the fact that Parliament was seized of the need to change the law, and that it would not be prudent to anticipate the content of the forthcoming legislation, by ordering the destruction of material the retention of which may be permissible in circumstances that would comply with Convention obligations.

The new law takes the form of a series of amendments to PACE 1984, in what is a complex regulatory framework. In essence, however, the DNA profile of someone convicted of a recordable offence may be retained indefinitely, in contrast to the position of anyone arrested or charged but not convicted for such an offence. In some such cases the DNA profiles may be retained indefinitely, as where the individual in question already has a conviction for a ‘recordable’ offence.¹⁴⁰ Otherwise, where the individual has been charged but not convicted for a ‘qualifying’ offence, the profile may be retained for up to three years.¹⁴¹ Where the individual has been arrested but not charged with a ‘qualifying’ offence, the profile may be retained with the approval of the newly established Commissioner for the Retention of Biometric Material, before whom the individual in question has a right to be heard in advance of any decision being made.

Police National Database

A third prominent database maintained by the state is the Police National Computer. The legal authority for the latter appears to be an obscure subsection in PACE 1984, in a section dealing with the ‘fingerprinting of certain offenders’. Thus by virtue of PACE 1984, s 27(4), the Home Secretary ‘may by regulations make provision for recording in national police records convictions for such offences as are specified in the regulations’. The regulations apply to (a) convictions for and (b) cautions, reprimands and warnings given in respect of any offence punishable with imprisonment and any offence specified in the Schedule to the National Police Records (Recordable Offences) Regulations 2000 (as amended).¹⁴²

Ironically, the Protection of Freedoms Act 2012 extends the recording of convictions in PACE 1984, s 27(4) to include cautions, reprimands and warnings, thereby perhaps giving retrospective effect to provisions in the 2000 regulations for which there is otherwise no authority in primary legislation. As pointed out in the Explanatory Notes to the 2012 Act, the primary purpose of the recording of this information is to enable criminal record checks to be conducted. A procedure for making such checks was established by the Police Act 1997, enabling employers (particularly those whose activity involves employees working closely with children or vulnerable adults) to require checks before engaging people in certain jobs. These checks are now made for employers by the Disclosure and Barring Service (DBS), which is the successor body to the Criminal Records Bureau and the Independent Safeguarding Authority.

As amended in 2005, the Police Act 1997 creates two different kinds of checks. The first are standard criminal record checks which list the recorded offences committed by the individual in question, as well as cautions, reprimands and warnings received. If there are no such offences or other recorded information, this should be stated in the certificate. The second are enhanced criminal record checks, which should include the foregoing matters, but also any other relevant information about the individual held by the police, which the

¹⁴⁰ A ‘recordable’ offence is one that by virtue of PACE 1984, s 27 is recordable on the national police computer (on which see below).

¹⁴¹ A ‘qualifying’ offence is an offence listed in the new PACE 1984, s 65A to include serious offences such as murder, manslaughter, sexual offences, terrorist offences, and many others.

¹⁴² SI 2000 No 1139.

chief officer ‘reasonably believes to be relevant’ and ought to be provided.¹⁴³ In including non-conviction information of this latter kind, the police must have regard to Home Office guidance. These procedures have been introduced principally for reasons of public safety, with the need for effective procedures of this kind being highlighted by the Soham murders referred to above.¹⁴⁴

Protection of the individual

It has been noticed judicially that use of these measures to obtain an enhanced check ‘has increased substantially since the scheme was first devised’, and that the number of disclosures of information by means of enhanced checks had reached 215,640 for 2007/2008 and 274,877 for 2008/2009. Moreover, ‘not far short of ten per cent of these disclosures [had additional ‘relevant information’ on them] (17,560 for 2007/2008; 21,045 for 2008/2009)’, with ‘the release of sensitive information of this kind’ in the context of increasing use of the procedure generally being said to be ‘a cause of very real public concern’.¹⁴⁵ This is because of the impact on (i) employment opportunities, (ii) the opportunity to engage in unpaid work in the community, and (iii) the opportunity to ‘establish and develop relations with others’.

It is not surprising that aspects of the procedure should be found to violate Convention rights, as a result of the disproportionate amount of information required in some cases.¹⁴⁶ On the other hand, in *R(L) v Metropolitan Police Commissioner*,¹⁴⁷ the applicant had been offered employment as a primary school assistant, which would involve close contact with children. Although she had no criminal convictions, an enhanced criminal record check revealed that her son had been placed on a child protection register because of neglect and disruptive behaviour at school. The applicant was refused the job, and claimed that the disclosure of this information violated ECHR, art 8. The Supreme Court rejected the argument that art 8 was ‘not engaged’ in this case, and held that any disclosure would have to be justified under art 8(2).

The Supreme Court also held, however, that questions of compatibility with Convention rights could be assessed within the framework of the existing legislation, which in this case did not need to be declared incompatible with these rights.¹⁴⁸ Notwithstanding the concerns expressed about this procedure, it was nevertheless held on the facts of this case that there was no ground to challenge the decision to release the information about the appellant. Amendments introduced by the Protection of Freedoms Act 2012 now enable individuals to have the inclusion of non-conviction material on an enhanced certificate reviewed by an independent monitor.¹⁴⁹ But the police are not required to allow a person who is the subject of a criminal record check to make representations before the information is released.¹⁵⁰

¹⁴³ Police Act 1997, ss 113A, 113B. This of course rather begs the question why the police should be holding such information in the first place. See above in relation to the NEDB.

¹⁴⁴ See HC 653 (2003–04) (Bichard Report).

¹⁴⁵ *R(L) v Metropolitan Police Commissioner* [2009] UKSC 3, [2009] 3 WLR 1056, para 42 (Lord Hope).

¹⁴⁶ *R(T) v Greater Manchester Chief Constable* [2013] EWCA Civ 25, [2013] 2 All ER 813 (declaration of incompatibility granted).

¹⁴⁷ [2009] UKSC 3, [2009] 3 WLR 1056.

¹⁴⁸ Compare *R(T) v Greater Manchester Chief Constable*, above, which dealt with different facts.

¹⁴⁹ Police Act 1997, s 117A.

¹⁵⁰ *R(X) v West Midlands Chief Constable* [2004] EWCA Civ 1068, [2005] 1 WLR 65.

F. Privacy and the press

The emphasis in this chapter so far has been on state interference with privacy. But, as already pointed out, private parties may also be responsible for infringing the privacy of individuals. These private parties may include employers, insurance companies and newspaper proprietors.¹⁵¹

It is true that some of the antics of the press will be caught by some of the measures already discussed, most notably telephone tapping or phone hacking,¹⁵² which may be an offence unless there is consent under s 3 of the RIPA 2000. The use of surveillance devices by journalists will not require authorisation under the RIPA 2000 and may be unlawful if a trespass is involved. But a ‘sting’ operation – in a hotel bedroom, for example – may take place with the consent of the owner of the property.¹⁵³ And as far as data protection is concerned, we have seen that by s 32 the 1998 Act expressly protects journalistic material.

Yet the invasion of privacy by the press has given rise to great concern in recent years. Indeed, it is the infringement of privacy by the newspapers rather than by public authorities which has been primarily responsible for the growing demands for a legally enforceable right to privacy. There is a duty under the ECHR to take positive steps to ensure that Convention rights are observed, a duty which ‘may involve the adoption of measures even in the sphere of relations between individuals’.¹⁵⁴ In this section we consider the evolution of such a right to protect individuals from what is in effect the violation of their privacy by unwanted publicity.¹⁵⁵

Breach of confidence

The starting point is the equitable doctrine of breach of confidence.¹⁵⁶ The genesis of the modern action is *Prince Albert v Strange*,¹⁵⁷ which related to a number of etchings which the Prince had made of close members of his family. The defendant had obtained a copy of the etchings from an employee of a printer to whom they had been given by the Prince so that they could be reproduced. The Prince secured an injunction to restrain the defendant from exhibiting the etchings. In somewhat tendentious terms, the Lord Chancellor rejected the claim of the defendant that he was ‘entitled to publish a catalogue of the etchings, that is to say, to publish a description or list of works or compositions of another, made and kept for the private use of that other, the publication of which was never authorised, and the possession of copies of which could only have been obtained by surreptitious and improper means’.¹⁵⁸ It was held that an injunction could lie in property, trust, confidence or contract.

¹⁵¹ See *McGoman v Scottish Water* [2005] IRLR 167, and *Martin v McGuinness* 2003 SLT 1424.

¹⁵² On which see HC 375 (2006–07), HC 362 (2009–10), paras 339–495 (dealing largely with the *News of the World*).

¹⁵³ *Grobelaar v News Group Newspapers Ltd* [2001] 1 WLR 3024.

¹⁵⁴ *Spencer v UK* (1998) 25 EHRR CD 105, at p 112, citing *Plattform ‘Ärzte für das Leben’ v Austria* (1988) 13 EHRR 204.

¹⁵⁵ There are a number of miscellaneous statutory provisions which offer protection of the same kind. These are designed to prevent the publication of confidential or highly personal information which is disclosed in legal proceedings from being published. See Judicial Proceedings (Regulation of Reports) Act 1926 and the Children and Young Persons Act 1933, s 39. For an important discussion of the scope of the latter, see *Re S (a child)* [2004] UKHL 47, [2005] 1 AC 593.

¹⁵⁶ See Gurry, *Breach of Confidence*, H Fenwick and G Phillipson [1996] CLJ 447 and (2000) 63 MLR 660, and G Phillipson (2003) 66 MLR 726.

¹⁵⁷ (1849) 1 Mac&G 25. See also *Pollard v Photographic Co* (1888) 40 Ch D 345.

¹⁵⁸ *Ibid.*, at p 42.

In *Argyll v Argyll*,¹⁵⁹ the court restrained the publication of confidential marital secrets and in doing so made clear that ‘the court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right of law’. The publication of confidential information can thus be restrained, even though there is no breach of contract or any violation of property rights.¹⁶⁰ Actions for breach of confidence have been brought on a number of occasions since *Argyll v Argyll* to restrain confidential information of a wide and varied kind.¹⁶¹ In one case, it was held that an action could be brought where the defendant disclosed the existence of a sexual relationship between the applicant and another woman (a murder victim) which the applicant had told the defendant in confidence.¹⁶² In another, it was held that a newspaper could be restrained from publishing a story to the effect that two unnamed doctors with AIDS were employed by a particular health authority and were continuing to practise despite their condition.¹⁶³

It has been held that there was a breach of confidence involved in the tapping of the applicant’s telephone by a newspaper,¹⁶⁴ but that there was no breach of confidence when it was done by the police investigating criminal offences.¹⁶⁵ Thus although there is a public interest in protecting confidential information, there may be circumstances where a more compelling public interest favours disclosure.¹⁶⁶ As will be discussed below, liability for breach of confidence has evolved quickly in recent recent years to encapsulate a wider liability for invasion of privacy, which is now likely often to be a feature of cases involving press disclosures of unwanted publicity. There remain circumstances, however, where an action to restrain a publication on the ground of breach of confidence alone may continue to be appropriate,¹⁶⁷ or where the confidential nature of information is itself an important ingredient in action based principally on other grounds.¹⁶⁸

Press Complaints Commission

Before addressing developments under the Human Rights Act, it is to be recognised that there are important self-regulatory measures designed to deal with privacy. Established and funded by newspaper publishers,¹⁶⁹ and subject to regular parliamentary scrutiny,¹⁷⁰ the Press Complaints Commission has produced a Code of Practice which deals with privacy, along with a number of other matters.¹⁷¹ So far as privacy is concerned, the Code provides as follows:

¹⁵⁹ [1967] Ch 302. The protection of confidentiality does not apply to sexual relationships outside marriage in the same way: *A v B plc* [2002] EWCA Civ 337, [2003] QB 195.

¹⁶⁰ The ingredients required to establish a breach of confidence are set out in *Coco v AN Clark Engineers Ltd* [1969] RPC 41, at p 47, and in *Attorney-General v Guardian Newspapers (No 2)* [1990] AC 109, at p 281.

¹⁶¹ See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413; *Fraser v Evans* [1969] 1 QB 349; *Lion Laboratories Ltd v Evans* [1985] QB 526.

¹⁶² *Stephens v Avery* [1988] Ch 449. Also *Barrymore v News Group Newspapers Ltd* [1997] FSR 600.

¹⁶³ *X v Y* [1988] 2 All ER 648.

¹⁶⁴ *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408.

¹⁶⁵ *Malone v Metropolitan Police Commissioner* [1979] Ch 344.

¹⁶⁶ *Attorney-General v Guardian Newspapers (No 2)*, note 160 above.

¹⁶⁷ *Napier v Pressdram Ltd* [2009] EWCA Civ 445, [2010] 1 WLR 934.

¹⁶⁸ *Associated Newspapers Ltd v Prince of Wales* [2006] EWCA Civ 1776, [2008] Ch 57.

¹⁶⁹ For background, see Cm 1102, 1990 (Calcutt report), and subsequently Cm 2135, 1993. The Commission has an independent chair as well as independent members and representatives of the national and regional press.

¹⁷⁰ See HC 294 (1992–93), HC 96 (1996–97), HC 375 (2006–07), HC 326 (2009–10).

¹⁷¹ But with other matters as well, relating to various questions of journalistic ethics.

3 Privacy

- (i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.
- (iii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.
- (ii) It is unacceptable to photograph individuals in private places without their consent.

Private places are defined to mean 'public or private property where there is a reasonable expectation of privacy'. The PCC hears complaints about breaches of the Code of Practice and a newspaper is required to print any PCC adjudication to which it is a party 'in full and with due prominence'. But 'the PCC has no legal power to prevent publication of material, to enforce its rulings or to grant any legal remedy against the newspaper in favour of the victim'.¹⁷²

Although the PCC is not a statutory body and its code of practice is not legally enforceable, there was concern during the enactment of the Human Rights Act 1998 that it might nevertheless be a public body for the purposes of that Act.¹⁷³ This means that it would be required to act in such a way as not to violate Convention rights and that it could be restrained in legal proceedings should it do so, either in the way in which it conducted its proceedings or in the adjudications which it gave. This would mean in particular that it would have to give due weight to the right to freedom of expression.

Concerns expressed in Parliament by Lord Wakeham (then chairman of the PCC) led to an amendment to the Human Rights Bill and the introduction of what is now s 12 – a solution which emphasises that unlike in some countries, in this country freedom of expression is 'not in every case the ace of trumps', and must be qualified by other societal values, even though 'it is a powerful card' to which the courts must always pay proper respect.¹⁷⁴ The amendment provides that courts are required to give due weight to freedom of expression (s 12(4)) – which they would surely be required to do anyway.¹⁷⁵ But it also provides that in proceedings which relate to journalistic, literary or artistic material, the court is to have regard – among other matters – to whether it would be in the public interest for the material to be published, as well as 'any relevant privacy code'.

What this seems designed to achieve is that if proceedings are brought to restrain a publication which relates to the private life of the applicant, the courts must take into account two questions: (i) is publication in the public interest, and (ii) has the newspaper complied with the PCC code? If the answer to both is 'yes', then the courts are less likely to restrain publication than if the answer is 'no'. In this way the PCC Code of Practice has an indirect legal effect: it is still not legally enforceable as such, but failure by a newspaper to comply with it could lead to a publication being restrained.¹⁷⁶ In the words of Brooke LJ in *Douglas v Hello! Ltd*: 'A newspaper which flouts cl 3 of the code is likely in those circumstances to have its claim to an entitlement to freedom of expression trumped by article 10(2) considerations of privacy.'¹⁷⁷

In recent years, however, all this seems to have been largely academic, with (i) the newspaper 'phone-hacking' and other allegations of unethical behaviour having brought the

¹⁷² *Spencer v UK* (1998) 25 EHRR CD 105.

¹⁷³ See HL Deb, 24 November 1997, col 772 (Lord Wakeham). On judicial review of the Commission, see *R (Ford) v Press Complaints Commission* [2001] EWHC 683 (Admin), [2002] EMLR 95.

¹⁷⁴ *Douglas v Hello! Ltd* [2001] QB 967, at p 982 (Brooke LJ).

¹⁷⁵ Cf *Douglas v Hello! Ltd*, *ibid*, at p 1004 (Sedley LJ).

¹⁷⁶ On the use of the code, see *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, [2013] WLR (D) 189 (no injunction, code apparently complied with).

¹⁷⁷ *Douglas v Hello! Ltd*, above, at p 994. See also *A v B plc* [2002] EWCA Civ 337, [2003] QB 195.

whole system of press self-regulation by the PCC irreparably into disrepute,¹⁷⁸ leading to calls for a new self-regulatory body, though one which is both independent and underpinned by statute.¹⁷⁹ In any event, compliance with the code cannot be conclusive: the fact that a newspaper has followed the code will not be a decisive factor if, for example, the courts take the view that the code or the way in which it is applied falls short of Convention rights as protected by art 8.¹⁸⁰

The Human Rights Act

Although the Human Rights Act does not permit an individual to sue a newspaper for a violation of privacy, the Act has nevertheless significantly advanced the cause of those who have argued that self-regulation of the newspaper industry is not a secure enough basis for the protection of privacy.¹⁸¹ It is true that there is no duty on the part of the courts to ‘create a free standing cause of action based on the Convention’, but there is nevertheless a duty ‘to act compatibly with Convention rights in adjudicating upon existing common law causes of action’,¹⁸² leading to claims that the English courts should ‘so far as possible, develop the common law in such a way as to give effect to Convention rights’, and that ‘in this way horizontal effect is given to the Convention’.¹⁸³

Since the Human Rights Act came into force in 2000, there have been a number of high profile cases brought by ‘celebrities’ and other people in the public eye challenging the publication in the press of information about their private lives. In dealing with these cases of alleged breach of private life the courts responded initially by absorbing Convention rights ‘into the long established action for breach of confidence’.¹⁸⁴ With the passage of time, however, it appears that a new tort of breach of privacy is emerging under the shadow of the Human Rights Act, which is related to and overlaps with (but is independent of) liability in equity for breach of confidence.¹⁸⁵

Perhaps the landmark case in this process is the House of Lords decision in *Campbell v MGN Ltd*,¹⁸⁶ where a fashion model claimed successfully in part that her privacy had been violated by a newspaper which revealed details of her drug addiction. The House of Lords held that the newspaper had been entitled to disclose that the appellant was a drug addict who was receiving treatment, but not the details of the treatment she was receiving. The House of Lords also held that this conclusion was reinforced by clause 3(i) of the Press Complaints Commission’s Code of Practice. In explaining the developing law of confidence, Lord Nicholls said:

The continuing use of the phrase ‘duty of confidence’ and the description of the information as ‘confidential’ is not altogether comfortable. Information about a person’s private life would not, in ordinary usage, be described as ‘confidential’. The more natural description today is that the information is private. *The essence of the tort is better encapsulated now as misuse of private information.*¹⁸⁷

¹⁷⁸ On which see the excoriating criticism by Sir Brian Leveson: HC 779 (2012–13).

¹⁷⁹ *Ibid.*

¹⁸⁰ See *Venables v News Group Newspapers Ltd* [2001] EWHC 32 (QB), [2001] Fam 430.

¹⁸¹ For a good discussion, see HC 362 (2009–10) (Culture, Media and Sport Select Committee).

¹⁸² *Venables v News Group Newspapers Ltd* (note 180 above), at p 446.

¹⁸³ *Associated Newspapers Ltd v Prince of Wales* [2006] EWCA Civ 1776, [2008] Ch 57, at para 25 (Lord Phillips).

¹⁸⁴ *A v B plc*, note 159 above, at para [4] (Woollf LCJ). See G Phillipson (2003) 66 MLR 726.

¹⁸⁵ For a discussion of this issue, see *Mosley v NGN* [2008] EWHC 1777 (QB), [2008] EMLR 20. See also R Buxton (2009) 29 OJLS 413.

¹⁸⁶ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; and subsequently *Campbell v MGN Ltd (No 2)* [2005] UKHL 61, [2005] 1 WLR 3394.

¹⁸⁷ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, at para 14. Emphasis added. In *Mosley* (above), it was explained that this cause of action applies ‘even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence’ (para 7).

Under the guidance of these developments, it was held that the private journals of the Prince of Wales commenting on the handover of Hong Kong to China were confidential and that the *Daily Mail* had acted unlawfully in publishing them. The journals in question had been leaked by a former employee of the Prince, and the Court of Appeal addressed the situation where publication ‘involves a breach of a relationship of confidence, an interference with privacy or both’, reinforcing the sense that privacy is emerging as a separate but overlapping cause of action.¹⁸⁸ In *Associated Newspapers Ltd v Prince of Wales*,¹⁸⁹ the Court of Appeal also emphasised the importance of art 10, a matter given little consideration in the past in determining whether a publication should be restrained on public interest grounds.

Where no breach of a confidential relationship is involved, a balance will have to be struck between art 8 and art 10 rights and ‘will usually involve weighing the nature and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information’.¹⁹⁰ Where, however, there is also a breach of confidence involved, this will tilt the balance more in the direction of restraining the publication, as in this case where it was said that ‘those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential’.¹⁹¹

The impact of the evolution of the law since *Campbell* is to be seen even more clearly in *Murray v Big Pictures (UK) Ltd*,¹⁹² where the child of a famous author (J K Rowling) succeeded in a claim that his art 8 rights had been violated by defendants who surreptitiously took photographs of him while in a public place being accompanied by his parents. It appears that injunctions may be obtained in such cases,¹⁹³ and that damages may be recoverable.¹⁹⁴

G. Conclusion

By virtue of the Human Rights Act, art 8 is now enforceable in the domestic courts against public authorities.¹⁹⁵ This means that the exercise of different powers referred to in sections B and C of this chapter may now be challenged under the Human Rights Act and indeed that it may be possible to challenge some of the statutory provisions as being incompatible with Convention rights. But although none of the legislation can be presumed to be watertight, it is most unlikely that many challenges will succeed, though it is possible that gaps will continue to be exposed in coverage the regulatory framework for the interception of communications.¹⁹⁶

There are also unlikely to be many cases where the Human Rights Act will add much in practice to the legal armoury of the individual concerned that powers of surveillance and

¹⁸⁸ See also *Lord Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295, [2007] 3 WLR 289; *Mosley v NGN Ltd*, above; and *Terry v Persons Unknown* [2010] EWHC 119 (QB), [2010] Fam Law 453.

¹⁸⁹ [2006] EWCA Civ 1776, [2008] Ch 57.

¹⁹⁰ *Ibid*, para 65.

¹⁹¹ *Ibid*, para 67.

¹⁹² [2008] EWCA Civ 446, [2009] Ch 481.

¹⁹³ *Lord Browne v Associated Newspapers Ltd*, above (subject to the requirements of the HRA, s 12(3) being met, on which see ch 14 above). See also *Terry v Persons Unknown* (above), and the controversial issue of ‘super-injunctions’, discussed at pp 476–7 below.

¹⁹⁴ *Mosley*, above, and *AAA v Associated Newspapers Ltd*, above. Damages may be aggravated but not exemplary.

¹⁹⁵ See ch 14.

¹⁹⁶ *Liberty v United Kingdom* (2009) 48 EHRR 1 (in relation to the interception of up to 10,000 telephone calls coming from Dublin to London between 1990 and 1997).

interception have been improperly exercised. By virtue of their different supervisory roles, senior and retired judges are now directly involved in the supervision and management of the different schemes, with the substance of which they seem broadly content, rarely upholding complaints that the exercise of a power to infringe privacy has been improperly authorised.

Similarly, the legal powers of government and others relating to the storage and use of information about individuals in section D above have been shown to be remarkably robust, though this is less true of the various police databases in section E. Nevertheless, it has not always been easy to challenge other powers of public authorities on privacy grounds, such as taking photographs of protestors,¹⁹⁷ the releasing of photographs of wanted suspects,¹⁹⁸ or advising the owners of caravan sites about the identity of convicted paedophiles.¹⁹⁹

The weight of any right to privacy derived from the Human Rights Act is thus likely to be felt most acutely in the field of private law, to protect the individual's right to privacy from the exercise of private rather than state power, particularly that exercised by the press. It is true that the courts have emphasised the need in such cases to balance the interests of privacy against the wider interest in free speech. Newspaper proprietors and editors nevertheless complain that the balance is tilted too heavily in favour of the individual, though it is also the case that the conduct of some newspapers in the pursuit of profit in recent years has been disgraceful.²⁰⁰

Yet if anything, the legal balance is likely to be tilted even more in the direction of the right to privacy at the expense of freedom of expression, following Sir Brian Leveson's inquiry on press culture, practices and ethics.²⁰¹ Reporting in 2012, this also found sections of the press to have acted 'outrageously' in recent years, in clear breach of their own PCC Code of Practice. While it is unclear whether Sir Brian's proposals for a new independent statutory authority will ever be implemented, his report nevertheless reminds us powerfully of why privacy needs protection from private bodies as well as public authorities.²⁰²

¹⁹⁷ *Wood v Metropolitan Police Commissioner* [2009] EWCA Civ 414, [2010] 1 WLR 123 (but unjustifiable retention and storage of photographs may breach Convention rights). See now *Catt v Metropolitan Police Commissioner* [2013] EWCA Civ 192, [2013] 1 WLR 3305, and *R(RMC) v Metropolitan Police Commissioner* [2012] EWHC 1681 (Admin).

¹⁹⁸ *Hellewell v Derbyshire Chief Constable* [1995] 1 WLR 804 (pre HRA).

¹⁹⁹ *R v North Wales Police Chief Constable, ex p Thorpe* [1999] QB 396 (pre HRA, but ECHR considered).

²⁰⁰ See HC 326 (2009–10).

²⁰¹ HC 779 (2012–13).

²⁰² On the Leveson report, see pp 452–3 below.

CHAPTER 17

Right to freedom of expression

The right to freedom of expression, in the words of art 10 of the European Convention on Human Rights, includes freedom to hold opinions ‘and to receive and impart information and ideas without interference by public authority and regardless of frontiers’. This freedom is fundamental to the individual’s life in a democratic society.¹ In the first place, it has a specific political content. The freedom to receive and express political opinions, both publicly and privately, is linked closely with the freedom to organise for political purposes and to take part in free elections:

Without free elections the people cannot make a choice of policies. Without freedom of speech the appeal to reason which is the basis of democracy cannot be made. Without freedom of association, electors and elected representatives cannot bind themselves into parties for the formulation of common policies and the attainment of common ends.²

So does freedom of expression closely affect freedom of religion.³ Lawyers remember *Bushell*’s case in 1670 as having established the right of the jury to acquit an accused ‘against full and manifest evidence’ and against the direction of the judge: they should also remember that Bushell was foreman of the jury which acquitted the Quakers William Penn and William Mead on charges of having preached to a large crowd in a London street contrary to the Conventicle Act.⁴ Moreover, liberty of expression is an integral part of artistic, cultural and intellectual freedom – the freedom to publish books or produce works of art, however disconcerting they may be to the prevailing orthodoxy.⁵

A. The nature of legal protection

Rights and restraints

It has been said that freedom of expression is a ‘sinew of the common law’.⁶ Individuals are thus free to speak and write what they like, provided that what they say is not otherwise unlawful. In addition, the law of parliamentary privilege provides protection for proceedings in Parliament,⁷ and there is a growing body of legislation that in different ways promotes and protects free speech in its widest sense. A statutory right to information is to be found in the

¹ For a compelling statement, see *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, at para [21].

² Jennings, *Cabinet Government*, p 14. See also Laski, *A Grammar of Politics*, ch 3.

³ The right to freedom of religion is separately protected by ECHR, art 9 and in an increasingly secular society raises new questions about freedom of religious expression: see *R (National Secular Society) v Bideford Town Council* [2012] EWHC 175 (QB), [2012] 2 All ER 1175 (local authority no power to say prayers at council meetings).

⁴ *R v Penn and Mead* (1670) 6 St Tr 951.

⁵ See also *R v Home Secretary, ex p Simms* [2000] 2 AC 115, at p 126, per Lord Steyn. For a good account of some of the issues discussed in this chapter, see Barendt, *Freedom of Speech*.

⁶ *R v Advertising Standards Authority, ex p Vernons* [1993] 2 All ER 202 (Laws J).

⁷ See ch 9. But the protection of parliamentary privilege may be lost if comments in Parliament are repeated outside: *Buchanan v Jennings* [2004] UKPC 36, [2005] 1 AC 115. See further pp ***_*** below.

Data Protection Act 1998 and the Freedom of Information Act 2000.⁸ Both of these measures aid the work of the investigative journalist, whose role has been acknowledged judicially.⁹

Also important is the Contempt of Court Act 1981, s 10, which protects the journalist from having to reveal his or her sources, although as discussed in chapter 13 above, this provision has been narrowly construed against the journalists by the courts. It was also shown little respect by the Foreign Affairs Select Committee in 2003, when it was interrogating the journalist Andrew Gilligan about the sources for his report that government documents relating to the Iraq war had been ‘sexed up’.¹⁰ In addition to the foregoing, the Public Interest Disclosure Act 1998 provides a limited protection for ‘whistleblowers’, that is to say workers who bring into the public domain serious concerns about the conduct of their employer’s business.¹¹

It remains the case nevertheless that freedom of expression is subject to a wide range of restrictions, many of which are long-standing. These restrictions are of two kinds: the first is censorship or prior restraint of material by state authorities before it is published or displayed. Restrictions of this kind have often been viewed with great suspicion, and have been strongly deprecated by the US Supreme Court in cases arising under the free speech guarantee in the First Amendment. Yet despite Blackstone’s insistence that free speech meant ‘laying no previous restraints upon publication’,¹² there have been concerns about censorship in Britain,¹³ while the use of injunctions and so called ‘super-injunctions’ to restrain publications has seen a controversial revival in recent years.

So far as restrictions of the second kind are concerned, these take the form of the imposition of penalties or the granting of redress in the case of someone specifically harmed by the material, after the event. There is a wide range of criminal offences which restrict free speech. These offences exist to protect public order; to protect public morality by punishing the publication of obscene material; and by virtue of the law on contempt of court, to maintain the authority and impartiality of the judiciary. Restrictions imposed by the recently reformed law of defamation exist to protect the rights and reputations of others, while the developing law on breach of confidence may help to protect the privacy of individuals from unwanted intrusion.

Human Rights Act

The right to freedom of expression has been formally strengthened by the Human Rights Act 1998, although even before the enactment and coming into force of this measure the right to freedom of expression was winning a new prominence in the case law, being supported by a number of powerful judicial dicta and extrajudicial statements.¹⁴ It is true that the bold assertion of freedom of expression in art 10 of the ECHR is subject

to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

⁸ See chs 16 and 11 respectively.

⁹ *Louchansky v Times Newspapers Ltd* [2001] EWCA Civ 536, [2002] QB 321. Compare *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935 (esp per Lord Reed).

¹⁰ HC 1044 (2002–03).

¹¹ See J Gobert and M Punch (2000) 63 MLR 25; and Hobby, *Whistleblowing and the Public Interest Disclosure Act 1998*. There are, however, serious concerns about the lack of protection for whistleblowers in the NHS in particular. See HC 898 (2012–13) (Francis Report).

¹² *Commentaries*, 9th edn, IV, p 151.

¹³ The classic legal study of censorship is O’Higgins, *Censorship in Britain*.

¹⁴ See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, *Louchansky v Times Newspapers Ltd*, above, and *R v Shayler*, above.

In this sense freedom of expression is the most heavily qualified of all the Convention rights, paradoxically perhaps in light of Lord Steyn's acknowledgement of freedom of expression as 'the lifeblood of democracy'.¹⁵

Nevertheless, the Human Rights Act contains special protection in the sense that no remedy is to be granted which affects the exercise of the Convention right to freedom of expression without ensuring that the respondent has been notified of the proceedings and given an opportunity to reply (s 12(2)). This is particularly important in the context of an application for an interim injunction to restrain a publication. So too is the parallel requirement that interim relief is not to be granted before a trial 'unless the court is satisfied that the applicant is likely to establish that publication should not be allowed' (s 12(3)). In all cases 'the court must have particular regard to the importance of the Convention right to freedom of expression' (s 12(4)).¹⁶

But the courts seem to have taken a cautious approach to these provisions, which are said not to require them 'to treat freedom of expression as paramount'.¹⁷ In fact the Human Rights Act has made only a limited impact in the field of freedom of expression, despite the very robust judicial dicta in its defence to which we have already referred. Part of the reason for this limited impact is that 'the courts emphasised the importance of freedom of expression or speech long before the enactment of the 1998 Act'.¹⁸ Indeed, a number of important decisions have been taken in recent years to extend the boundaries of free speech quite independently of the Human Rights Act (although clearly within its shadow),¹⁹ but perhaps not as far as many would like.

Another reason has been the willingness on the part of the courts to have the fullest regard for the rights and freedoms of others.²⁰ So we find that the rights of the press – and others – have been subordinated to the demands of copyright, defamation, 'public morality', national security, and confidentiality. Indeed, as discussed in chapter 14, the Act may have helped fashion a new restraint on press freedom by encouraging the development of an enforceable right to privacy on the back of the equitable doctrine of breach of confidence. These developments reflect an appreciation on the part of the judges that large newspapers can be engines of oppression, an appreciation most vividly expressed in Sir Brian Leveson's inquiry into the culture, practices and ethics of the press.²¹

B. Prior restraint: censorship and ownership

Censorship

For many years dramatic and operatic performances in Great Britain were subject to the prior censorship of the Lord Chamberlain, an officer of the royal household. The Theatres Act 1968 abolished the requirement that plays should receive a licence before being performed (s 1).²² In place of censorship, rules against obscenity similar to those in the Obscene Publications Act 1959 are applied to the performance of plays (s 2), subject to a defence of public good (s 3). Other criminal restraints placed on theatrical performances are in respect

¹⁵ *R v Home Secretary, ex p Simms* [2000] 2 AC 115, at p 126.

¹⁶ See ch 14 above.

¹⁷ *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All ER 385, at p 391.

¹⁸ *Ibid.*

¹⁹ For example, *Reynolds v Times Newspapers Ltd* [2001] AC 127.

²⁰ As illustrated by *R (Pro-Life Alliance) v BBC* [2003] UKHL 23; [2004] 1 AC 185.

²¹ HC 779 (2012–13).

²² For the background, see HC 503 (1966–7). See also Findlater, *Banned!*

of the use of threatening, abusive or insulting words or behaviour intended or likely to stir up racial hatred,²³ or occasion a breach of the peace.²⁴

Prosecutions for these various offences, including obscenity, require the consent of the Attorney General in England and Wales, though there are proposals to transfer this responsibility to the DPP or some other public official.²⁵ Unusually, the Theatres Act 1968, s 2(3) prescribes that ‘proceedings on indictment for presenting or directing an obscene performance cannot be commenced more than two years after the commission of the offence’.²⁶ In addition, there may be no prosecution at common law for any offence the essence of which is that a performance of a play is ‘obscene, indecent, offensive, disgusting or injurious to morality’; nor may there be prosecutions under various statutes relating to indecency (1968 Act, s 2(4)), an important safeguard against moral censorship.

Censorship of films originated unintentionally with the Cinematograph Act 1909, which authorised local authorities to license cinemas in the interests of public safety, mainly against fire. In fact, with the approval of the courts,²⁷ local authorities extended the scope of licensing to other matters to include the approval of the films shown in licensed cinemas.²⁸ In the Cinematograph Act 1952, and more recently in the Cinemas Act 1985, Parliament confirmed the power of local authorities to license the films shown and required licensing authorities to impose conditions restricting children from seeing unsuitable films. The main work of censorship of films is undertaken by the British Board of Film Classification, a non-statutory body set up by the film industry, with the approval of central and local government.

The board is responsible for the classification of films with special reference to the admission of young children and others under 18. Although a licensing authority normally allows the showing of films that have been classified by the board, the authority may not transfer its functions to the board and must retain power to review decisions of the board.²⁹ Thus it may refuse a local showing to a film classified by the board; it may vary the board’s classification; or it may grant permission to a film refused a certificate by the board. Powers of local censorship are not popular with the film industry, but a case can be made for maintaining some local variation in issues of public morality.

The Video Recordings Act 1984 established a scheme for the censorship of video recordings,³⁰ under which it is an offence to supply (whether or not for reward) any recording for which no classification certificate has been issued (s 9). Certain recordings are exempt from this requirement (such as those concerned with sport, religion or music and those designed to be educational) (s 2), and so are certain kinds of supply (s 4). A video work may not, however, be an exempted work if to any extent it depicts or is designed to encourage such matters as sexual or violent activity (s 2(2)).³¹ Nor is it exempt if to any extent it depicts criminal activity which is likely to any significant extent to stimulate or encourage the commission of an offence (s 2(3)).

²³ Public Order Act 1986, s 20.

²⁴ Theatres Act 1968, s 6.

²⁵ Private prosecutions may be launched on other grounds, as in 2007 when a private prosecution for blasphemy was brought unsuccessfully by a Christian group in relation to ‘Jerry Springer – the Opera’. Blasphemy has since been abolished. See below, p 458.

²⁶ *R v J* [2004] UKHL 42, [2005] 1 AC 562, at para 55.

²⁷ *LCC v Bermondsey Bioscope Ltd* [1911] 1 KB 445.

²⁸ See generally, Hunnings, *Film Censors and the Law*; Williams Report on Obscenity and Film Censorship, Cmnd 7772, 1979; Robertson, *Freedom, the Individual and the Law*, pp 238–41.

²⁹ *Ellis v Dubowski* [1921] 3 KB 621; *Mills v LCC* [1925] 1 KB 213.

³⁰ The Act was unusually repealed and revived in its entirety by the Video Recordings Act 2010 (without amendment), to comply with overlooked obligations under EU law. See ch 6 above.

³¹ See *Kent CC v Multi Media Marketing*, *The Times*, 9 May 1995.

Classification is conducted by the British Board of Film Classification, which may certify that a video work is suitable for general viewing, suitable only for persons over the age of 18,³² or that it is to be supplied only in a licensed sex shop.³³ Although not an enforcement agency, the BBFC's website reveals that it assists public authorities concerned with the illegal supply of videos, and also plays a part in the enforcement of the Video Recordings Act 1984, working with local enforcement agencies (such as trading standards officers) for this purpose. The main concerns here are the sale of material to people under the age of 18, the distribution and sale of unclassified material, and the unauthorised sale of restricted material in an unlicensed sex shop.

Ownership and self-regulation

The historic freedom of the press means that, subject to the civil and criminal restraints on publication which will be considered later, any person or company may publish a newspaper or magazine without getting official approval in advance, provided they have the financial means to do so. For economic reasons, this liberty is unlikely to be exercised effectively on a national basis except by a very few newspaper publishers. Fears of a movement towards monopoly conditions in sectors of the press led to the enactment of provisions to ensure that newspaper mergers above a certain scale did not take place in a manner contrary to the public interest.

This is not so much a restraint as a device to ensure diversity in opinion, and is a problem compounded now with the same global companies playing a large part in both the television and newspaper industries. In the interests of diversity, it is important to ensure that there is not over-concentration of media ownership in a few hands, and important also to ensure that private media owners do not misuse the considerable power that ownership bestows. Britain has not, however, followed the route of some countries (notably Sweden) by subsidising newspaper owners in order more actively to promote competition and diversity.³⁴

The current regulatory regime is now to be found in the Enterprise Act 2002, which was extended with modifications to media mergers by the Communications Act 2003. This replaced the procedure that operated under the Fair Trading Act 1973. Media mergers may involve advice, assessment and judgment by the Office of Communications (OFCOM) and the Competition and Markets Authority (previously the Competition Commission),³⁵ and ultimately a merger may be blocked or modified by the Secretary of State on public interest grounds. These grounds relate to the need for accurate presentation of news in newspapers, free expression of opinion in newspapers, and a sufficient plurality of views in the newspaper market.³⁶

The operation of these measures gives rise to acute political difficulty from time to time, with the demands of politically powerful media proprietors often putting ministers in uncomfortable positions. Perhaps as a result, the British newspaper industry remains heavily concentrated in the hands of a few proprietors with four principal newspaper publishers dominating both the daily and Sunday circulation. While they play an important role probing the conduct of government, it is not to be forgotten that most newspapers are

³² On which see *Tesco Stores Ltd v Brent London Borough Council* [1993] 1 WLR 1037.

³³ For the procedures adopted by the Board, see *Wingrove v UK* (1996) 24 EHRR 1. For appeals to the Video Appeals Committee, see S Edwards [2001] Crim LR 305. On the implications of judicial review, see C Munro [2006] Crim Law Rev 957.

³⁴ Questions of media concentration and competition are discussed in HC 779 (2012–13) (Leveson report). See also HL Paper 122 (2007–08).

³⁵ See OFCOM, *Measuring Media Plurality* (2012).

³⁶ Enterprise Act 2002, s 58(2A) and (2B), as inserted by the Communications Act 2003. And now *British Sky Broadcasting Group plc v Competition Commission* [2010] EWCA Civ 2, [2010] 2 All ER 97.

commercial enterprises whose first duty is one arising under private law to maximise shareholder return. Press demands for special regulatory immunity should always be treated with caution.

Since 1953 newspaper proprietors have accepted a measure of self regulation to deal with abuse on the part of their editors and journalists. The Press Complaints Commission was created in 1991, to replace the Press Council, the Commission being funded by a voluntary levy of newspaper and magazine publishers. Apart from the independent chair, the Commission includes members with no press connections, as well as senior editors drawn from the national and regional newspapers and magazines. Its primary responsibilities include the handling of complaints of alleged violations of the Code of Practice which was published in 1991 (by the newspaper industry) to regulate its conduct on a range of matters dealing mainly with accuracy and privacy.

Following a number of highly publicised abuses, in 2012 Sir Brian Leveson proposed a new regulatory model. While sympathetic to the principle of press self-regulation, Sir Brian reported that a new body should be established by the industry, but that it should be independent and underpinned by statute.³⁷ Accepting the need for change, the government proposed a variation, in the shape of a regulatory body established by royal charter rather than statute, with powers to award fines of up to £1 million, but with an immunity for participating newspapers from liability in defamation.³⁸ In addition, the royal charter would be subject to change only if both Houses of Parliament approved a draft of the change, in each case with the support of two thirds of those voting.³⁹

C. Regulation of television and radio⁴⁰

The BBC

In the case of broadcasting, technical reasons have so far prevented access being open to all comers as in the case of the press. Even if all broadcasting were to be provided by privately owned companies, it would still be necessary for a regulatory agency to allocate channels and frequencies to them. Until 1954, the British Broadcasting Corporation enjoyed a public monopoly of all broadcasting in the United Kingdom and it still provides a large share of broadcasting services. The BBC is a corporation set up by royal charter and it operates under the strategic direction of the BBC Trust and the Chairman of the BBC.

The BBC's charter was renewed in 2006 for a period of ten years,⁴¹ together with a new agreement between the corporation and the government whereby the broadcaster is subject to a number of duties.⁴² These are similar in terms to those imposed on the commercial broadcasters by legislation. The charter is debated by both Houses of Parliament before it is granted by the Queen in Council, though it is open to question whether the BBC should be regulated by legislation rather than royal prerogative.⁴³ Although the BBC is mainly financed

³⁷ HC 779 (2012–13).

³⁸ Crime and Courts Act 2013, s 34 et seq (conditional immunity from exemplary damages for newspapers that participate in the self-regulatory system proposed by the government).

³⁹ For the final draft of the Royal Charter (11 October 2013), which has the support of the three main political parties, see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249783/Final_Draft_Royal_Charter_11_Oct_2013.pdf.

⁴⁰ Barendt, *Broadcasting Law*; Craufurd Smith, *Broadcasting Law and Fundamental Rights*.

⁴¹ Cm 6925, 2006.

⁴² Cm 6872, 2006.

⁴³ See HC 82 (2004–05) (Culture, Media and Sport Committee).

by a grant from the exchequer, equivalent to the net revenue of television licence fees, the structure of the BBC seeks generally to maintain its independence of the government of the day.

The BBC has a number of public purposes set out in the agreement with the government, under which it is still required to broadcast a daily account of the proceedings in Parliament. The regulatory provisions of the agreement mean that the BBC may not broadcast its own opinions about current affairs, being under a duty to do all it can to treat controversial subjects with due accuracy and impartiality, both in its news services and in other programmes dealing with matters of public policy or of political or industrial controversy. But ‘due impartiality does not require absolute neutrality on every issue or detachment from fundamental democratic principles’, the meaning of which is not specified.

Under the general obligations of the BBC, the government in an emergency may request the corporation to broadcast certain specified material, and may also request that it does not broadcast other specified material, requests which under the terms of the agreement must be met. Apart from these specific powers, the government may not control the BBC’s programmes, although it may bring great pressure to bear, and disputes may erupt between the government and the BBC, as in 2003 when the government vigorously contested a claim by a BBC journalist that it had deliberately exaggerated Saddam Hussein’s weapons capabilities in the run up to the invasion of Iraq in that year.⁴⁴

Commercial television and radio

Television and radio services financed by advertising are now governed by the Broadcasting Acts 1990 and 1996, and by the Communications Act 2003. The Office of Communications (OfCOM) is the regulatory authority, replacing a number of bodies which previously performed a regulatory role, including the Independent Television Commission and the Broadcasting Standards Commission. As such, OfCOM is one of a growing number of regulators operating in British public life with what is by now a familiar mixture of roles and responsibilities, sometimes performing duties (such as the issuing and renewal of licences) that in the past were the responsibility of the Secretary of State.⁴⁵

OfCOM is required to ensure the ‘availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests’.⁴⁶ It is also required to ensure that there is a ‘sufficient plurality of providers of different television and radio services’, as well as the application of standards to protect the public from the inclusion of ‘offensive and harmful material’ in broadcasting services.⁴⁷ These obligations are in addition to the duty to ensure that standards are in place to provide adequate protection to the public ‘and all other persons’ from both unfair treatment in programmes and unwarranted infringements of privacy by broadcasters.⁴⁸

Curiously, OfCOM has only an oblique statutory duty to promote or uphold the right to freedom of expression, and indeed many of the foregoing duties are about restraints on free speech. But as a public authority, OfCOM is clearly bound by the obligations of the Human Rights Act and art 10 of the ECHR. OfCOM is, however, required to produce a code to promote certain statutory objectives dealing with broadcasting standards. There are

⁴⁴ See Lord Hutton, Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly, CMG (2004).

⁴⁵ Ch 12 above.

⁴⁶ Communications Act 2003, s 3(2)(c).

⁴⁷ *Ibid*, s 3(2)(d) and (e).

⁴⁸ *Ibid*, s 3(2)(f).

12 statutory objectives, covering both programme content and advertisements, including a requirement of impartiality on matters of political or industrial controversy, a requirement that news is reported with ‘due accuracy’, and a requirement that the public are protected from harmful and offensive material.⁴⁹

The main restraint on advertising relates to political advertising. This is widely defined to mean (a) an advertisement inserted by or on behalf of a political organisation; (b) an advertisement directed towards a political end; or (c) an advertisement that has a connection with an industrial dispute.⁵⁰ Licence holders are required to comply with the standards code and OFCOM is required to establish procedures to deal with complaints that the standards have been breached.⁵¹ OFCOM also has the duty to ensure that licence holders comply with the fairness code issued under the Broadcasting Act 1996,⁵² an obligation transferred to OFCOM by the 2003 Act.⁵³ There is now a single code, which deals with both standards and fairness.⁵⁴

Broadcasting Code

OFCOM’s Broadcasting Code – which applies in part to the BBC as well as the other broadcasters – is designed to balance the broadcasters’ rights to freedom of expression with various rights of viewers and listeners (as well as programme participants and subjects). The code thus purports to set boundaries for the broadcaster, including those which relate to (a) standards, and (b) fairness. The standards’ requirements amplify the matters specified in the legislation and give guidance on protecting young people, on protecting all members of the public from harmful and offensive material, and on ensuring that material likely to encourage disorder or crime is not included in broadcasts.

The guidance also seeks to ensure that broadcasters exercise responsibility in dealing with religion, and it indicates what is needed to comply with obligations relating to due impartiality. A separate chapter on elections and referendums reminds the broadcasters about various legal obligations but also advises them that due weight must be given to ‘the coverage of major parties during the election period’. The main parties for this purpose are the three national parties, extended in Scotland and Wales to include the principal nationalist parties.⁵⁵ The broadcasters are also advised that they must consider giving ‘appropriate coverage’ to other parties and independent candidates ‘with significant views and perspectives’.

So far as the fairness provisions are concerned, these emphasise the need to deal fairly with contributors to programmes and the need to obtain ‘informed consent’ from those who take part. This means that contributors should be told ‘the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute’. It is also provided that guarantees about confidentiality and anonymity ‘should normally be honoured’. A related chapter of the Code on privacy provides that any breach of privacy must be warranted, and if the reason for breach of privacy is based on the public interest, the broadcaster must be able to demonstrate that the public interest outweighs the right to privacy.

⁴⁹ Ibid, s 319.

⁵⁰ Ibid, s 321 (*R (Animal Defenders’ International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312; *Animal Defenders International v United Kingdom* [2013] ECHR 1362 (GC), (2013) 57 EHRR 21). On political advertising, see ch 7 above.

⁵¹ Communications Act 2003, s 325.

⁵² Ibid, s 326.

⁵³ Ibid, Sch 1, para 14.

⁵⁴ OFCOM, *Broadcasting Code* (2013). The code is explicitly drafted ‘in the light of’ the Human Rights Act and the ECHR.

⁵⁵ There are five ‘main parties’ in Northern Ireland: OFCOM, *List of Main Parties* (2013).

Complaints about a breach of the fairness or privacy provisions of the Code may be made to OFCOM, by someone affected or by someone authorised by the person affected. Privacy complaints may be made by legal as well as natural persons: ‘A company does have activities of a private nature which need protection from unwarranted intrusion’.⁵⁶ OFCOM may refuse to entertain a fairness complaint relating to unjust or unfair treatment if the person making the complaint does not have sufficient interest.⁵⁷ Other restrictions on complaints mean that they cannot be considered where the matter complained of is the subject of court proceedings, or if it appears to OFCOM that the person affected has a remedy by way of legal action in a court of law.

Role of the courts

A few attempts have been made to challenge broadcasting content in the courts. A difficulty with the BBC, however, is that it was established under the prerogative and, at least until the *CCSU* case,⁵⁸ it was unclear to what extent those exercising power under the prerogative were subject to judicial review. As late as 1983, the High Court in Northern Ireland was unwilling to enforce the BBC’s policy of political impartiality in an action brought by the Workers’ Party contesting election broadcasting.⁵⁹ It is now well accepted, however, that the BBC is subject to judicial review.⁶⁰ So in *Houston v BBC*,⁶¹ an interim interdict was granted to restrain the corporation from broadcasting in Scotland an extended interview with the Prime Minister three days before the local government elections. It was held that the pursuers had established a prima facie case that the broadcast would violate the BBC’s duty, under the terms of its licence, to treat controversial subjects with due impartiality and that the programme should not be broadcast until after the close of the poll.

The BBC is a public authority for the purposes of the Human Rights Act, so that it not only enjoys Convention rights, but that it must respect the Convention rights of others.

In *R (Pro-Life Alliance) v BBC*⁶² the broadcasting authorities refused to carry the pictures of a party election broadcast which had been submitted by the Alliance. The broadcast contained ‘prolonged and deeply disturbing’ images of an aborted foetus which the broadcasters believed to be contrary to their obligations to maintain taste and decency. It was argued for the Alliance in legal proceedings that this ‘censorship’ of the broadcast by the broadcasters violated art 10 of the ECHR. In reversing a decision of the Court of Appeal, the House of Lords (by a majority) disagreed, with Lord Hoffmann in a robust speech expressing the view that it is not unreasonable to require political parties to comply with standards of taste and decency which are ‘not particularly exacting’.

⁵⁶ See *R v Broadcasting Standards Commission, ex p BBC* [2001] QB 885.

⁵⁷ Broadcasting Act 1996, s 111. Cf *R v Broadcasting Complaints Commission, ex p Channel Four Television, The Times*, 6 January 1995 (the term ‘direct interest’ had to be broadly construed, even if it meant that ‘too many complaints’ would be made). But cf *R v Broadcasting Complaints Commission, ex p BBC, The Times*, 24 February 1995 (complaint by National Council for One Parent Families refused on the ground that it did not have a sufficiently direct interest in a *Panorama* programme which was said to build up a false picture of lone parents by using misleading and false information).

⁵⁸ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

⁵⁹ *Lynch v BBC* [1983] NILR 193.

⁶⁰ *R (Pro-Life Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185.

⁶¹ 1995 SLT 1305. See also *R v BBC, ex p Referendum Party, The Times*, 29 April 1997.

⁶² Note 60 above. For a critique, see E Barendt [2003] PL 580; J Jowell [2003] PL 592; and A Scott (2003) 66 MLR 224. But compare *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546; ch 14 above.

In contrast to the position of the BBC, there has never been much scope for disputing that – as statutory bodies – the commercial television and radio sector is subject to judicial review. This would be particularly true of the regulatory authorities such as OFCOM and its predecessor bodies such as the Independent Television Authority and the Independent Broadcasting Authority. But although the IBA like everyone else was required to observe the law, and although the IBA's decisions were subject to judicial review, the courts did not show a desire to assume the role of censor.⁶³ A similar restraint has been shown in the (now many) cases brought to challenge party election broadcasts (more fully explained in chapter 7 D), and more recently the operation of the statutory restrictions on political advertising,⁶⁴ although there are exceptions to such restraint.⁶⁵ As already indicated, regulatory bodies such as OFCOM are public authorities for the purposes of the Human Rights Act 1998.

There are also cases where the television or radio company itself may be the subject of legal proceedings.

In *R v Central Independent Television plc*⁶⁶ the respondents were due to broadcast a programme on the work of the obscene publications squad of Scotland Yard and in particular about the work of detectives engaged in tracing a man who was imprisoned on two charges of indecency. The man had previously been married to Mrs R who was the mother of his child and there was concern that the programme contained scenes which would identify the mother and the child, causing the latter distress. Invoking the parental jurisdiction of the court, the mother moved successfully to have the moving pictures of the father obscured, a decision reversed by the Court of Appeal which held that the press and broadcasters were entitled to publish the results of criminal proceedings, even though 'the families of those convicted had a heavy burden to bear and the effect of publicity on small children might be very serious'.

In a robust defence of freedom of expression, in a case where it was perhaps unnecessary, Hoffmann LJ said:

Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.

It is to a consideration of some of these exceptions that we now turn.

⁶³ *Attorney-General, ex rel McWhirter v IBA* [1973] QB 629.

⁶⁴ *R v Radio Authority, ex p Bull* [1997] 2 All ER 561; *R (Animal Defenders' International) v Secretary of State for Culture, Media and Sport*, note ** above; *Animal Defenders International v United Kingdom*, note 50 above.

⁶⁵ *Wilson v Independent Broadcasting Authority* 1979 SLT 279. Cf *Wilson v Independent Broadcasting Authority* 1988 SLT 276. Also C Munro, *New Law Journal*, 4 October 1996, p 1433, and *New Law Journal*, 11 April 1997, p 528.

⁶⁶ [1994] Fam 192.

D. Offences against public order

Changing nature of criminal law

By section 73, the Criminal Justice and Coroners Act 2009 abolished the common law offences of seditious libel and blasphemous libel, offences that were covered in earlier editions of this book. The former made it an offence to create political discontent and disaffection (and as such was a handy tool against the pioneering socialists in the late nineteenth and early twentieth centuries),⁶⁷ while the latter made it an offence to outrage and insult a Christian's feelings (and as such was a handy tool to be used against those who linked Jesus Christ to homosexuality).⁶⁸

Blasphemy was, however, used by the British Board of Film Classification when it refused to issue a classification certificate under the Video Recordings Act 1984 for a film entitled *Visions of Ecstasy*. The film included an 'intense erotic' moment between St Teresa and Jesus Christ, the decision being taken on the ground that the film was blasphemous. Nevertheless, these offences were increasingly anomalous at a time of greater political plurality and vigour in public debate, and at a time when cultural diversity made it inappropriate to single out one religion (albeit that of the established church) for special treatment.

The abolition of these offences should not be taken as a retreat of the criminal law as a source of restraint on free speech. There are two reasons for this, the first being that many other chapters in this book reveal a wide range of criminal constraints on freedom of expression. These include contempt of court restricting the publication of material calculated to prejudice a fair trial or interfere with the administration of justice (chapter 13), and official secrecy and associated common law offences (misconduct in a public office) which deal with the disclosure and reporting of material dealing with certain kinds of government information (chapter 19).

Secondly, however, while sedition and blasphemy have been abolished, legislation remains on the statute book addressing in modern form the kind of mischief to which both of these offences were principally addressed. Thus it might be argued that statutory measures dealing with incitement to religious hatred are a more wide-ranging restriction on free speech than that imposed in modern times by blasphemy, while the offence of inducing terrorism is a more precise and targeted way of addressing the concerns of sedition in a contemporary context (there being significant overlap between this statutory offence introduced in 2008 and the common law offence abolished in 2009).

So far as restraints on free speech in the interests of public order are concerned, these restrictions tend to be responses to particular problems at particular times, and the issues considered here overlap with those considered in chapters 18 and 19. If, however, sedition was a crime of the eighteenth and nineteenth centuries in particular, incitement to disaffection is a restriction introduced to deal with the activities of the Communist party in the 1930s as it tried to encourage soldiers and sailors to disaffect. Similarly, the law relating to the incitement to racial hatred is a restriction introduced to deal with the menace of far-right parties with racist views at a time of growing ethnic diversity.

Finally, the offence of inducing terrorism is a response to the more recent problem of political violence in Northern Ireland, and the emergence of terrorism on a global scale. The offence is directed specifically at the activities of some supporters of national and international terrorist organisations (widely defined) and their willingness publicly to express that

⁶⁷ *R v Burns* (1886) 16 Cox CC 355, *R v Aldred* (1909) 22 Cox CC 1. More recently, see *R v Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] QB 429. And see Williams, *Keeping the Peace*, ch 8, and E C S Wade (1948) 64 LQR 203.

⁶⁸ *R v Lemon* [1979] AC 617. And see *Gay News Ltd v UK* (1982) 5 EHRR 123.

support. In other words the legal restrictions on freedom of expression discussed here are symptoms of temporal problems, which – at least in the case of incitement to disaffection – are allowed to remain on the statute book long after the mischief to which they were directed has gone.

Incitement to disaffection⁶⁹

Parliament has on several occasions legislated to prevent the spread of disaffection, mainly to protect members of the armed forces, who might otherwise be exposed to attempts to persuade them to disobey their orders. The Incitement to Mutiny Act 1797, passed following the Nore mutiny, made it a felony maliciously and advisedly to endeavour to seduce members of the armed forces from their duty and allegiance to the Crown or to incite members to commit any act of mutiny. Although the 1797 Act has been repealed (and although seditious libel has been abolished), the Aliens Restriction (Amendment) Act 1919, s 3, still prohibits an alien from causing sedition or disaffection among the civil population as well as among the armed forces.

It is an offence under the 1919 Act, s 3 for any alien to promote or interfere in an industrial dispute in any industry in which he or she has not been bona fide engaged in the United Kingdom for at least two years preceding an alleged offence. The Police Act 1996, s 91, replacing legislation first passed in 1919 at a time of serious unrest within the police, prohibits acts calculated to cause disaffection among police officers or to induce them to withhold their services or commit breaches of discipline. Under the Incitement to Disaffection Act 1934, which passed through Parliament against severe criticism from a variety of quarters, it is an offence maliciously and advisedly to endeavour to seduce a member of the armed forces from his or her duty or allegiance.

The 1934 Act contains wide-ranging provisions for the prevention and detection of the offence. These include wide powers of search on reasonable suspicion, though a warrant may be issued only by a High Court judge. Moreover, it is an offence for any person, with intent to commit or to aid, counsel or procure commission of the main offence, to have in his or her possession or under his or her control any document of such a nature that the distribution of copies among members of the forces would constitute that offence. Notwithstanding the safeguards in the Act, it does restrain certain forms of political propaganda; and it could be used to suppress or interfere with the distribution of pacifist literature.

Prosecutions under the Act in England require the consent of the Director of Public Prosecutions. This consent was given between 1973 and 1975 in relation to members of a campaign for the withdrawal of British troops from Northern Ireland, who were convicted for the leaflets they had prepared, one of the convictions being upheld by the Court of Appeal.⁷⁰ The accused has a right to jury trial: it would be a matter for the jury to decide whether a leaflet which gave information to a soldier about procedures for leaving the army and his or her rights as a soldier was an attempt to seduce him or her from duty or allegiance to the Crown. There have been calls for the offence to be abolished, and it appears currently to serve little useful purpose.

Incitement to racial hatred

It has long been recognised that the preservation of public order justifies the imposition of criminal sanctions on those who utter threats, abuse or insults in public places, which are

⁶⁹ Bunyan, *The Political Police in Britain*, pp 28–36; Ewing and Gearty, *The Struggle for Civil Liberties*, chs 2–5.

⁷⁰ *R v Arrowsmith* [1975] QB 678; and see *Arrowsmith v UK* (1978) 3 EHRR 218 (no infringement of European Convention on Human Rights).

likely to give rise to a breach of the peace.⁷¹ In 1965, when Parliament first created machinery to deal with racial discrimination, an offence of incitement to racial hatred was created which was not dependent on proof of an immediate threat to public order. This reflected the belief that racial hatred itself contains the seeds of violence.⁷² The position is now governed by the Public Order Act 1986, dealing specifically with ‘racial hatred’, taken to mean ‘hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins’ (s 17).

The provisions in the Public Order Act 1986, s 17 replace measures enacted earlier in the Race Relations Act 1976 and before that in the Race Relations Act 1965. By s 18 of the 1986 Act, it is an offence for a person to use threatening, abusive or insulting words or behaviour or to display any material which is threatening, abusive or insulting if he or she does so with intent to stir up racial hatred or if in the circumstances racial hatred is likely to be stirred up.⁷³ The 1986 Act also applies to publicising or distributing such material (s 19), theatrical performances (s 20), the distribution, showing or playing of a recording of visual images or sounds (s 21), and television and radio broadcasts (s 22).

The offence in s 23 of the Act relates to the possession of material which if published or displayed would amount to an offence under the Act. Where there are reasonable grounds for suspecting that a person has possession of such material, a justice of the peace may grant a warrant to a police constable authorising the entry and search of premises for the material in question. It is not an offence to publish a fair and accurate report of proceedings in Parliament (or the Scottish Parliament or the Welsh Assembly), or of proceedings publicly heard before a tribunal or court where the report is published contemporaneously with the proceedings (s 26).

No prosecution in England and Wales may occur without the consent of the Attorney General (s 27). Although these are wide-ranging restrictions, they are justifiable primarily because a serious threat to personal security and dignity, not to mention public order, is inherent in certain forms of political and social expression. Nevertheless, controversy was sparked when in 2006 these provisions were extended to apply also to incitement to religious hatred, this being ‘hatred against a group of persons defined by reference to religious belief or lack of religious belief’.⁷⁴ The law was later extended to cover incitement to hatred on grounds of sexual orientation.⁷⁵

Incitement to terrorism

The Terrorism Act 2006 introduced a third public order restriction on free speech, a highly contentious measure politically at the time of its introduction, attracting opposition from both government and opposition benches. By section 1, this applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as ‘a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism’. For this (and other purposes in the Act) ‘public’ is defined to mean ‘the public of any part of the United Kingdom or of a country or territory outside the United Kingdom, or any section of the public’ (s 20(3)(a)).⁷⁶

⁷¹ Ch 18.

⁷² See D G T Williams [1966] Crim LR 320; Lester and Bindman, *Race and Law*, ch 10; and P M Leopold [1977] PL 389.

⁷³ It is not now necessary, as it was under the 1965 Act, to prove that the accused intended to stir up racial hatred: in practice, such proof had been too stringent a requirement for the law to be an effective restraint on racist propaganda. See also W J Wolffe [1987] PL 85 and S Poulter [1991] PL 371.

⁷⁴ Racial and Religious Hatred Act 2006, s 1, inserting new Public Order Act 1986, ss 29A – 29N.

⁷⁵ Criminal Justice and Immigration Act 2008, s 74, Sch 16; amending Public Order Act 1986.

⁷⁶ It also applies to public meetings, whether entry is on payment of a fee or not (s 20(3)(b)).

It is an offence – punishable by up to seven years' imprisonment – to publish a statement to which the foregoing applies if at the time the statement is published the accused intends members of the public to be directly or indirectly encouraged to commit acts of terrorism, or is reckless as to whether they will be so encouraged or induced (s 1(2)). Statements are likely to be understood as indirectly encouraging the commission of acts of terrorism if they glorify the commission or preparation of acts of terrorism, provided it can reasonably be inferred that what is being glorified is 'being glorified as conduct that should be emulated' (s 1(3)). Other provisions in the Act define glorification to include 'any form of praise or celebration' (s 20(2)).

Related to the above, section 2 creates a separate offence in relation to terrorist publications, which is the offence of dissemination of such publications. The question of what is a terrorist publication is surprisingly complex and the term needs carefully to be dissected. First, it is necessary to determine what is meant by *terrorist* for these purposes (a question which also arises in relation to the section 1 offence referred to above). The answer lies in the Terrorism Act 2000, s 1, where terrorism is defined widely to mean action or the threat of action involving serious violence or serious damage to property, which is designed to influence the government or intimidate the public or a section of the public, and is undertaken to advance an ideological cause.⁷⁷

For these latter purposes the government to be influenced need not be the United Kingdom government, but could be a foreign government, and the activity being planned could be planned to be undertaken overseas. This leads to the second question of what is meant by a *publication* for these purposes. Here s 2(13) defines it to mean an article or record of any description that contains matter to be read, listened to, or looked at or watched, which means that it covers traditional printed material (such as leaflets and pamphlets) as well as more sophisticated internet-based material (in relation to which new powers are given to the police by s 3 to require people to remove terrorism related material from internet sites).

Having thus defined *terrorist* and *publication*, the third question arises after putting both together: what is a *terrorist publication*? Here s 2(3) provides that the term applies to publications likely to be understood by those or some of those to whom the material becomes available to be 'a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism', or to be 'useful' in the commission or preparation of such acts. As in the case of the s 1 offence referred to above, 'matter that is likely to be understood by a person as indirectly encouraging the commission or preparation of acts of terrorism includes any matter which [glorifies terrorism]' (s 2(4)).

The section 2 offence is committed only if the dissemination (for example by circulation, sale or loan) takes place with the intention that the dissemination will have the effect of directly or indirectly encouraging or inducing the commission, preparation or instigation of acts of terrorism (s 2(1)). This is a complicated offence, which requires an intention to encourage or induce acts of terrorism by the dissemination of a publication which encourages or induces acts of terrorism. Like section 1, the section 2 offence carries a penalty of up to seven years' imprisonment if convicted on indictment (s 2(11)).⁷⁸ Despite its controversial nature, the CPS website records a number of convictions under the 2006 Act in almost every year since its introduction.⁷⁹

⁷⁷ This is a definition which overlaps with the now abolished offence of seditious libel, which also emphasised (i) an intention to change the constitution, by (ii) violent means. See *R v Burns*, above, and *R v Aldred*, above. The common law offence was probably wider and more elastic in principle, though it had probably become unusable in practice, having been designed for a different age.

⁷⁸ For guidance, see *R v Rahman* [2008] EWCA Crim 1465, [2008] 4 All ER 661.

⁷⁹ <http://www.cps.gov.uk/publications/prosecution/ctd.html>.

E. Obscene publications

Before the Obscene Publications Act 1959

It resulted from the development of the law concerning the printing of books that, as with seditious, blasphemous and other libels, it became an offence punishable by the common law courts to publish obscene material. This jurisdiction was exercised for the first time in *Curl's* case when the court held that it was an offence to publish a book which tended to corrupt morals and was against the King's peace.⁸⁰ The flourishing business of pornography in the Victorian underworld led to the Obscene Publications Act 1857. This Act gave the police power to search premises, seize obscene publications kept for sale, and bring them before a magistrates' court for destruction.

The Act did not define 'obscene' but its sponsor, Lord Campbell, stated that it was to apply 'exclusively to works written for the single purpose of corrupting the morals of youth, and of a nature calculated to shock the common feelings of decency in any well regulated mind'.⁸¹ In 1868, in *R v Hicklin*, Cockburn CJ declared the test for obscenity to be:

whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.⁸²

This test came to dominate the English law of obscenity, and as we will see the legacy of the common law continues to be found on the statute book, despite so far forlorn attempts to find a new approach. As developed, this test of obscenity required account to be taken of the circumstances of publication: in *Hicklin's* case, Cockburn CJ said that immunity for a medical treatise depended on the circumstances, since the publication of some medical details would not be fit for boys and girls to see. But the test did not permit the author's intention to be taken into account. Although the tendency to deprave and corrupt was often assumed from the character of a book, who might the potential readers be?

In 1954, in *R v Reiter*, the Court of Criminal Appeal took the view that a jury should direct their attention to the result of a book falling into the hands of young people.⁸³ But a few months later, in *R v Martin Secker Warburg Ltd*, Stable J asked: 'Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged 14?'.⁸⁴ Other difficulties in the law included the use of the 1857 Act against serious literature; the failure of the 1857 Act to enable a publisher or author to defend a work against destruction; and the tendency of prosecutors to take selected passages of a book out of context. A lengthy campaign by publishers and authors led to the Obscene Publications Act 1959.⁸⁵

Obscene Publications Acts 1959 and 1964

The 1959 Act, which does not apply to Scotland, sought both to provide for the protection of literature and to strengthen the law against pornography. For the purposes of the 1959 Act (but not of other Acts in which the word 'obscene' is used):⁸⁶

⁸⁰ (1727) 17 St Tr 153; Robertson, *Obscenity*, ch 2.

⁸¹ HL Deb, 25 June 1857, col 329.

⁸² (1868) LR 3 QB 360, 371.

⁸³ [1954] 2 QB 16.

⁸⁴ [1954] 2 All ER 683, 686 (Kauffmann's *The Philanderer*).

⁸⁵ See HC 123 (1957–58); and Robertson, *Obscenity*, pp 40–4.

⁸⁶ *R v Anderson* [1972] 1 QB 304, 317 (*Oz*, *School Kids Issue*).

an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it (s 1(1)).⁸⁷

A wide definition of ‘article’ (s 1(2)) includes books, pictures, films, records and such things as film negatives used in producing obscene articles,⁸⁸ and video cassettes.⁸⁹ It is an offence to publish an obscene article, whether for gain or not, or to have obscene articles in one’s possession, ownership or control for the purpose of publication for gain or with a view to such publication,⁹⁰ whether for sale within Britain or abroad.⁹¹ The definition of ‘publishing’ includes distributing, circulating, selling, hiring and, for example, showing pictures or playing records; since 1991 it includes television and sound broadcasting,⁹² and since 1994 it has included the transmitting of electronically stored data.⁹³ It is a defence to prove that publication of an obscene article is justified ‘as being for the public good on the ground that it is in the interests of science, literature, art or learning or other objects of general concern’. Expert evidence on the literary, artistic, scientific or other merits of an article is admissible to establish or negative the defence of public good.⁹⁴

The 1959 Act, s 3, confers search, seizure and forfeiture powers similar to those in the 1857 Act. A warrant may be obtained by a constable (or the DPP) from a magistrate for the search of specified premises, stalls or vehicles, where there is reasonable suspicion that obscene articles are kept for publication for gain. When a search is made, articles believed to be obscene and also documents relating to a trade or business may be seized. The seized articles must be brought before a magistrate. When notice has been given to the occupier of the premises to show cause why the articles should not be forfeited, the magistrates’ court may order forfeiture if satisfied that the articles are obscene and were kept for publication for gain. The owner, author or maker of the articles may also appear to defend them against forfeiture. The defence that publication is for the public good is available and expert evidence relating to the merits of the articles may be called. In these proceedings there is no right to the decision of a jury, but there are rights of appeal to the Crown Court or the High Court. Because of certain defects in the 1959 Act, the Act of 1964 was passed to strengthen the law against publishing obscene matter. Inter alia, the Act made it an offence to have an obscene article for publication for the purposes of gain,⁹⁵ and authorised a forfeiture order to be made following a conviction under the 1959 Act.

One difficulty is the 1959 Act’s definition of obscenity as ‘a tendency to deprave and corrupt’. The definition makes it impossible to rely on such synonyms as ‘repulsive’, ‘filthy’, ‘loathsome’ or ‘lewd’,⁹⁶ and requires the jury to consider whether the effect of a book is to tend to deprave and corrupt a significant proportion of those likely to read it. ‘What is a significant proportion is entirely for the jury to decide.’⁹⁷ In cases relating to the internet

⁸⁷ On the item by item test, see *R v Anderson*, *ibid*, at p 312.

⁸⁸ 1964 Act, s 2, the sequel to *Straker v DPP* [1963] 1 QB 926.

⁸⁹ *A-G’s Reference (No 5 of 1980)* [1980] 3 All ER 816.

⁹⁰ 1959 Act, s 2(1), as amended in 1964. See *R v Taylor* [1995] 1 Cr App R 131 (publication where films depicting obscene acts are developed, printed and returned to the owner).

⁹¹ *Gold Star Publications Ltd v DPP* [1981] 2 All ER 257; and see (1983) 5 EHRR 591.

⁹² Broadcasting Act 1990, s 162, amending 1959 Act, by inserting s 1(4)–(6).

⁹³ Criminal Justice and Public Order Act 1994, s 168(1). See *R v Perrin* [2002] EWCA (Crim) 747.

⁹⁴ 1959 Act, s 4.

⁹⁵ Cf *Mella v Monahan* [1961] Crim LR 175.

⁹⁶ *R v Anderson* [1972] 1 QB 304; cf the perceptive analysis by Windeyer J in *Crowe v Grahame* (1968) 41 AJLR 402, 409.

⁹⁷ *R v Calder & Boyars Ltd* [1969] 1 QB 151, 168. But it is ‘more than a negligible number’ (*R v O’Sullivan* (1995) 1 Cr App R 455).

in particular, however, it may not be appropriate for ‘the task of the jury [to] be complicated by a direction that the effect of the article must be such as to tend to deprave and corrupt a significant proportion, or more than a negligible number of likely viewers’.⁹⁸ Lord Wilberforce has said: ‘An article cannot be considered as obscene in itself: it can only be so in relation to its likely readers.’⁹⁹ Experienced police officers may for practical purposes not be susceptible to being depraved and corrupted,¹⁰⁰ but it seems that a man may be corrupted more than once.¹⁰¹ Although the circumstances in which articles are sold are relevant, it is no defence for booksellers to prove that most of their sales are made to middle-aged men who are already addicted to pornography; articles may ‘deprave and corrupt’ the mind without any overt sexual activity by the reader resulting.¹⁰² Obscenity is not confined to sexual matters: a book dealing with the effects of drug taking may be obscene,¹⁰³ as may cards depicting violence when sold to children.¹⁰⁴

Common law offences

In *Shaw v DPP*,¹⁰⁵ the appellant had published the *Ladies’ Directory*, an illustrated magazine containing names, addresses and other details of prostitutes and their services. The House of Lords upheld Shaw’s conviction for the offence of conspiracy to corrupt public morals. Lord Simonds accepted that the law must be related to the changing standards of life, having regard to fundamental human values and the purposes of society; he said that ‘there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State’.¹⁰⁶ It was the jury which provided a safeguard against the launching of prosecutions to suppress unpopular or unorthodox views. Lord Reid, dissenting, rejected the view that the court was guardian of public morals. This controversial decision derived in part from the supposed offence of conspiracy to effect a public mischief, which was later held not to be part of criminal law.¹⁰⁷ Although Shaw was also convicted for having published an obscene book, contrary to the 1959 Act, *Shaw’s* case enabled prosecutions to be brought at common law for conspiracy rather than for breaches of the 1959 Act. Thereafter the Law Officers assured the House of Commons that a conspiracy to corrupt public morals would not be charged so as to circumvent the ‘public good’ defence in the 1959 Act.¹⁰⁸

In *Kneller Ltd v DPP*,¹⁰⁹ however, the House of Lords reaffirmed the decision in *Shaw*, in a case in which the appellants had published a magazine containing advertisements by male homosexuals seeking to meet other homosexuals. The Lords upheld a conviction of the appellants for conspiracy to corrupt public morals, rejecting a defence based on the Sexual Offences Act 1967 by which homosexual acts between adult males in private had ceased to be an offence. A second conviction for conspiracy ‘to outrage public decency’ was quashed

⁹⁸ *R v Perrin* [2002] EWCA (Crim) 747. According to the court ‘such a direction is all too likely to give rise to a request for further assistance as to what proportion is significant, or what number is negligible’.

⁹⁹ *DPP v Whyte* [1972] AC 849, 860.

¹⁰⁰ *R v Clayton and Halsey* [1963] 1 QB 163.

¹⁰¹ *Shaw v DPP* [1962] AC 220, 228 (CCA).

¹⁰² *DPP v Whyte* [1972] AC 849, 867.

¹⁰³ *Calder (Publications) Ltd v Pomell* [1965] 1 QB 509; *R v Skirving* [1985] QB 819.

¹⁰⁴ *DPP v A & BC Chewing Gum Ltd* [1968] 1 QB 159.

¹⁰⁵ [1962] AC 220.

¹⁰⁶ *Ibid*, p 268. See D Seaborne Davies (1962) 6 JSP T L 104, J E Hall Williams (1961) 24 MLR 626 and Robertson, *Obscenity*, ch 8.

¹⁰⁷ *DPP v Withers* [1975] AC 842.

¹⁰⁸ HC Deb, 3 June 1964, col 1212.

¹⁰⁹ [1973] AC 435.

on the ground of misdirection, but a majority of the House held that at common law it was an offence to outrage public decency and also to conspire to outrage public decency; and that such a conspiracy could take the form of an agreement to insert outrageously indecent matter on the inside pages of a magazine sold in public.¹¹⁰ Lords Reid and Diplock did not agree that ‘outraging public decency’ was an offence; Lord Reid said, ‘To recognise this new crime would go contrary to the whole trend of public policy followed by Parliament in recent times.’¹¹¹ Nevertheless, the abolition of common law conspiracy with the introduction of new statutory offences in the Criminal Law Act 1977 was stated expressly not to affect a conspiracy that involves an agreement to engage in conduct which tends to corrupt public morals or outrages public decency.¹¹²

Although the common law offence has thus been recognised and preserved by statute,¹¹³ prosecutions for conspiracy to corrupt public morals or to outrage public decency are very unusual. One such case, however, is *R v Gibson*,¹¹⁴ in which both the owner of an art gallery and an artist were convicted for exhibiting a model’s head to the ears of which were attached earrings made out of a freeze-dried human foetus of three or four months’ gestation. The case raised the question whether a prosecution at common law to outrage public decency was precluded by s 2(4) of the Obscene Publications Act 1959, whereby common law proceedings are not to be brought where ‘it is of the essence of the offence that the matter is obscene’. The Court of Appeal held that there are two broad types of offence involving obscenity and that the 1959 Act applied only in respect of one (those involving the corruption of public morals) but not the other (those which involve an outrage on public decency, whether or not public morals are involved). This decision may make it easier for the Crown to bring prosecutions at common law, thereby circumventing the defences which would otherwise be available in a prosecution brought under the Act. Of these, the most important is undoubtedly the public good defence in s 4. However, the offence can only be committed in public and only if seen by others.¹¹⁵

Reform of the law

The law of obscenity and indecency was reviewed by a highly regarded Home Office committee (chairman, Professor Bernard Williams) which reported in 1979.¹¹⁶ The committee analysed the purposes for which regulation of obscenity was justified. It considered that the existing law should be scrapped and a fresh start made with a comprehensive new statute. In particular, terms such as ‘obscene’, ‘indecency’, ‘deprave and corrupt’ should be abandoned as having outlived their usefulness.¹¹⁷ The government did not accept these recommendations; nor it seems did the courts, with the Court of Appeal expressing concern about the ‘evil’ of ‘pornography’ within three years of the publication of the Williams Report.¹¹⁸

¹¹⁰ See now *R v Walker* [1996] 1 Cr App R 111.

¹¹¹ *Kneller Ltd v DPP* [1973] AC 435, 459.

¹¹² Criminal Law Act 1977, s 5(3); cf s 53(3).

¹¹³ See also Theatres Act 1968, s 2(4).

¹¹⁴ [1990] 2 QB 619; M Childs [1991] PL 20.

¹¹⁵ *R v Hamilton* [2007] EWCA Crim 2062, [2008] 2 WLR 107.

¹¹⁶ Cmnd 7772, 1979. See Simpson, *Pornography and Politics – the Williams Report in Retrospect*.

¹¹⁷ *R v O’Sullivan*, note 97 above. It seems that there is little to be said for the existing law, which is routinely criticised in academic literature: see P Kearns [2007] Crim Law Rev 667; C McGlynn and E Rackley [2007] Crim Law Rev 677. However, the current provisions are flexible and allow prosecution policy to move with the times: what was obscene in 1960 will not be regarded as obscene in 2013 as the basis for a prosecution.

¹¹⁸ *R v Holliday* (1982) 4 Cr App R (S) 128. According to the court ‘the only way of stamping out this filthy trade is by imposing sentences of imprisonment on first offenders and all connected with the commercial exploitation of pornography’.

There is no prospect of these proposals being adopted, the Williams report now a monument to an era that has long passed. Since 1979, Parliament has generally added fresh layers of restriction, as in the Criminal Justice and Immigration Act 2008. This not only increases the penalties under the Obscene Publications Act 1959 (to five years), but also introduces a new offence of possessing extreme pornographic images. The latter is expressed to (i) relate to defined activities listed in the Act, and (ii) to be ‘grossly offensive, disgusting or otherwise of an obscene character’, though there is no definition of obscene (or ‘disgusting’) for these purposes (s 63). The Human Rights Act has yet to have an impact here.¹¹⁹

One of the main challenges in this area at the present time relates to the internet, where there is a real concern about child pornography and the sexual solicitation and exploitation of children, as well as problems of access by children to unsuitable material. Unlike other forms of electronic media (notably television and radio) there is no specific regulation of the internet to control access to sexually explicit or material offensive for other reasons. Although such regulation may be difficult to introduce, internet service providers and internet users will be subject to ordinary civil and criminal liabilities, including the law relating to obscene publications, defamation and incitement to racial hatred.¹²⁰

In the United Kingdom, the matter is addressed by a further example of self-regulation, in the form of the Internet Watch Foundation which was established in 1996 by UK internet service providers to advise internet users about how best to restrict access to harmful or offensive content on the internet generally.¹²¹ The Foundation is independent of government and, although it works very closely with government, has no statutory powers. Internet users report material to the Foundation, which they believe to be criminal: this can be for any reason, although complaints are overwhelmingly about child pornography. If on investigation the material is thought to be criminal, the internet service provider will be asked to remove it and the information will be passed to the police.

F. Defamation

Nature of liability

In an impressive report on *Press Standards, Privacy and Libel*, the Culture, Media and Sport Committee of the House of Commons warmly welcomed the abolition of criminal libel by the Coroners and Justice Act 2009.¹²² However, defamation continues to give rise to civil liability, the law being designed to protect the reputation of the claimant from improper attack.¹²³ In principle, the law provides a remedy for false statements which ‘substantially affect in an adverse manner the attitude of other people towards the claimant, or have a tendency so to do’.¹²⁴ For this purpose words are to be given ‘the natural and ordinary meaning [they] would have conveyed to the ordinary reasonable reader’.¹²⁵

¹¹⁹ Cf *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

¹²⁰ See *Godfrey v Demon Internet Ltd* [2001] QB 201 (defamation), and *R v Perrin* [2002] EWCA Crim 747 (obscene publications).

¹²¹ See www.iwf.org.uk.

¹²² HC 362 (2009–10), para 235.

¹²³ See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, at p 201 (Lord Nicholls) and *Kearns v Bar Council* [2003] EWCA Civ 331, [2003] 1 WLR 1357, at p 1373 (Simon Brown LJ). For fuller accounts of the law of defamation, see textbooks on the law of tort and Mitchell, *The Making of the Modern Law of Defamation*.

¹²⁴ *Lord McAlpine v Berrow* [2013] EWHC 1342 (QB). For an action to succeed, the publication must be read as a whole, rather than one or more isolated passages. See *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65.

¹²⁵ *Bonnick v Morris* [2002] UKPC 31, [2003] 1 AC 300.

Defamation takes two main forms: (a) slander (defamation in a transitory form by spoken word or gesture) and (b) libel (defamation in a permanent form such as the written or printed word). By statute, words used in the course of broadcasting and of public performances in a theatre are treated as publication in permanent form and may be libellous.¹²⁶ In the interest of free speech, neither local authorities (and by inference central government departments) nor political parties may bring an action in defamation.¹²⁷ It is thus an anomaly of English law that corporations may sue in libel, particularly in view of the increasing role of corporations in the delivery of public services, defamation thus a major chill on efforts to hold corporations to account.¹²⁸

It is perhaps difficult to exaggerate the extent to which defamation law is an important restraint on freedom of expression and the ability of the press to hold politicians and others to account.¹²⁹ Although giving rise to rights and remedies in private law, the importance of defamation for public law is to be seen in the high-profile cases brought by politicians, sometimes ill-advisedly and sometimes with disastrous consequences for the individuals concerned. Nevertheless, freedom of expression ought not to be a licence for newspapers or others gratuitously to besmirch the reputations of politicians or anyone else, and it is the role of the law to ensure that powerful newspaper companies do not use that freedom as a licence.¹³⁰

Growing concern about the effect of defamation law on freedom of expression gave way to the Defamation Act 2013,¹³¹ which makes a number of important changes that ought to benefit publishers and campaigners.¹³² A statement is now not to be treated as defamatory unless its publication has ‘caused or is likely to cause serious harm to the reputation of the claimant’ (s 1(1)).¹³³ While defamation continues to protect corporations, it is now provided that ‘harm to the reputation of a body that trades for profit is not ‘serious harm’ unless it has caused or is likely to cause the body serious financial loss’ (s 1(2)),¹³⁴ though it is too early to tell whether this will be enough to stop defamation being used as a weapon by companies against those who would hold them to account.

New statutory defences

The Defamation Act 2013 does not only address the nature of the harm that must be established for the purposes of libel. It also amends the law relating to defences, with section 2 abolishing the common law defence of justification,¹³⁵ and replacing it with a new truth-based

¹²⁶ Broadcasting Act 1990, s 166; and Theatres Act 1968, s 4.

¹²⁷ See respectively *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 and *Goldsmith v Bhoyrul* [1998] QB 459; *E Barendt* [1993] PL 449. Public servants may sue for libel: *Gough v Local Sunday Newspapers (North) Ltd* [2003] EWCA Civ 297, [2003] 1 WLR 1836 (borough solicitor accused of incompetence).

¹²⁸ *Steel v McDonald's Corporation* [1999] EWCA Civ 1144; *Tesco Stores Ltd v Guardian* [2008] EWHC 14 (QB), [2009] EMLR 5; *Jameel v Wall Street Journal* [2006] UKHL 44, [2007] 1 AC 359. The position is all the more anomalous for the fact that trade unions cannot sue for defamation: *EETPU v Times Newspapers* [1980] 1 All ER 1097.

¹²⁹ For a good account from a serious journalist's perspective, see G Palast, *The Best Democracy Money Can Buy*.

¹³⁰ See the discussion in *Reynolds v Times Newspapers Ltd*, above. Compare Loveland, *Political Libels*.

¹³¹ See A Mullis and A Scott (2014) 77 MLR 87.

¹³² Other changes are proposed by the Crime and Courts Act 2013, which will provide a form of immunity from exemplary damages for newspapers that participate in the self-regulatory procedures discussed at note 38 above.

¹³³ A statement for these purposes is defined to mean ‘words, pictures, visual images, gestures or any other method of signifying meaning’.

¹³⁴ For useful background to this change, see HC 362 (2009–10), paras 164–78.

¹³⁵ On the common law defence, see *Rothschild v Associated Newspapers Ltd* [2013] EWCA Civ 197, and *Cruddas v Calvert* [2013] EWHC 2298 (QB).

defence, which applies where the ‘imputation conveyed by the statement complained of is substantially true’ (s 2(1)).¹³⁶ Where a statement is capable of two or more distinct imputations, the defence applies if one is substantially true and any other is not, provided that the latter does not cause any substantial harm.

In addition to abolishing the defence of justification, the 2013 Act also abolishes the common law defence of fair comment, replacing it with a new statutory defence of honest opinion (s 3(1)).¹³⁷ The latter defence applies where three conditions are met: the statement complained of was a statement of opinion (s 3(2)); the statement complained of indicated the basis of the opinion (s 3(3)); and the opinion is one that could have been held by an honest person on the basis of any fact existing at the time of the publication, or anything asserted as a fact in a privileged statement (s 3(4)).

Section 4 of the Defamation Act 2013 abolishes the so-called *Reynolds* defence, after the decision in which it was established.¹³⁸ The defence is essentially a form of qualified privilege (on which see below), which applies where the publication can be justified in the public interest. In applying this test, Lord Nicholls said that courts should have regard to ten factors. These were: the seriousness of the allegation; the nature of the information; the source of the information; steps taken to verify the information; the status of the information; the urgency of the matter; whether comment was sought from the claimant; whether the article contained the gist of the claimant’s side of the story; the tone of the article; and the circumstances and timing of the article.

In developing these principles (said to be non-exhaustive), Lord Nicholls said that ‘the common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse’.¹³⁹ Although in the *Reynolds* case, the defence of qualified privilege was not established (the newspaper having failed to carry an account of the claimant’s side of the story),¹⁴⁰ it has nevertheless become well established, with judges now encouraged not to apply it rigidly.¹⁴¹ Indeed, the *Reynolds* defence is thought to provide a firm basis for investigative journalism, the House of Lords accepting that there was a duty or interest on the part of the press to impart information for the benefit of the democratic process.

A new statutory defence has, however, replaced the *Reynolds* defence, designed to codify the common law rules in force at the time of enactment.¹⁴² The new defence may be engaged where a contested statement (*a*) was, or formed part of, a statement on a matter of public interest, which (*b*) the defendant reasonably believed was in the public interest to publish. There is no definition of the public interest for these purposes, though the Explanatory Notes accompanying the Act make clear that ‘the current case law would constitute a helpful

¹³⁶ Cf *Rothschild*, *ibid*, where Laws LJ cites with approval the following passage from the judgment of Tugendhat J in the court below: ‘In a case where a defendant is not able to prove the whole of the defamatory allegation he has made, the law is that he may nevertheless succeed if he can prove, on the balance of probabilities, that what he has alleged is substantially true’.

¹³⁷ See *Joseph v Spiller* [2010] UKSC 53, [2011] 1 AC 852, where it was thought that the then common law defence of fair comment should be renamed honest comment. For the position in Scotland, see *Massie v McCaig*, 2013 CSIH 13 (allegedly defamatory remarks about the purpose of a political donation).

¹³⁸ [2001] 2 AC 127.

¹³⁹ *Ibid* at p 202.

¹⁴⁰ See also *Galloway v Daily Telegraph* [2006] EWCA Civ 17, [2006] EMLR 221; Cf *Bonnick v Morris* [2002] UKPC 31, [2003] 1 AC 300.

¹⁴¹ *Jameel v Wall Street Journal Europe* [2006] UKHL 44, [2007] 1 AC 359. And see *Roberts v Gable* [2007] EWCA Civ 721, [2008] QB 502; *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972, [2008] 1 All ER 750.

¹⁴² Defamation Act 2013, s 4.

(albeit not binding) guide to interpreting how the new statutory defence should be applied. It is expected the courts would take the existing case law into consideration where appropriate' (para 35).

The scope of the statutory defence is said to reflect the common law defence it replaced, and to embrace both an objective (part (a)) and a subjective (part (b)) element. In determining 'whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest' (part (b)), the court is required to 'make such allowance for editorial judgment as it considers appropriate' (s 4(4)). It is also provided 'for the avoidance of doubt' that the new defence under s 4 may be relied upon 'irrespective of whether the statement complained of is a statement of fact or a statement of opinion' (s 4(5)). Despite its origins, the *Reynolds* test does not apply only to categories of political information.¹⁴³

New forms of communication have presented new problems for defamation law. In *Godrey v Demon Internet Service*,¹⁴⁴ it was held that internet service providers may be liable in defamation for defamatory messages posted by internet users, internet posting constituting a publication for these purposes. The Defamation Act 2013 provides a specific defence for internet operators, who may escape liability if they can show that they did not post the offending statement, though the defence may be defeated if the operator fails to remove it (s 5). Messages posted on Twitter have also been found to be subject to the law of defamation, as revealed in a high profile case involving Ms Sally Bercow who was found to have defamed a former treasurer of the Conservative party.¹⁴⁵ There is no special defence for Twitter users, and it is not yet clear whether Twitter would be a publisher for these purposes and liable along with the author of offending tweets.

Absolute, qualified and parliamentary privilege

Reynolds was about creating a new head of 'qualified privilege' whereby it will be a defence to an action for libel that the publication was in the public interest and without malice. Although *Reynolds* revealed that the categories of privilege at common law are not closed,¹⁴⁶ it was already the case most of the common law categories of privilege were the subject of statutory privilege, following the Defamation Act 1996. By virtue of the latter, absolute privilege includes:

(a) statements made during parliamentary proceedings and statements in the official reports of debates or in other papers published by order of either House of Parliament;¹⁴⁷ (b) statements made by one officer of state to another in the course of his or her official duty, a privilege which in absolute form applies only to certain communications at a high level;¹⁴⁸ (c) reports by and statements to the Parliamentary Ombudsman;¹⁴⁹ (d) the internal documents of a foreign

¹⁴³ It is important to note, however, that *Reynolds* provides a defence not only in relation to claims brought by politicians: see *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273.

¹⁴⁴ [2001] QB 201.

¹⁴⁵ *Lord McAlpine v Bercow* [2013] EWHC 1342 (QB).

¹⁴⁶ *Reynolds*, above, at p 197.

¹⁴⁷ Ch 9.

¹⁴⁸ E.g. *Chatterton v Secretary of State of India* [1895] 2 QB 189.

¹⁴⁹ Parliamentary Commissioner Act 1967, s 10(5); ch 23.

embassy;¹⁵⁰ and (e) the fair and accurate report of proceedings in public before a court anywhere in the world (including an international court) if published contemporaneously with the proceedings. For this purpose a court includes any tribunal or body exercising the judicial power of the state.¹⁵¹

Qualified privilege, unlike absolute privilege, is destroyed as a defence if the plaintiff proves malice on the part of the defendant.¹⁵² Under the Defamation Act 1996, Sch 1, such privilege arises in two types of case. The first comprises reports privileged without ‘explanation or contradiction’.

This first category applies to the fair and accurate report of public proceedings of a legislature or international organisation anywhere in the world;¹⁵³ a court anywhere in the world (to the extent not protected by absolute privilege);¹⁵⁴ or a person appointed to hold a public inquiry by a government or legislature anywhere in the world.¹⁵⁵ It also applies to the fair and accurate report of any public document and of any material published by or on the authority of a government or legislature anywhere in the world,¹⁵⁶ as well as to any matter published anywhere in the world by an international organisation or conference.¹⁵⁷

The second category of qualified privilege comprises reports privileged subject to explanation or contradiction, in the sense that there is no defence if the plaintiff shows that the defendant failed following a request, ‘to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction’.¹⁵⁸

This second category includes ‘a copy, extract from or summary of a notice or other matter issued for the information of the public’ by a legislature or government anywhere in the world, or any authority carrying out governmental functions (expressly defined to include police functions).

The second category also includes a fair and accurate report of proceedings at any public meeting in the UK of (a) a local authority or local authority committee; (b) a justice of the peace acting otherwise than as a court exercising judicial functions; (c) a commission or tribunal; (d) a local authority inquiry; or (e) any other statutory tribunal, board or inquiry.

An amendment introduced in 2013 now explicitly includes a fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest.¹⁵⁹ This is in addition to the fair and accurate report of a number of other matters specified in the Schedule, the substance of many of which was expanded by the 2013 Act.¹⁶⁰

Turning to the question of parliamentary privilege, this is usually seen as an important source of protection for free speech, as a result of the operation of art 9 of the Bill of Rights

¹⁵⁰ *Al-Fayed v Al-Tajir* [1988] QB 712.

¹⁵¹ Defamation Act 1996, s 14(3), as amended by the Defamation Act 2013.

¹⁵² *Ibid*, s 15(1). But carelessness, impulsiveness or irrationality do not amount to malice: *Horrocks v Lowe* [1975] AC 135, though any of these may ‘cost a journalist dear’ in an action against the press – *Louchansky v Times Newspapers (Nos 2–5)* [2001] EWCA Civ 536, [2002] QB 321. See also on qualified privilege, *Kearns v Bar Council* [2003] EWCA Civ 331, [2003] 1 WLR 1357.

¹⁵³ See also ch 9.

¹⁵⁴ See also ch 13, and *Webb v Times Publishing Co* [1960] 2 QB 535.

¹⁵⁵ See *Tsikata v Newspaper Publishing plc* [1997] 1 All ER 655 (report need not be a contemporary report).

¹⁵⁶ See *Curistan v Times Newspapers Ltd* [2008] EWCA Civ 432, [2008] 3 All ER 923 (privilege not lost because of the publication in the same article of extraneous material not privileged).

¹⁵⁷ Defamation Act 1996, Sch 1, Part 1.

¹⁵⁸ *Ibid*, s 15(2)(a).

¹⁵⁹ This is for clarification. The House of Lords had already held that a press conference was covered under other heads to which qualified privilege applies under the Act: *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277.

¹⁶⁰ See Defamation Act 1996, Sch 1, Part 2, the content of which is too detailed for a full account here.

of 1689. *Prebble v Television New Zealand Ltd*,¹⁶¹ revealed, however, that the latter provision could have consequences probably never intended. The plaintiff was a New Zealand cabinet minister who claimed to have been defamed by the television company. The defendant wished to demonstrate the truth of the allegations by relying on things said or done in Parliament, but was confronted by the Bill of Rights. In upholding the lower courts, the Privy Council said that: ‘Parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading.’

But on a second point, the Privy Council reversed a decision of the lower court to stay the proceedings in the light of the apparent disadvantage to the defendant, on the ground that although there ‘may be cases in which the exclusion of material on the grounds of parliamentary privilege makes it quite impossible fairly to determine the issues between the parties’, on the facts this was not one of them. Where, however, ‘the whole subject matter of the alleged libel relates to the plaintiff’s conduct in the House so that the effect of parliamentary privilege is to exclude virtually all the evidence necessary to justify the libel’, the proceedings should be stayed not only to prevent an injustice to the defendant, but also to avoid the ‘real danger’ that ‘the media would be forced to abstain from the truthful disclosure of a member’s misbehaviour in Parliament’.

Although the plaintiff in *Prebble* was permitted to proceed with his action on the facts, the impact of the decision was immediately felt in this country by two Conservative members of Parliament.

In the case of Rupert Allason MP,¹⁶² an action against *Today* newspaper was stayed, the defendant seeking to show that which was prohibited, namely that ‘early day motions were at least inspired by improper motives’. To enforce parliamentary privilege but to refuse a stay would be unjust to the defendant, who would be deprived of their only defence ‘while allowing the plaintiff to continue on an unsatisfactory and unfair basis’. In the view of Owen J, MPs ‘had to take the ill consequences together with the good consequences’ of parliamentary privilege.

In the case of Neil Hamilton MP, it was claimed by the plaintiff that he had been libelled by the *Guardian* which alleged that he had received money from a businessman in return for asking ministers questions which were intended to further that businessman’s interests. On this basis it was ruled by May J that the case could not proceed as the evidence directly involved proceedings in Parliament.¹⁶³ This case provided a catalyst for legislative reform, a number of people at the time believing Mr Hamilton to have been placed in an invidious position.

¹⁶¹ [1995] 1 AC 321. G Marshall [1994] PL 509, M Harris (1996) 8 *Auckland UL Rev* 45.

¹⁶² *Allason v Haines*, *The Times*, 25 July 1995.

¹⁶³ For details, see HL Deb, 7 May 1996, cols 24–5. See also cols 42–3 (regarding Mr Ian Greer).

The *Prebble* case and its progeny in the United Kingdom were thought to create a real injustice, and an amendment was introduced to the Defamation Bill in 1996.¹⁶⁴ As a result, the art 9 protection may be waived, overcoming the *Prebble* problem in the following way: a claimant may bring an action in defamation to vindicate his or her reputation provided he or she is willing to permit the defence to refer to proceedings in Parliament to justify what it had written. If the claimant is not prepared to waive the protection of art 9 then *Prebble* will continue to apply and the action may be stayed, on the ground that the newspaper must be allowed to prove that what it said was true. Newspapers would otherwise be ‘reluctant to criticise what anyone said in Parliament if it meant that they could be sued while they had to stand with their hands tied behind their backs’.¹⁶⁵

Returning to the case of Mr Neil Hamilton, Hamilton dropped his case against *The Guardian* despite the fact that the 1996 Act, s 13 allowed him to continue. But not only did he discontinue the legal proceedings, the House of Commons Standards and Privileges Committee found that he had received money from the businessman Mr Al Fayed for lobbying services, and he lost his parliamentary seat at the general election in 1997. In a second libel case, this time against Mr Al Fayed about allegations made by him on television, the defence sought to have the trial stayed on the ground of parliamentary privilege. But Mr Hamilton invoked the 1996 Act, s 13 to waive parliamentary privilege, and this was found by the House of Lords to provide a complete answer to the attempt by the defence to have the action stayed.¹⁶⁶ The libel action failed.

Procedure and remedies

While much of the Defamation Act 2013 is concerned with the substance of the law, other provisions of the same Act also address procedural points. The latter are designed in part to respond to concerns about ‘libel tourism’, whereby someone with a remote connection with the United Kingdom brings claims for defamation in the English courts on the ground that what may be only a few copies of an allegedly defamatory article have been published in this country. Steps to tighten up on this are to be found in the 2013 Act, s 9, following which a defamation action may not be brought unless ‘the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement’ (s 9(2)).

This means that ‘where a statement has been published in this jurisdiction and also abroad the court will be required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard’.¹⁶⁷ By way of example a statement ‘published 100,000 times in Australia and only 5,000 times in England’, which would be ‘a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than England’. However, a number of factors would have to be taken into account in addition to the number of times a statement was published in different jurisdictions, ‘including, for example, the amount of damage to the claimant’s reputation in this jurisdiction compared to elsewhere’.¹⁶⁸

Three other procedural changes are also significant. The first is the abolition of jury trial in defamation cases (s 11), an issue that has been a major concern for publishers over many years. Actions for defamation were one of the few surviving forms of civil action where either party had a right to insist on trial by jury.¹⁶⁹ When the judge ruled that a statement was

¹⁶⁴ Ibid, col 24.

¹⁶⁵ Ibid, col 251.

¹⁶⁶ *Hamilton v Al Fayed* [2001] 1 AC 395. See A W Bradley [2000] PL 556.

¹⁶⁷ Defamation Act 2013, Explanatory Notes.

¹⁶⁸ Ibid.

¹⁶⁹ Senior Courts Act 1981, s 69.

capable of being regarded as defamatory, it was the jury that decided whether the applicant had been defamed and if so the damages that he or she should recover. The provisions of the 2013 Act, s 11 are the end of a process in recent years in which the role of the jury has been diminished, a process triggered by the extravagant award of damages in some cases.¹⁷⁰ The removal of the jury nevertheless removes an important aspect of popular control over the conduct of the press.

The second additional procedural change is the power of the court to require a summary of its judgment in a defamation case to be published by the defendant. Where the parties are unable to agree the content of the summary, the dispute may be resolved by the court (s 12(3)), which is also empowered to give directions about ‘the time, manner, form or place of publication’ if necessary (s 12(4)).¹⁷¹ The third procedural change is to be found in s 13, which applies where a court gives judgment for the claimant, in circumstances where the defendant may not be in a position to require the offending material to be withdrawn from circulation (as where it is on internet site, or where it is being distributed by others). In such cases, the court may order a number of steps to be taken, including the removal of a defamatory statement from a website (s 13(1)).

G. Breach of confidence

Government information

We turn finally to consider the role of breach of confidence as a restraint on freedom of expression. As with defamation, liability here arises under civil law rather than criminal law, which means that actions may be brought by individuals and companies as well as by the state. We have already seen in chapter 16 how the action for breach of confidence has provided the basis for the emerging right to privacy. But the law relating to confidentiality does not apply only to protect information relating to the private life of the individual.

It may thus be possible in some cases to use breach of confidence to restrain the disclosure of government information. However, the label of ‘confidential’ applied to a document does not mean that a court will restrain its publication should a copy reach a newspaper. In *Fraser v Evans*, the court refused to ban publication of a confidential report which Fraser, a public relations consultant, had prepared for the Greek government, when the *Sunday Times* had obtained a copy of it from Greek sources: Fraser’s contract with the Greek government required him but not the government to keep it confidential.¹⁷²

More recently, the Attorney General invoked the same action in 1975 in his attempt to restrain publication of the Crossman diaries, discussed more fully in chapter 11 above. This

¹⁷⁰ See *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442 (excessive damages awards inconsistent with defendant’s Convention rights), and *John v Mirror Group Newspapers* [1997] QB 586 (judges to give greater guidance to juries about damages).

¹⁷¹ Section 12 complements and extends generally the provisions of the Defamation Act 1996, s 8, which enables the court in some circumstances to deal with defamation cases by way of summary judgment. In these cases the court could order the defendant to publish a suitable correction and apology (s 9(1)(b)). If the parties are unable to agree the content of any such correction or apology, ‘the court may direct the defendant to publish or cause to be published a summary of the court’s judgment agreed by the parties or settled by the court in accordance with rules of court’ (s 9(2)). Where the parties are unable to agree on the time, manner, form or place of publication of the correction and apology, ‘the court may direct the defendant to take such reasonable and practicable steps as the court considers appropriate’ (ibid).

¹⁷² [1969] 1 QB 349.

is another case that revealed both the limitations of breach of confidence as a restriction on freedom of expression, as well as its potential scope. In that case an injunction was not granted to restrain the publication of the diaries. Lord Widgery CJ nevertheless ruled that publication of information received by a Cabinet minister prejudicial to Cabinet collective responsibility would be restrained if such restraint was clearly required in the public interest.¹⁷³

Breach of confidence is important because it allows the government to apply for an order to prevent the publication of a document or information. To that extent it is very different from defamation where the courts traditionally have been reluctant to grant injunctions, the victim being left instead to seek a remedy in damages (though this is not to deny the severe chilling effect of a claim in advance of publication that a proposed publication contains potentially defamatory material).¹⁷⁴ It is also very different from the criminal law, which relies on punishment after publication, though it would be possible both to seek an injunction to restrain a publication and to bring a prosecution under the Official Secrets Acts 1911–1964.¹⁷⁵

Spycatcher and national security

It is nevertheless clear that an action for breach of confidence may be brought to restrain the publication of government secrets. In this respect, the action acquired considerable prominence and value for the government as a tool for restraining the disclosure of secret information by disaffected members of the security services. Here, the most sensational attempt to use breach of confidence to protect government information was the *Spycatcher* case.

Mr Peter Wright, a retired security service officer, wrote a book, *Spycatcher*, in which he claimed to reveal secrets relating to activities of the British security service. The book was due to be published initially in Australia, which the British government sought an injunction to restrain. Two British newspapers (the *Guardian* and the *Observer*) carried accounts of what the book was said to contain, at which point the Attorney General moved for an injunction to restrain the newspapers from carrying any such reports. An interim injunction was granted on the ground that publication would be a breach of confidence. Legal proceedings to restrain publication in Australia failed,¹⁷⁶ and the book was also published in the United States. When copies of the book began freely to enter the United Kingdom, the *Guardian* and the *Observer* moved to have the interim injunctions discharged, on the ground that there was now no public interest in maintaining the injunctions in view of the fact that the contents of the book were widely known and freely available throughout the world. The House of Lords (by a majority of three to two) refused the application on the ground that the restrictions remained necessary in the public interest (for reasons that were neither clear nor convincing).¹⁷⁷

¹⁷³ *A-G v Jonathan Cape Ltd* [1976] QB 752. See also *Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 147 CLR 39.

¹⁷⁴ *Herbage v Pressdram Ltd* [1984] 2 All ER 769. This is because of ‘the value the court has placed on freedom of speech and . . . also on freedom of the press, when balancing it against the reputation of a single individual, who . . . can be compensated in damages’ (at p 771).

¹⁷⁵ See ch 19.

¹⁷⁶ (1987) 8 NSWLR 341 (Powell J); (1987) 75 ALR 353 (NSW Court of Appeal); (1988) 78 ALR 449 (High Court of Australia). See Turnbull, *The Spycatcher Trial*.

¹⁷⁷ *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316.

However, the Attorney General's application for permanent injunctions against the newspapers failed.¹⁷⁸ The House of Lords agreed that security service personnel owe a lifelong duty of confidence and that they may be restrained by injunction from disclosing any information which they obtain in the service of the Crown, as may any third party to whom such information is improperly conveyed. However, the availability of the book in the United States fatally undermined the government's claim that the maintenance of the injunctions was necessary in the public interest. In the opinion of Lord Keith, 'general publication in this country would not bring about any significant damage to the public interest beyond what has already been done. All such secrets as the book may contain have been revealed to any intelligence service whose interests are opposed to those of the United Kingdom.'¹⁷⁹ But although the actions for permanent injunctions failed, the punishment of several newspapers for contempt of court was subsequently upheld by the House of Lords. The appellants had published material which breached the terms of the injunctions against the *Observer* and the *Guardian*, and it was held that by their conduct they had interfered with the administration of justice.¹⁸⁰

It was subsequently held by the European Court of Human Rights that the refusal of the House of Lords in 1987 to discharge the injunctions violated art 10 of the European Convention on Human Rights on the ground that, after publication of the book in the United States, the material in question was no longer confidential.¹⁸¹ Breach of confidence has nevertheless become an established basis for regulating the publication of material about the security service,¹⁸² and this continues to be the position, notwithstanding the Human Rights Act.

In *Attorney-General v Times Newspapers Ltd*¹⁸³ the newspaper gave an undertaking to the Attorney General not to publish information about the secret service (SIS) which had been given to it by Richard Tomlinson, a former agent. When his book was subsequently published in Russia, *The Times* successfully applied to the court to have the undertaking varied, to allow it to publish any of Tomlinson's material which was 'generally accessible to the public at large'. The Attorney General thought that this variation was too wide, but the Court of Appeal overruled his objections and also rejected his claim that any publication should be approved in advance either by himself or by the court. Having regard to the Human Rights Act the court did not think it right that the newspaper 'should seek confirmation from the Attorney General or the court that facts that they intend to republish have been sufficiently brought into the public domain by prior publication so as to remove from them the cloak of confidentiality'. But the court emphasised that the newspaper was bound by confidentiality, the effect of the decision being that the newspaper alone should be responsible for determining when it thought the boundaries had been reached. Should it break the obligation, it would be 'subject to the sanctions that exist for contempt of court'.

¹⁷⁸ *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

¹⁷⁹ For a fuller treatment of this intricate affair, see Ewing and Gearty, *Freedom under Thatcher*, pp 152–69. See also D G T Williams (1989) 12 Dalhousie LJ 209; and A W Bradley [1988] All ER Rev 55.

¹⁸⁰ *A-G v Times Newspapers Ltd* [1992] 1 AC 191.

¹⁸¹ *The Observer v UK* (1992) 14 EHRR 153. And see I Leigh [1992] PL 200.

¹⁸² See *Lord Advocate v Scotsman Publications Ltd* [1990] 1 AC 812; N Walker [1990] PL 354.

¹⁸³ [2001] 1 WLR 885.

So although Times Newspapers succeeded in having the undertaking varied, the result was hardly a ringing endorsement of freedom of expression, despite the Human Rights Act. The court also stated: ‘It is desirable that there should usually be consultation between a newspaper and representatives of SIS before the newspaper published information that may include matters capable of damaging the service or endangering those who serve in it.’ Such consultation does, in fact, take place. Where a publication is made in breach of confidence, the agent may be required to account for his or her profits.¹⁸⁴

Commercial information: ‘super-injunctions’ and parliamentary privilege

As we have seen in chapter 16, liability for breach of confidence has developed under the Human Rights Act, which has not led to an unequivocal vindication of free speech in this area. This is partly because Convention rights include the right to respect for one’s private life, a provision that has to be balanced against the Convention right to freedom of expression. Breach of confidence continues to provide a basis of restraint of information that has political implications, as well as information that deals with personal or commercial secrets. One such example discussed in chapter 16 relates to the journals of the Prince of Wales in which there was criticism of Chinese government officials at the time of the hand-over of Hong Kong by the United Kingdom.¹⁸⁵

An even more controversial example of the use of injunctions to restrain the publication of confidential information is provided by the *Trafigura* affair, which raises questions also about the use of so-called ‘super-injunctions’ to prevent discussion of matters of public interest. Although the case was about restraining the publication of material subject to legal privilege,¹⁸⁶ the issues were similar in principle to questions that might arise in relation to breach of confidence. The matter erupted when Paul Farrelly MP tabled a parliamentary question about *Trafigura* which had obtained an injunction preventing the disclosure of an internal document relating to ‘the alleged dumping of toxic waste in the Ivory Coast’.¹⁸⁷ The problem arose because a month earlier an injunction had been granted against the *Guardian* (and ‘persons unknown’) preventing it from publishing details of the report.

The latter injunction also prohibited publication of the fact that the injunction had been obtained, stating in terms that the respondent must not communicate or disclose ‘the information that the Applicants have obtained an injunction’. A ‘third level of secrecy was granted by the judge in that *Trafigura* and subsidiary’s identities as claimants were replaced by the random initials “RJW” and “SJW”’.¹⁸⁸ The gravity of this matter was increased still further when *Trafigura* informed the *Guardian* that it would be in breach of the injunction if it reported Mr Farrelly’s question, which led the newspaper to report on its front page that it was unable to report a parliamentary question.¹⁸⁹ On this occasion, the Lord Chief Justice issued an unprecedented statement a week later doubting whether the injunction could prevent discussion of the matter in Parliament,¹⁹⁰ a view supported by the Speaker who resisted calls on behalf of the company for a debate on libel to be halted on sub judice grounds.¹⁹¹

In the course of that debate, the Parliamentary Under-Secretary of State for Justice agreed that reporting of any such matter in Parliament was protected by the Parliamentary Papers

¹⁸⁴ *Attorney-General v Blake* [2001] AC 268.

¹⁸⁵ *Associated Newspapers Ltd v Prince of Wales* [2006] EWCA Civ 1776, [2008] QB 57.

¹⁸⁶ Neuberger, *Report of the Committee on Super-Injunctions* (2011), para 5.10.

¹⁸⁷ HC 362 (2009–10), para 94.

¹⁸⁸ *Ibid*, para 95.

¹⁸⁹ *The Guardian*, 13 October, 2009.

¹⁹⁰ HC 362 (2009–10), para 97.

¹⁹¹ *Ibid*, paras 98, 102.

Act 1840, s 3, and that the *Guardian* was free to report Mr Farrelly's question.¹⁹² The injunction was eventually withdrawn, and the position of the *Guardian* was thus vindicated.¹⁹³ However, doubts have since been expressed about the extent to which media reporting of parliamentary proceedings is in fact protected from the risk of legal liability.¹⁹⁴

H. Conclusion

The Trafigura affair highlights the different potential threats to freedom of expression, with attempts to use the law of confidence directly to prevent the publication of a report, the identity of applicants for an injunction, and the existence of an injunction; as well as indirectly to prevent the press reporting of a parliamentary question, and a debate in Parliament. While the drama also revealed the continuing importance of parliamentary privilege as a means of protecting freedom of expression, the conclusion of the affair left a number of outstanding questions unresolved, not least the use of 'super-injunctions' to restrain publicity, as a new form of prior restraint.¹⁹⁵

In the meantime, although much has been done to remove redundant laws by statute (seditious, blasphemous, obscene and criminal libel), in some cases these laws have been replaced by legislation that occupies much the same territory. And although a great deal has been done by statute and judicial decision to contain the scope of libel law, other restraints on freedom of expression have been fashioned by the courts to protect the privacy of individuals. These contrasts and contradictions are a reminder that there will always be those who wish to impose restraints on the speech of others, and that freedom of expression will never be unlimited.

¹⁹² See ch 9 above.

¹⁹³ The use of super-injunctions was also the subject of investigation by a committee chaired by Lord Neuberger, following which their use was discouraged though not prohibited. See Neuberger, *Report of the Committee on Super-Injunctions*, above. Chapter 6 of the latter report contains a detailed account of the Trafigura affair.

¹⁹⁴ *Ibid*, paras 6.23–6.24. See ch 9 above.

¹⁹⁵ See also *Terry v Persons Unknown* [2010] EWHC 119 (QB), [2010] Fam Law 453.

CHAPTER 18

Freedom of association and assembly

This chapter examines the principal features of the law relating to freedom of association and assembly.¹ These freedoms traditionally were protected in the same way as other freedoms in English law; that is to say, people are free to associate and assemble to the extent that their conduct is not otherwise unlawful. The principle is best illustrated in the context of freedom of assembly by the seminal decision in *Beatty v Gillbanks*²:

Members of the Salvation Army insisted on marching through the streets of Weston-super-Mare despite violent opposition from the 'Skeleton Army' and despite an order from the magistrates that they should not march. In an attempt to stop the Salvationist marches, the police sought to have their leaders bound over to keep the peace on the ground that they had committed an unlawful assembly. If the Salvationists had not marched there would clearly have been no disturbance of the peace. As previous processions had led to disorder, the Salvationists knew that similar consequences were likely to ensue. The Divisional Court held that the acts of the Salvation Army were lawful and that it was not a necessary and natural consequence of these acts that disorder should have occurred. The court did not accept that a person might be punished for acting lawfully if he knew that his doing so might lead another person to act unlawfully.

Although historically the common law might thus offer some protection, cases in which freedom of assembly triumphed nevertheless tended in practice to be unusual, in view of the wide range of statutory (and common law) 'exceptions' to the legal principle. Protection for freedom of assembly has, however, now been enhanced by the Human Rights Act, with the right to freedom of association and assembly now being expressly protected by art 11 of the ECHR. But as in the case of the common law, these Convention rights are subject to significant qualifications and permitted limitations, provided they are 'prescribed by law' and 'necessary in a democratic society'. There thus continues to be a tension between freedom and restraint, and it is this tension that will be explored in the following pages.

A. Freedom of association³

The law generally imposes no restrictions on the freedom of individuals to associate together for political purposes. People are free to form themselves into political parties, pressure groups,

¹ See Ewing and Gearty, *The Struggle for Civil Liberties*, chs 5 and 6; Ewing and Gearty, *Freedom under Thatcher*, ch 4; and Ewing, *Bonfire of the Liberties*, ch 4. Also Feldman, *Civil Liberties and Human Rights*, ch 18; C A Gearty, in McCrudden and Chambers (eds), *Individual Rights and the Law in Britain*, ch 2. Further, Morgan, *Conflict and Order*, and Townshend, *Making the Peace*. For Scotland, see Ewing and Dale Risk, *Human Rights in Scotland*, ch 9, and R Reed and J L Murdoch, *Human Rights Law in Scotland*, ch 7.

² (1882) 9 QBD 308. And see Hart and Honoré, *Causation in the Law*, pp 333–5. Compare *Deakin v Milne* 1882 10 R (J) 22, and *Hutton v Main* 1891 19 R (J) 5.

³ See K D Ewing, in McCrudden and Chambers (eds), *Individual Rights and the Law in Britain*, ch 8.

community associations and so on, without any official approval. People are also free to determine with whom they will associate: organisations ought not to be required to accept into membership or to retain individuals who for one reason or another have beliefs that collide with those of the organisation.⁴ Trade unions, for example, cannot normally be required to take into membership people (such as members of the British National Party), whose beliefs and conduct are thought to be contrary to the principles of the union.⁵ Freedom of association thus swings both ways: it is a right of the individual, but simultaneously a right of individuals in association, and sometimes the exercise of both rights gives rise to an irreconcilable conflict in which only one can prevail.

The first exception to the right to freedom of association relates to the need to promote a politically neutral public service. As we saw above, there continue to be restrictions on the political activities of civil servants, these depending to a great extent on the seniority of the official in question and the nature of the work in which he or she is engaged. Although these restrictions relate mainly to political activities rather than membership of political or other organisations, it would surely be unusual for senior civil servants to align themselves formally with a political party.⁶ Similarly, local government officers in politically restricted posts may not actively engage in party politics, though there does not appear to be a restriction on membership of a political party.⁷ Police officers may not take any active part in politics,⁸ a rule designed ‘to prevent a police officer doing anything which affects his impartiality or his appearance of impartiality’.⁹ Concerns about external security led to the controversial banning of trade union membership at Government Communications Headquarters (GCHQ) in 1984, a ban not revoked until 1997.¹⁰

A second exception to the right to freedom of association lies in the banning of certain forms of association, even by people who are not otherwise restricted in their political activities because of their employment in the public service. Under the Public Order Act 1936, s 1, it is an offence for any person in a public place or at a public meeting to wear a uniform signifying association with a political organisation or with the promotion of any political object.¹¹ Passed in response to the conduct of fascists in the 1930s, s 2 of the same Act makes it an offence (a) to organise or train the members or supporters of any association for the purpose of enabling them to be used in usurping the functions of the police or the armed forces, or (b) to organise and train (or equip) them, either for enabling them to be employed for the use or display of physical force in promoting any political object, ‘or in such manner as to arouse reasonable apprehension that they are organised and either trained or equipped for that purpose’.¹²

More recently, the Terrorism Act 2000 re-enacted wide-ranging restrictions on membership and participation in the activities of terrorist organisations.¹³ This Act contains what appears to be the only example of British legislation that makes it an offence simply to be a

⁴ See *RSPCA v Attorney-General* [2001] 3 All ER 530.

⁵ Employment Act 2008, s 19, implementing *ASLEF v United Kingdom* [2007] IRLR 361; K D Ewing (2007) 36 ILJ 425; (2009) 38 ILJ 50.

⁶ See ch 11.

⁷ Local Government and Housing Act 1989, ss 1–2 (as amended by the Local Democracy, Economic Development and Construction Act 2009); SI 1990 No 851. These arrangements have been found not to violate the ECHR, art 10: *Ahmed v UK* (2000) 29 EHRR 1. See G Morris [1998] PL 25; [1999] PL 211.

⁸ SI 2003 No 527, reg 6 and Sch 1. See also Police Act 1996, s 64(1), restrictions on freedom of police officers to join trade unions.

⁹ *Champion v Chief Constable of Gwent* [1990] 1 All ER 116.

¹⁰ See ch 19 below. Also, Fredman and Morris, *The State as Employer*.

¹¹ See *O’Moran v DPP* [1975] QB 864. See now Terrorism Act 2000, s 13.

¹² *R v Jordan and Tyndall* [1963] Crim LR 124; D G T Williams [1970] CLJ 96, 102–4.

¹³ Terrorism Act 2000. Part II.

member of a specific organisation;¹⁴ the proscribed organisations include al-Qaeda and Hamas, as well as proscribed ‘Irish Groups’. There are, in fact, 14 proscribed organisations listed in the Terrorism Act 2000, Sch 2; the Act contains a power for more to be added (s 3), as a result of which another 52 have been proscribed.¹⁵

B. The right of public meeting

Public meetings may be held in the open air in places to which the public have free access. However, it is usually necessary to get the prior consent of the owners of the land. Many local authorities have made by-laws governing the use of parks for various purposes, including public meetings; breach of these by-laws is a criminal offence, unless the court is prepared to hold the by-law to be ultra vires,¹⁶ and a civil remedy may also be available to restrain persistent breach of the law.¹⁷ Otherwise, it may be possible to hold an assembly on the highway without the need for prior consent.¹⁸ But the scope of this right is very limited: the assembly must be ‘reasonable and non-obstructive, taking into account its size, duration and the nature of the highway’. It must, moreover, be ‘not inconsistent with the primary right of the public to pass and repass’.¹⁹ As we shall see in the pages that follow, it may be very difficult to hold an assembly on the highway without inadvertently acting unlawfully.

In the case of Trafalgar Square in London, statutory regulations have been made under which approval is required from the Greater London Authority and the Mayor acting on its behalf.²⁰ Similarly, in the case of Hyde Park, no meetings may be held as of right:²¹ although Speaker’s Corner is available for any who wish to speak, the law is applied there ‘as fully as anywhere else’.²² More recently, the Police Reform and Social Responsibility Act 2011 introduced new controls on activities in Parliament Square.²³ With the activities of recent anti-war protestors such as Brian Haw clearly in mind,²⁴ the new legislation is designed to stop the unauthorised use of loudspeakers and loudhailers, and the use of tents and sleeping equipment in the controlled area. Police officers have wide powers to give directions to individuals to cease a prohibited activity, failure to comply with which is an offence.²⁵ It is permissible to use these powers against someone who had been authorised under the statutory regime previously in operation to do that which now constitutes a controlled activity.²⁶

For meetings, rallies or assemblies which are not held in the open air, a major practical restriction is the need to find premises for them, to say nothing of the cost of hiring a hall

¹⁴ Ewing, note 1 above.

¹⁵ See ch 20 below.

¹⁶ *De Morgan v Metropolitan Board of Works* (1880) 5 QBD 155; *Aldred v Miller* 1925 JC 21; *Aldred v Langmuir* 1932 JC 22. And see *R v Barnet Council, ex p Johnson* (1990) 89 LGR 581 (condition excluding ‘political activity’ at community festival held invalid).

¹⁷ Cf *Llandudno UDC v Woods* [1899] 2 Ch 705.

¹⁸ *DPP v Jones* [1999] 2 AC 240. See 484–5 below.

¹⁹ *Ibid*, per Lord Chancellor (Irvine).

²⁰ Greater London Authority Act 1999, s 383–385. See Trafalgar Square Bye-Laws 2012.

²¹ *Bailey v Williamson* (1873) 8 QBD 118; Royal Parks and Other Open Spaces Regulations 1997, SI 1997 No 1639 (as amended).

²² *Redmond-Bate v DPP* [2000] HRLR 249.

²³ Police Reform and Social Responsibility Act 2011, ss 142–149.

²⁴ On whom, see *R (Haw) v Home Secretary* [2006] EWCA Civ 532, [2006] QB 780; *DPP v Haw* [2007] EWHC 1931 (Admin), [2008] 1 WLR 379.

²⁵ On the scope of the powers, see 2011 Act above, ss 144, 145.

²⁶ *R (Gallastegui) v Westminster City Council* [2013] EWCA Civ, [2013] 2 All ER 579.

and dealing with security.²⁷ The organisers of an unpopular cause may find it difficult to hire suitable halls, whether these are owned by private individuals or by public authorities such as a local council. However, candidates at local, parliamentary and assembly elections are entitled to the use of schools and other public rooms for the purpose of holding election meetings.²⁸ Otherwise local authorities appear to have a wide discretion in deciding to whom to let their halls, although this discretion is subject to law and may now be open to challenge on the ground of illegality under the Human Rights Act 1998.²⁹ But not even the Human Rights Act has fully met the argument that local authorities in particular should be under a general duty to make their halls available to all groups, whether popular or unpopular, without discriminating between them on political or other grounds.³⁰

Such a duty applies to universities and higher and further education institutions under the Education (No 2) Act 1986. By s 43, the governing bodies of such establishments must 'take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers'. This includes an obligation 'to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with (a) the beliefs or views of that individual or of any member of that body; or (b) the policy or objectives of that body'. Governing bodies must issue and keep up to date a code of practice to facilitate the discharge of these duties.

In *R v University of Liverpool, ex p Caesar-Gordon*,³¹ the university authorities refused permission for a meeting at the university to be addressed by two first secretaries from the South African Embassy. This was done because of fear that in the event of the meeting taking place public violence would erupt in Toxteth, the residential area adjacent to the university. On an application for judicial review by the chairman of the student Conservative Association, the Divisional Court held that, on a true construction of s 43(1), the duty imposed on the university is local to the members of the university and its premises. Its duty is to ensure, so far as is reasonably practical, that those whom it may control, that is to say its members, students and employees, do not prevent the exercise of freedom of speech within the law by other members, students and employees and by visiting speakers in places under its control. But under s 43(1), the university was not entitled to take into account threats of 'public disorder' outside the confines of the university by persons not within its control. A declaration was granted that the university acted ultra vires in denying permission to hold the meeting. The court suggested, however, that had the university authorities confined their reasons when refusing permission 'to the risk of disorder on university premises and among university members', then no objection could have been taken to their decisions.

²⁷ Under the Criminal Justice and Public Order Act 1994, s 170, the security costs of political party conferences may be met by the Treasury.

²⁸ Representation of the People Act 1983, ss 95, 96. See *Webster v Southwark Council* [1983] QB 698; *Ettridge v Morrell* (1986) 85 LGR 100.

²⁹ Such decisions may also be open to challenge if the refusal to let a hall is unreasonable in the *Wednesbury* sense: *Wheeler v Leicester City Council* [1985] AC 1054. Cf *Verrall v Great Yarmouth BC* [1981] QB 202.

³⁰ Street, *Freedom, the Individual and the Law* (5th edn), p 56.

³¹ See E Barendt [1987] PL 344.

C. Public processions and assemblies

Public processions

By contrast with static meetings on the highway, at common law a procession in the streets is *prima facie* lawful, being no more than the collective exercise of the public right to use the highway for its primary purpose.³² This does not mean that it would be a reasonable use of the highway for a dozen demonstrators to link arms and proceed down a street so as to interfere with the right of others to use the highway, or for a large group of demonstrators to decide to obstruct a street: a procession would become a nuisance ‘if the right was exercised unreasonably or with reckless regard of the rights of others’.³³ It might also be held to be an obstruction of the highway.

But because processions were *prima facie* lawful, statutory powers were needed if the police were to control them. General powers were contained in the Public Order Act 1936, passed at a time when fascist marches in the East End of London were a serious threat to order. These powers were extended by the Public Order Act 1986. The first major change was the introduction of a requirement that the organisers of a public procession should give advance notice to the police (s 11). The duty applies in respect of processions designed (a) to demonstrate support for or opposition to the views or actions of any person or body of persons; (b) to publicise a cause or campaign; or (c) to mark or commemorate an event. There are a few exclusions from the duty to notify,³⁴ but most processions for political purposes will be caught by these requirements. The notice, which must specify the proposed time, date and route, must be delivered to a police station (in the area where the procession is to start) at least six clear days in advance.

In addition to this notice requirement, the 1986 Act extends the grounds for which conditions can be imposed on public processions, as well as the circumstances whereby such processions may be banned. So in addition to the original ground of ‘serious public disorder’ in the 1936 Act, a senior police officer may impose conditions where he or she reasonably believes that the procession may result in serious damage to property or serious disruption to the life of the community. He or she may also impose conditions where the purpose of the organisers of the procession is to intimidate others (s 12). The conditions may be such as appear necessary to prevent disorder, damage, disruption or intimidation, including conditions prescribing the route and prohibiting entry to a specified public place. Unlike the 1936 Act, there is no restriction on the giving of directions relating to the display of flags, banners or emblems. If these powers to impose conditions are not enough to prevent serious public disorder, the chief officer of police may apply to the local authority (or in London the Home Secretary) for a banning order under what is now s 13 of the 1986 Act. The power to issue a banning order is restricted to serious public disorder; the section does not permit an order to be made on the wider grounds on which conditions may be imposed.

Similar powers in Scotland are in the Civic Government (Scotland) Act 1982.³⁵ By s 62, the organisers of a public procession must notify (at least 28 days in advance) both the Scottish police and the local authority in whose area the procession is to be held. After consulting the

³² A Goodhart (1937) 6 CLJ 161, 169.

³³ *Lomdens v Keaveney* [1903] 2 IR 82, 90 (Gibson J); and see *R v Clark (No 2)* [1964] 2 QB 315.

³⁴ By s 11(2), there is no duty to notify where ‘the procession is one commonly or customarily held in the police area (or areas) in which it is proposed to be held or is a funeral procession organised by a funeral director acting in the normal course of his business’. A monthly cycle ride by large numbers of cyclists through the streets of London which did not follow any particular route was held to fall within s 11(2): *Kay v Metropolitan Police Commissioner* [2008] UKHL 69, [2008] 1 WLR 2723.

³⁵ See Ewing and Dale-Risk, note 1 above, ch 9. See also W Finnie, in Finnie, Himsworth and Walker (eds), *Edinburgh Essays in Public Law*, pp 251–77.

chief constable, the local authority may then prohibit the holding of the procession or impose conditions upon it. This may be done having regard to the likely effect of the procession in relation to public safety, public order, damage to property, and disruption to the life of the community, while the local authority should also have regard to any ‘excessive burden on the police’.³⁶ It thus appears not only that a local authority in Scotland could ban a specific march (whereas in England and Wales the ban must be on the holding of all public processions or of any class of public processions specified in the order), but that the grounds for imposing a ban (or conditions) are both different and wider.

Another important difference between Scots law and the 1986 Act is the appeal procedure in the Civic Government (Scotland) Act 1982, s 64. Thus, a person who has given notice of a procession under s 62 may appeal within 14 days to the sheriff against an order prohibiting or imposing conditions on the procession. The grounds of appeal are limited by the statute to error of law, mistake of fact, unreasonable exercise of discretion or that the local authority have ‘otherwise acted beyond their powers’. There is no comparable provision in the Public Order Act 1986. It is true that the organiser of a procession could seek judicial review of a banning order or of an order to impose conditions.³⁷ But, unlike in Scotland, this would be review and not an appeal, and it would be in the High Court under the judicial review procedure and not in the local sheriff court. In any event, as the Court of Appeal has made clear that, in a case involving a banning order under s 3(2) of the 1936 Act, it is not willing to encourage such applications.³⁸ There is also the practical problem of securing judicial review in enough time before the procession is due to be held.

There is no duty on the police to give notice of the conditions ‘as early as possible’, as there is on the local authority in Scotland.³⁹ If the police exercise their powers unreasonably, it may be possible for anyone arrested for violating the conditions to challenge the legality of any conditions as a defence in criminal proceedings. But this will not restore their right to participate in the procession, or the right to conduct the procession as initially conceived.

Public assemblies

Police powers specifically to regulate public assemblies were introduced in the Public Order Act 1986 (s 14). The senior police officer present at an assembly (or the chief constable in the case of an assembly intended to be held) may impose conditions as to its location and duration, as well as the number of people who may be present. These conditions may be issued where it is reasonably believed (*a*) that the assembly may result in serious public disorder, serious damage to property, or serious disruption to the life of the community; or (*b*) that the purpose of organising the assembly is to intimidate others. A public assembly is defined to mean an assembly of two or more people in a public place which is wholly or partly open to the air (s 16).⁴⁰

There is no procedure in the Act for challenging instructions issued under this power, although if they are issued long enough in advance, judicial review is available in principle. The only other means of challenging any directions would be collaterally, as a defence in

³⁶ Police, Public Order and Criminal Justice (Scotland) Act 2006, s 71, amending Civic Government (Scotland) Act 1982, s 63.

³⁷ Judicial review was also available in principle to challenge banning orders under s 3(2) of the Public Order Act 1936. See *Kent v Metropolitan Police Commissioner*, *The Times*, 15 May 1981. For the position under the ECHR, see *Plattform ‘Äzte für das Leben’ v Austria* (1988) 13 EHRR 204.

³⁸ *Kent v Metropolitan Police Commissioner*, above. That may have to be re-assessed, however, in light of the Human Rights Act 1998.

³⁹ Civic Government (Scotland) Act 1982, s 63.

⁴⁰ As amended by the Anti-social Behaviour Act 2003, s 57. Before then a public assembly for this purpose was defined as meaning an assembly of at least 20 people.

criminal proceedings for violating a direction given under the Act. It could be argued that the police had exceeded their powers, for example, because the purpose of an assembly was to cause inconvenience and embarrassment to third parties, rather than to intimidate them.⁴¹ Nevertheless, the section gives the police wide powers to control public assemblies, and by the power to issue directions, to frustrate the purpose of the assembly. In a report on the G20 protests in 2009 (at which a bystander died after an incident with a police officer), the House of Commons Home Affairs Committee noted concerns about the way in which this power is now being used, drawing attention in particular to an alleged failure of the police properly to communicate their use of section 14, so that to ‘the protesters being dispersed it seemed as if the police, without warning had began to use force to clear a peaceful protest’.⁴²

The Criminal Justice and Public Order Act 1994 added new powers in respect of public assemblies, corresponding to the powers relating to public processions in s 13 of the 1986 Act.⁴³ These powers apply to ‘trespassory assemblies’, that is to say an assembly ‘on land to which the public has no right of access or only a limited right of access’, a wide definition of uncertain scope, as considered below. The power of the police – in what is now the Public Order Act 1986, s 14A – is activated where a chief officer ‘reasonably believes’ that such an assembly of 20 or more people (*a*) is likely to be held without the permission of the occupier of the land, and (*b*) may result in serious disruption to the life of the community or significant damage to land, a building or monument of historical, architectural, archaeological or scientific importance.

If these conditions are met, the chief officer of police may apply to the local authority for an order prohibiting all ‘trespassory assemblies’ in the district or part of it, for a specified period of up to four days in an area within five miles’ radius of a specified centre. The order, which may be varied or revoked before it expires, may be made after consulting the Secretary of State (who must give consent before an order may be made), and the order may be made as requested, or with modifications. In Scotland there is no need for ministerial approval to the making of the order (or in granting it with varied terms), while in London the order may be issued by the Metropolitan Police Commissioner with the consent of the Home Secretary. It is an offence to organise or take part in an assembly which is known to be prohibited and a constable in uniform may stop any person reasonably believed to be on the way to an assembly ‘likely to be an assembly which is prohibited’, and ‘direct him [or her] not to proceed in the direction of the assembly’. It is an offence to fail to comply with a direction.

In *DPP v Jones*⁴⁴ an order had been made prohibiting the holding of assemblies within a four-mile radius of Stonehenge from 29 May to 1 June 1995. While the order was in force, a peaceful assembly was held within the area covered by the order. When those present refused to disperse, they were arrested and convicted of trespassory assembly. The conviction was overturned by the Crown Court, and on an appeal by way of case stated it was held that conduct could constitute a trespassory assembly even though the conduct complained of was peaceful and did not obstruct the highway.

On a further appeal to the House of Lords, the question was whether the assembly exceeded the public’s right of access to the highway for the purposes of the definition of a ‘trespassory assembly’: if the public had the right to use the highway in this way, there would

⁴¹ *Police v Lorna Reid* [1987] Crim LR 702.

⁴² HC 418 (2009–10), para 27. The same report also expressed concerns about the use of section 14 against journalists covering protests.

⁴³ On the 1994 Act, see M J Allen and S Cooper (1995) 59 MLR 364.

⁴⁴ [1999] 2 AC 240; G Clayton (2000) 63 MLR 252.

be no 'trespass' under the 1986 Act as amended. The House of Lords (dividing 3:2) reinstated the decision of the Crown Court. The Lord Chancellor said that the right to use the highway was not limited to passage and repassage: 'the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway'.⁴⁵

D. Freedom of assembly and private property rights

Picketing

The purpose of picketing is to enable pickets to impart information to those entering or leaving premises, or in some cases to seek to persuade them not to enter in the first place. It has been said that the Human Rights Act 'arguably has created a "right to picket" to the extent that the right to peaceful assembly has been guaranteed by article 11 of the [ECHR]'.⁴⁶ However, those who picket may be subject to directions issued by the police under s 14 of the Public Order Act 1986. The police may also issue directions to prevent a breach of the peace; failure to comply with such directions may lead to an arrest for obstructing a police officer.⁴⁷ But even if a picket is perfectly peaceful and is not subject to regulation by the police in these ways, those who participate may in law be committing offences for which they can be arrested without a warrant provided the conditions for making an arrest are met.

1. Criminal and civil liability

The offence most obviously committed by those engaged in peaceful picketing is obstruction of the highway under the Highways Act 1980, s 137, for the purposes of which the highway includes the pavement as well as the road. A picket is no more a lawful or unlawful use of the highway than is any other kind of assembly.⁴⁸ Under the Trade Union and Labour Relations (Consolidation) Act 1992, s 241 (a measure originally contained in the Conspiracy and Protection of Property Act 1875, s 7), it is an offence for a person 'wrongfully and without legal authority' to 'watch and beset' premises where a person works or happens to be, with a view to compelling him or her to abstain from doing something which he or she is entitled to do. This is an offence introduced to deal with the workplace, but there is no reason why its application should be so limited. Having apparently fallen into disuse, what is now s 241 was revived during the miners' strike of 1984/85 as one of the weapons in the police armoury for dealing with the large-scale picketing that took place.⁴⁹

Apart from possible criminal liability, those who organise a picket may also face civil liability. There is authority for the view that picketing premises may constitute a private nuisance against the owner or occupier of these premises. At least the law is sufficiently unclear that an interim injunction may be granted on an application to stop the picketing.

⁴⁵ Ibid, at p 257.

⁴⁶ *Gate Gourmet London Ltd v TGWU* [2005] EWHC 1889 (QB), [2005] IRLR 881, para 22 (Fulford J).

⁴⁷ See pp 501–503 below.

⁴⁸ See *Broome v DPP* [1974] AC 587; *Kavanagh v Hiscock* [1974] QB 600; and *Hirst v Chief Constable of West Yorkshire* (1987) 85 Cr App R 143.

⁴⁹ See *P Wallington* (1985) 14 ILJ 145.

In *Hubbard v Pitt*, a community action group organised a peaceful picket outside the offices of estate agents in Islington, distributing leaflets and displaying placards to protest against the firm's part in improving property at the expense of working-class residents. On the issue of whether an interim injunction should be issued to the firm against the pickets, Forbes J held that the picketing was unlawful since it was not in contemplation or furtherance of a trade dispute (on the significance of which, see below) and was inconsistent with the public right to use the highway for passage and repassage.

But in the Court of Appeal, the majority upheld the interim injunction on quite different grounds, holding only that the plaintiffs had a real prospect of establishing at the eventual trial that the protesters were committing a private nuisance against them and that the balance of convenience lay in favour of the picketing being stopped until the main hearing of the action. Lord Denning MR dissented, holding that the use of the highway for the picket was not unreasonable and did not constitute a nuisance at common law; he considered that picketing other than for trade disputes was lawful so long as it was done merely to obtain or communicate information or for peaceful persuasion.⁵⁰

During the miners' strike of 1984/85 an attempt was made – successfully in the short term – to extend the tort of private nuisance. So in *Thomas v NUM (South Wales Area)*,⁵¹ Scott J held that pickets would be liable not only to the owner or occupier of the premises being picketed, but also to workers (and presumably others) who were 'unreasonably harassed' in entering the premises. This extension of tortious liability was subsequently rejected, in relation to an industrial dispute at Wapping in 1985/86.⁵²

2. Special rules for trade disputes

Special rules govern picketing in the case of trade disputes. As now provided by the Trade Union and Labour Relations (Consolidation) Act 1992, s 220:

It shall be lawful for a person in contemplation or furtherance of a trade dispute⁵³ to attend

- (a) at or near his own place of work; or
- (b) if he is an official of a trade union, at or near the place of work of a member of that union whom he is accompanying and whom he represents

for the purpose only of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working.⁵⁴

This provision, unlike its predecessors, restricts the freedom to picket in a trade dispute to one's own place of work. Secondary picketing – the picketing of other workplaces – is thus not protected.⁵⁵ There is no restriction in the Act on the number of people who may picket in this way, but a Code of Practice on Picketing issued by the then Department of Employment (with parliamentary approval) recommends no more than six people at any

⁵⁰ [1976] QB 142. See P Wallington [1976] CLJ 82. But picketing is not necessarily a nuisance: see K Miller and C Woolfson (1994) 23 ILJ 209, at pp 216–17.

⁵¹ [1986] Ch 20 (K D Ewing [1985] CLJ 374). See now Protection from Harassment Act 1997, and *Hunter v Canary Wharf* [1997] AC 655.

⁵² *News Group Newspapers Ltd v SOGAT 1982 (No 2)* [1987] ICR 181.

⁵³ For the meaning of the term 'trade dispute', see Trade Union and Labour Relations (Consolidation) Act 1992, s 244.

⁵⁴ See also the Code of Practice on Picketing issued under the 1992 Act (note 57 below).

⁵⁵ As to secondary action under the old law, see *Duport Steels Ltd v Sirs* [1980] 1 All ER 529.

particular site,⁵⁶ although this could be reduced if the police are of the view that, to prevent a breach of the peace, a smaller number is necessary.⁵⁷

Even if these requirements are met, there is no right on the part of pickets to stop vehicles and to compel drivers and their occupants to listen to what they have to say. In *Broome v DPP*,⁵⁸ the House of Lords refused to read such a right into a statutory predecessor of the current law on the ground that it would involve reading into the Act words which in their view would seriously diminish the liberty of the subject. Everyone has the right to use the highway free from the risk of being compulsorily stopped by any private citizen and compelled to listen to what he or she does not want to hear.⁵⁹ Pickets thus have a right to seek to communicate information or to seek peacefully to persuade, but not to stop persons or vehicles.

The purpose of the special provisions relating to picketing in trade disputes is to give workers and trade union officials a limited protection from both criminal and civil liability. So far as the criminal law is concerned, those who picket peacefully for the permitted purposes will not be liable under either the Highways Act 1980, s 137, or the Trade Union and Labour Relations (Consolidation) Act 1992, s 241. This is because the latter, by s 220 (providing that picketing ‘shall be lawful’), gives legal authority to obstruct the highway and to watch and beset. If, however, the purpose of the picket is deemed to be the causing of an obstruction rather than the peaceful communication of information, then s 220 of the 1992 Act will not prevent those involved from being arrested and charged.

So far as civil liability is concerned, s 220 provides an immunity from liability for private nuisance where the pickets are acting peacefully.⁶⁰ But it does not provide immunity where the purpose of the picket is adjudged to be to harass others, as in *Thomas v NUM (South Wales Area)*.⁶¹ Together with s 219 of the 1992 Act, s 220 also gives pickets immunity in tort for conspiracy, inducing breach of contract, and intimidation.⁶² In this case, however, the protection is of qualified value, for it applies only where the increasingly tight restrictions on the conduct of industrial action have been complied with, including the holding of a secret ballot and the giving of appropriate notice to employers.

There may be circumstances where picketing in the course of a trade dispute does not involve the commission of a tort and where as a result the immunity is unnecessary. Although such cases are rare, they are not unknown.

In *Middlebrook Mushrooms Ltd v Transport and General Workers’ Union*,⁶³ the plaintiff employers were in dispute with some of their employees who went on strike and were subsequently dismissed. The employees then organised a campaign to distribute leaflets outside supermarkets to persuade shoppers not to buy the plaintiff’s mushrooms. An injunction was granted at first instance to restrain the defendants from directly interfering with the employer’s contracts, but was discharged on appeal.

⁵⁶ SI 1992 No 476. Failure to comply with the code does not render any person liable to proceedings, but it may be taken into account by a court or tribunal. See e.g. *Thomas v NUM (South Wales Area)*, above.

⁵⁷ Code of Practice on Picketing, para 51. These restrictions do not, however, prevent strikers and their supporters from attending demonstrations near rather than at the workplace: see *Gate Gourmet London Ltd v TGWU*, above (200 people demonstrating at a site some 500 metres from the workplace).

⁵⁸ [1974] AC 587. Also *Kavanagh v Hiscock* [1974] QB 600.

⁵⁹ *Ibid*, at p 603.

⁶⁰ *Hubbard v Pitt* [1976] QB 142.

⁶¹ [1986] Ch 20.

⁶² For full consideration of these questions, reference should be made to the labour law texts, e.g. Collins, Ewing and McColgan, *Labour Law*; Deakin and Morris, *Labour Law*; and Smith and Wood’s, *Employment Law*.

⁶³ [1993] ICR 612.

Neither party relied on the 1992 Act and it was held that in order for the defendants' action to be tortious, the persuasion had to be directed at one of the parties to the contracts allegedly interfered with (in this case between the supermarket and the employers). Here the 'suggested influence was exerted, if at all, through the actions or the anticipated actions of third parties who were free to make up their own minds'. The leaflets were directed at customers and contained no message which was directed at the supermarket managers.

Sit-ins, squatting and forcible entry

In recent years the expression of protest has often taken the form of entry onto private land, most notably by animal rights protesters and environmental activists, the former protesting about field sports and vivisection, the latter about the building of new motorways, power stations or airports, which in the process spoil or destroy the natural or built environment. Other groups to engage in this type of activity are workers protesting about the threat of job losses, and peace campaigners anxious about nuclear weapons or the role of British troops in Afghanistan or Iraq.

1. Criminal liability

There is no right to enter private property for these purposes,⁶⁴ and this form of protest action may fall foul of some of the measures already discussed, although there are other provisions that may be relevant. So in *Chandler v DPP*,⁶⁵ an attempt by nuclear disarmers to enter and sit down outside an RAF base was held to be a conspiracy to commit a breach of the Official Secrets Act 1911, s 1(1), which makes it an offence for any purpose prejudicial to the safety of the state to approach or enter 'any prohibited place'. In *Galt v Philp*,⁶⁶ a sit-in at a hospital laboratory by scientific officers was held to be a breach of s 7 of the Conspiracy and Protection of Property Act 1875 (now s 241 of the Trade Union and Labour Relations (Consolidation) Act 1992).

Action of this type is also governed to some extent by the Criminal Law Act 1977, which extensively reformed the law following the recommendation of the Law Commission.⁶⁷ Part I creates a statutory offence of conspiracy, which was charged in *R v Jones*⁶⁸ where the accused entered an RAF base with the intent to cause criminal damage to military equipment at the time of the Iraq war. It was no defence that the events in Iraq were unlawful under international law, the court rejecting a claim to this effect based on the Criminal Damage Act 1971. Part II of the 1977 Act created various offences relating to entering and remaining on property. These include (a) without lawful authority, to use or threaten violence for the purpose of securing entry into any premises on which another person is present and against the will of that person (s 6); (b) to remain on residential premises as a trespasser after being required to leave by or on behalf of a displaced residential occupier of the premises (s 7); (c) without lawful authority, to have offensive weapons on premises after having entered them as a trespasser (s 8); (d) to enter as a trespasser any foreign embassies and other diplomatic premises (s 9); and (e) to resist or obstruct a sheriff or bailiff seeking to enforce a court order for possession (s 10).

⁶⁴ *Appleby v United Kingdom* (2003) 37 EHRR 38 (exclusion of protestors from a shopping centre not a breach of the ECHR). See J Rowbottom [2005] EHRLR 186, and same author, *Democracy Distorted*, ch 6.

⁶⁵ [1964] AC 763. Prosecutions have also been brought for breach of regulations made under the Military Lands Act 1892: *Francis v Cardle* 1988 SLT 578.

⁶⁶ [1984] IRLR 156. See K Miller (1984) 13 ILJ 111. For the offence under the 1992 Act, see p 487 above.

⁶⁷ HC 176 (1975–6). Cf *Kamara v DPP* [1974] AC 104.

⁶⁸ [2006] UKHL 16, [2007] 1 AC 136.

Additional measures directed at trespassing on private land were introduced by the Criminal Justice and Public Order Act 1994. Indeed, Part V of the Act is entitled ‘Public Order: Collective Trespass or Nuisance on Land’, but deals with a wide range of different issues, not all of which are concerned with freedom of assembly. This part of the Act deals, for example, with people trespassing on land, ‘with the common purpose of residing there for any period’ (s 61),⁶⁹ gatherings on land in the open air of 20 or more persons (whether or not trespassers) at which amplified music is played during the night (so-called raves) (s 63),⁷⁰ the removal of squatters (ss 75–6), and unauthorised campers residing on land, without the consent of the occupier (s 77). The Act does, however, deal expressly with questions of freedom of assembly and public protest, not least in the provision it makes for ‘trespassory assemblies’, the terms of which we have already encountered.

Otherwise s 68 deals with what are referred to as ‘disruptive trespassers’, the main targets being animal rights’ activists who trespassed on land to disrupt fox-hunting events. But s 68 is not confined to such activity, the government declining to accept an Opposition amendment to limit its scope to country sports, on the ground that there is no reason why events such as church fêtes, public race meetings or open-air political meetings ‘should suffer the invasion of others who intend to intimidate, obstruct or disrupt these proceedings’.⁷¹ Thus it is an offence (of aggravated trespass) for any person to trespass on land to intimidate persons taking part in lawful activities or to obstruct or disrupt such activity.⁷² The senior police officer present at the scene is empowered to require anyone committing or participating in aggravated trespass to leave the land in question; failure to do so is an offence.⁷³

More recent concerns about demonstrations at or near royal palaces led to the introduction of a new criminal offence to enter or be on any designated site as a trespasser.⁷⁴ A designated site is one designated by the Secretary of State and may include any Crown land, any land owned privately by the Queen or the Prince of Wales, and any land designated in the interests of national security.

2. Civil liability and injunctions

As in the case of picketing outside private property,⁷⁵ civil law has an important role to play in relation to those who take their protest into or onto private property.

In *Department of Transport v Williams*,⁷⁶ an application was made for injunctions to restrain protesters from action designed to disrupt the building of the M3 extension over Twyford Down. Interim injunctions were granted by Allott J to restrain the defendants from (i) entering upon land specified in the order, (ii) interfering with the use of the highway specified in the order, and (iii) interfering with the carrying on of work authorised by the M3 Motorway Scheme (SI 1990 No 463).

⁶⁹ See *R (Fuller) v Dorset Chief Constable* [2002] EWHC Admin 1057, [2003] QB 480.

⁷⁰ As amended by the Anti-social Behaviour Act 2003, s 58.

⁷¹ Official Report, Standing Committee B, 8 February 1994, col 614.

⁷² See *Winder v DPP*, *The Times*, 14 August 1996 (Schiemann LJ); *DPP v Barnard*, *The Times*, 9 November 1999 (Laws LJ); *DPP v Tilly* [2002] Crim LR 128; and *McAdam v Urquhart* 2004 SLT 790. It is no defence to a charge under s 68 that the activities being disrupted were unlawful under international law: *R v Jones* [2006] UKHL 16, [2007] 1 AC 136.

⁷³ It is no defence to a charge under s 68 that the accused (in this case protestors against genetically modified crops who disrupted the drilling of maize) had an honest and genuine belief about the dangers of such crops: *DPP v Bayer* [2003] EWHC 2567 (Admin), [2004] 1 WLR 2856 (DC).

⁷⁴ Serious Organised Crime and Police Act 2005, s 128.

⁷⁵ *Hubbard v Pitt* above.

⁷⁶ *The Times*, 7 December 1993.

In the case of the first injunctions, it was held that these could be granted on the ground of trespass, but that the second should be set aside because they added nothing to the first. The third required there to be a basis in law for holding that it was tortious to prevent or interfere with the department's carrying out of works under the authorisation in the statutory instrument. It was held that in such a case an injunction could be grounded in the tort of wrongful interference with business; the unlawful means for the purposes of establishing this was found in the Highways Act 1980, which provides by s 303 that it is an offence wilfully to obstruct any person carrying out his lawful duties under the Act.⁷⁷

The risk of civil liability is particularly serious in view of the principle in *American Cyanamid Co v Ethicon Ltd*⁷⁸ that an interim injunction may be granted on the ground that there is a serious issue to be tried and that the balance of convenience is in favour of relief, pending the trial of the action.⁷⁹ The defendant thus need not be acting unlawfully to be restrained, it being possible and indeed likely that the balance of convenience will lie in favour of the plaintiff where disorder is threatened. On the other hand, it has been held that *American Cyanamid Co* does not deal with the situation where the granting or otherwise of the interim injunction is likely to dispose finally of the matter,⁸⁰ as in the case of a protest, the cause of which may well have passed before the matter comes to trial. In these cases, it has been held that 'the degree of likelihood the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance'.⁸¹

Applications for injunctions to restrain assemblies of various kinds are likely to encounter claims based on the Human Rights Act 1998 to the extent that the injunction will undermine the right to freedom of assembly. In these circumstances the courts ought to give more weight to the respondent's defence than might otherwise have been the case.⁸²

E. Public order offences

Riot and violent disorder

As well as the rules relating to assemblies and processions, there are several ways in which breaches of public order constitute offences. Such offences were initially developed through the common law, but following Law Commission recommendations in 1983⁸³ these common law offences were abolished and replaced with new offences in the Public Order Act 1986.⁸⁴

⁷⁷ See also *CIN Properties Ltd v Rawlins*, *The Times*, 9 February 1995; and *Phestos Shipping Co Ltd v Kurmiaman* 1983 SLT 388.

⁷⁸ [1975] AC 396.

⁷⁹ For the similar position in Scotland, see *McIntyre v Sheridan* 1993 SLT 412.

⁸⁰ *NWL Ltd v Woods* [1979] ICR 867 (a trade dispute case, where the *American Cyanamid Co* rule was modified by statute).

⁸¹ *Ibid*, at p 881 (Lord Diplock).

⁸² See *Gate Gourmet London Ltd*, above. Where the case raises freedom of expression issues, see Human Rights Act 1998, s 12, discussed in ch 14 C above.

⁸³ Criminal Law: Offences Relating to Public Order (Law Commission 123).

⁸⁴ 1986 Act, Part I. For the background to the 1986 Act, see Cmnd 7891, 1980; HC 756 (1978–80); Cmnd 9510, 1985. Also Law Commission, Criminal Law: Offences Relating to Public Order (above).

The first of these is *riot*, defined by s 1 of the 1986 Act to apply where 12 or more persons who are present together use or threaten unlawful violence for a common purpose in circumstances where their conduct ‘would cause a person of reasonable firmness present at the scene to fear for his personal safety’.⁸⁵ The scope of the offence is widened considerably, since no person of reasonable firmness need actually be present at the scene and since, unlike at common law, a riot may be committed in private as well as in a public place.⁸⁶ Charges of riot are unusual today (at least in the context of political and industrial protest).⁸⁷ But such charges were brought during the miners’ strike of 1984/85, though many of the prosecutions collapsed in controversial circumstances.⁸⁸

When a riot is in progress, the police and other citizens may use such force as is reasonable in the circumstances to suppress it.⁸⁹ Anyone convicted of riot is liable to imprisonment of up to ten years or a fine, or both,⁹⁰ while anyone who suffers property damage in a riot may bring a claim for compensation against the police authority under the Riot (Damages) Act 1886.⁹¹ Compensation has been paid for damage done by those celebrating the end of the First World War,⁹² and by football fans seeking to climb into Stamford Bridge football ground to watch Chelsea play Moscow Dynamo during their famous post-war British tour.⁹³ The government commissioned a review of the Act in 2013, following difficulties in its administration after widespread civil disorder in London, Manchester and Birmingham in August 2011.⁹⁴

Section 2 of the Public Order Act 1986 replaces the old common law offence of unlawful assembly with an offence of *violent disorder*. The history of unlawful assembly is an important part of the history of the law of public order. After the lapse of the Seditious Meetings Act 1817, it fell to the courts to develop the definition of an unlawful assembly, upon which depended the powers of the police to control and disperse such assemblies.⁹⁵ The statutory offence clears up some of the confusion of the old law.⁹⁶ Violent disorder is committed where three or more persons who are present together use or threaten unlawful violence and their conduct (taken together) is such as would cause a person of reasonable firmness present at the scene

⁸⁵ For the common law definition, see *Field v Metropolitan Police Receiver* [1907] 2 KB 853. At common law riot could be committed by three or more people. For a general account of the law in practice, see Vogler, *Reading the Riot Act*.

⁸⁶ Public Order Act 1986, s 1(5).

⁸⁷ Charges of mobbing and rioting were unsuccessfully brought in Scotland during the miners’ strike in 1972, when strikers used force to prevent supplies of coal reaching a power station. See P Wallington (1972) 1 ILJ 219.

⁸⁸ See McCabe and Wallington, *The Police, Public Order and Civil Liberties*, p 163.

⁸⁹ Criminal Law Act 1967, s 3. The Riot Act 1714 has now been repealed, both for England and Wales, and Scotland.

⁹⁰ Public Order Act 1986, s 1(6).

⁹¹ *Field v Metropolitan Police Receiver*, above; *Munday v Metropolitan Police Receiver* [1949] 1 All ER 337. For a detailed examination of the Act, see *Yarl’s Wood Immigration Ltd v Bedfordshire Police Authority* [2009] EWCA Civ 1110, [2010] QB 698. In Scotland, compensation is payable under the Riotous Assemblies (Scotland) Act 1822, s 10 (as amended by the Local Government etc. (Scotland) Act 1994). See also HC 1456 (2010–12), where the Act is said by the Home Affairs Select Committee to be an ‘anomaly’ (para 66).

⁹² *Ford v Metropolitan Police Receiver* [1921] 2 KB 344.

⁹³ *Munday v Metropolitan Police Receiver*, above.

⁹⁴ HC Debs, 9 May 2013, col 171. See also HC 1456 (2010–12), concerns expressed by Home Affairs Select Committee on the delays in paying compensation after the disorder in August 2011. On the disorder, see K D Ewing, ‘The Sound of Silence – Human Rights, the Rule of Law and the “Riots”’, UK Const. L. Blog (31 August 2011) (available at <http://ukconstitutionallaw.org>).

⁹⁵ Leading cases included *R v Vincent* (1839) 9 C & P 91, and *R v Fursey* (1833) 6 C & P 80. See also Hawkins, *Pleas of the Crown*, c 63, s 9.

⁹⁶ See *R v Chief Constable of Devon and Cornwall, ex p CEGB* [1982] QB 458. See also HC 85 (1983–4), p 38.

to fear for his or her personal safety. As with riot, no person of reasonable firmness need actually be present, and the offence may be committed in private as well as in public places.

As with the old common law rules, a meeting which begins as a lawful gathering may become an unlawful assembly if disorder takes place, weapons are produced, or if language inciting an offence is used by speakers. But unlike the common law, under the statutory offence, when this transformation occurs persons present who do not share the unlawful purpose are not guilty of violent disorder. A person is guilty of violent disorder only if he or she intends to use or threaten violence or is aware that his or her conduct may be violent or threaten violence.⁹⁷ Such a person is liable on conviction on indictment to imprisonment for up to five years and on summary conviction to imprisonment for up to six months.⁹⁸ In both cases a fine may be imposed rather than or as well as imprisonment. At common law when an unlawful assembly was in progress, it was the duty of every citizen to assist in restoring order, for example by dispersing or by going to the assistance of the police.⁹⁹ Presumably the duty survives the abolition of the common law offence and its replacement with violent disorder,¹⁰⁰ even if it is likely to be impossible to enforce.

Prosecutions for unlawful assembly and violent disorder are not unknown in modern times. When serious disorder occurred at a demonstration protesting against a Greek dinner at the Garden House Hotel in Cambridge (at a time when the Greek government was unpopular in radical circles) students in the forefront of the disorder were convicted of riot and unlawful assembly.¹⁰¹ In *Kamara v DPP*,¹⁰² students from Sierra Leone occupied the Sierra Leone High Commission in London, locking the staff in a room and threatening them with an imitation gun. Their conviction for, inter alia, unlawful assembly was upheld by the House of Lords, which ruled that it was not necessary to show that an unlawful assembly had occurred in a public place. As we have seen, this ruling has been given statutory force for the purposes of violent disorder.¹⁰³

Unlawful assembly charges were brought during the miners' strike of 1984/85, reflecting 'a specific prosecution policy intended to have a deterrent effect even before charges were proved and sentence pronounced'. However, many charges were dropped before the first hearing and, of those which did proceed, only 'a few indictments for unlawful assembly resulted in conviction'.¹⁰⁴ A few charges of *affray* were also brought during the strike. This ancient offence consists of unlawful fighting or a display of force by one or more persons in a public place or on private premises, involving a degree of violence calculated to terrify persons present who are of reasonably firm character.¹⁰⁵ The Public Order Act 1986 placed this offence on a statutory footing (s 3).¹⁰⁶

⁹⁷ Public Order Act 1986, s 6(2). The same is true for riot, see s 6(1).

⁹⁸ *Ibid*, s 2(5).

⁹⁹ *Charge to the Bristol Grand Jury* (1832) 5 C & P 261; *R v Brown* (1841) Car & M 314. And see *Devlin v Armstrong* [1971] NLR 13.

¹⁰⁰ Cf *A-G for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105.

¹⁰¹ *R v Caird* (1970) 54 Cr App R 499. And see *The Listener*, 8 October (S Sedley) and 26 November 1970 (A W Bradley).

¹⁰² [1974] AC 104. For unlawful assembly during an industrial dispute, see *R v Jones* (1974) 59 Cr App R 120.

¹⁰³ Public Order Act 1986, s 2(4).

¹⁰⁴ McCabe and Wallington, above, pp 99–100.

¹⁰⁵ *Button v DPP* [1966] AC 591; *Taylor v DPP* [1973] AC 964.

¹⁰⁶ By s 3 of the 1986 Act, a person is guilty of *affray* if he or she uses or threatens unlawful violence towards another and his or her conduct is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety. Where two or more persons use or threaten the unlawful violence, it is their conduct taken together that must be considered. See *I v DPP* [2001] UKHL 10, [2002] 1 AC 285 (brandishing petrol bombs constitutes an offence; but it must be directed towards a person or persons present at the scene).

Threatening, abusive and insulting behaviour

Apart from riot, violent disorder and affray, the other category of offences dealt with by the Public Order Act 1986 relates to threatening, abusive and insulting behaviour. This offence – which appears to correspond to the Scottish common law offence of breach of the peace – was originally enacted in the Public Order Act 1936, s 5. This provided that it was an offence to use threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace was likely to be occasioned. If the purpose of ss 1–4 of the 1936 Act was to regulate the conduct of fascist demonstrators in the 1930s, the purpose of s 5 was, it seems, to deal with communist counter-demonstrators who would disrupt fascist rallies.

Section 5 of the 1936 Act has been replaced by ss 4, 4A and 5 of the Public Order Act 1986. By s 4:

A person is guilty of an offence if he –

- (a) uses towards another person threatening, abusive or insulting words or behaviour, or
- (b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

This provision of the 1986 Act was supplemented by a new s 4A inserted by the Criminal Justice and Public Order Act 1994. This provides that it is an offence for a person with intent to cause another person harassment, alarm or distress to (a) use ‘threatening, abusive or insulting words or behaviour, or disorderly behaviour’; or (b) display any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that person or another person (who need not be the intended target of the conduct) ‘harassment, alarm or distress’. This complements s 5 of the 1986 Act by which it is an offence for any person to use threatening or abusive (but not now insulting) words or behaviour, or disorderly behaviour, or display threatening or abusive (but not now insulting) material of the kind referred to in s 4 (b) within the hearing of any person ‘likely to be caused harassment, alarm or distress thereby’.¹⁰⁷

By virtue of the Crime and Courts Act 2013, s 57, it is no longer an offence under the Public Order Act 1986, s 5 to use ‘insulting’ words or behaviour, or to distribute or display writing, signs, or other visible representations on the ground only that they are ‘insulting’. This small change to the 1986 Act was initiated in the House of Lords and was initially resisted by the government, which thought it useful as a way to deal with people who desecrated poppies on Remembrance day or swore at police officers, while it was also used against Christian fundamentalists who railed against homosexuality.

This power under s 5 to prosecute for insulting behaviour only was thought by some to be an unjustifiable restraint on free speech, though it was defended by the police as being a valuable tool to help them keep the peace and maintain public order, while others saw it as a way of protecting minorities. But although the government accepted this amendment to the 1986 Act, it is to be emphasised that the use of insulting words or behaviour and the delivery of insults by means of writing, signs or other visible representations continues to be unlawful where it falls within the 1986 Act, sections 4 and 4A.

¹⁰⁷ The threat of violence is not a requirement of s 5 (nor indeed of s 4A), and ‘a police officer can be a person who is likely to be caused harassment and so on’ (*DPP v Orum* [1988] 3 All ER 449).

All three offences (ss 4, 4A and 5) may be committed in a public or private place, though no offence is committed in a private place where the words or behaviour are used by a person within a dwelling, and the person harassed, alarmed or distressed is also inside the dwelling. It is a defence under ss 4A and 5 that the accused's conduct took place inside a dwelling and that he or she had no reason to believe that it would be seen or heard outside. It is also a defence under ss 4A and 5 that the accused's conduct was reasonable,¹⁰⁸ and additionally under s 5 that he or she had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress.¹⁰⁹ Moreover, a person is guilty of an offence under ss 4 and 5 only if he or she intends or is aware that the conduct is threatening, abusive, insulting or disorderly (s 6).¹¹⁰

As with s 5 of the 1936 Act, the crucial words 'threatening, abusive or insulting' are not defined.¹¹¹ Decisions under s 5 of the 1936 Act may thus be helpful in the construction of ss 4, 4A and 5 of the 1986 Act. On what is meant by insulting, the leading case is *Brutus v Cozens*.¹¹²

During a Wimbledon tennis match, Brutus and other anti-apartheid protesters went on to the court, distributed leaflets and sat down. The spectators strongly resented the interruption of play. Brutus was prosecuted for using insulting behaviour whereby a breach of the peace was likely to be occasioned. The justices dismissed the charge, finding that the conduct was not insulting. On appeal by the prosecutor, the Divisional Court directed the justices that behaviour was insulting if it affronted other people and evidenced a disrespect or contempt for their rights, and thereby was likely to cause the resentment which the spectators had expressed at Wimbledon. The House of Lords unanimously allowed an appeal by Brutus against this direction, holding that 'insulting' was to be given its ordinary meaning and that the question of whether certain behaviour had been insulting was one of fact for the justices to determine. Lord Reid pointed out that s 5 of the 1936 Act did not prohibit *all* speech or conduct likely to occasion a breach of the peace. Vigorous, distasteful and unmannerly speech was not prohibited. There could be no definition of insult: 'an ordinary sensible man knows an insult when he sees or hears it'.

It is not enough that the accused's conduct is insulting. Under the Act it must, for example in the case of s 4, be likely to provoke violence. This corresponds with the requirement in s 5 of the 1936 Act that the accused's conduct be likely to provoke a breach of the peace. In *Jordan v Burgoyne*,¹¹³ the accused was convicted under s 5 because a speech he made in

¹⁰⁸ On which see *DPP v Percy* [2002] Crim LR 835, which considers the relationship between the reasonable-ness defence and Convention rights, notably art 10. In that case a conviction for desecrating the American flag in the presence of American soldiers was overturned because the district judge had not given adequate weight to Convention rights. But it seems clear that had he more fully considered this defence, he could quite properly have convicted. See *Hammond v DPP* [2004] Crim LR 851.

¹⁰⁹ See *Morrom, Geach and Thomas v DPP* [1994] Crim LR 58 (defence not made out in a case of a protest outside an abortion clinic – 'shouting slogans, waving banners, and preventing staff and patients from entering', thereby causing distress to patients).

¹¹⁰ See *DPP v Clarke* (1992) 94 Cr App R 359 (defendants displaying pictures outside an abortion clinic: pictures abusive for the purposes of s 5 and caused distressed; but it did not follow that the defendants intended them to be threatening, abusive or insulting, or were aware that they might be so). On the other hand, it is unnecessary for the purpose of s 5 that anyone has suffered harassment, alarm or distress: *Norwood v DPP* [2003] Crim LR 888.

¹¹¹ [1973] AC 854.

¹¹² *Ibid.* Cf *Coleman v Power* (2004) 209 ALR 182 (High Ct of Australia).

¹¹³ [1963] 2 QB 744.

Trafalgar Square was provocative ‘beyond endurance’ to Jews, blacks and ex-servicemen in the crowd. It was held that the words used were insulting, and the Divisional Court rejected the interpretation of the court below that the words used by the defendant were not likely to lead ordinary, reasonable persons to commit breaches of the peace. In the view of the court the defendant must ‘take his audience as he finds them, and if those words to that audience or that part of the audience are likely to provoke a breach of the peace, then the speaker is guilty of an offence’.¹¹⁴ A similar conclusion would be reached under the 1986 Act.

An important issue under s 4 of the 1986 Act relates to the question, of how soon after insulting conduct must the violence be likely to take place. Section 5 of the 1936 Act ‘did not require that the breach of the peace which was either intended or likely to be occasioned should follow immediately upon the actions of the defendant’. The question whether such a requirement now exists was considered in *R v Horseferry Road Magistrate, ex p Siadatan*.¹¹⁵

The applicant laid an information against Penguin Books and Mr Salman Rushdie, the publishers and author of *The Satanic Verses*, which many devout Muslims found offensive. It was alleged that the respondents had distributed copies contrary to s 4(1) of the 1986 Act on the ground that the book contained abusive and insulting writing whereby it was likely that unlawful violence would be provoked. On a strict construction of the Act, the Divisional Court held that the magistrate was correct in refusing to issue a summons. In the view of the court, the requirement in the Act that the insulted person should be ‘likely to believe that such violence will be used’ means that the insulted person is likely to believe that the violence will be used immediately. Watkins LJ observed: ‘A consequence of construing the words “such violence” in s 4(1) as meaning “immediate unlawful violence” will be that leaders of an extremist movement who prepare pamphlets or banners to be distributed or carried in public places by adherents to that movement will not be committing any offence under s 4(1) albeit that they intend the words in the pamphlet or on the banners to be threatening, abusive and insulting and it is likely that unlawful violence will be provoked by the words in the pamphlet or on the banner.’¹¹⁶

Although s 4 of the 1986 Act thus appears to be narrower than the corresponding provisions of the 1936 Act, the police have other powers which may go some way towards closing any ‘gap in the law which did not exist under the 1936 Act’.¹¹⁷ These include the powers conferred by the Police Act 1996, s 89(2), which is discussed below. It is a separate offence if any of the foregoing offences under ss 4, 4A or 5 of the 1986 Act are racially or religiously aggravated,¹¹⁸ a provision widely construed by the House of Lords.¹¹⁹

¹¹⁴ Ibid, at p 749.

¹¹⁵ [1991] 1 QB 260.

¹¹⁶ Compare *DPP v Ramos* [2000] Crim LR 768.

¹¹⁷ [1991] 1 QB 260, at p 266.

¹¹⁸ Crime and Disorder Act 1998, s 31, as amended by Anti-terrorism, Crime and Security Act 2001, s 39. On the meaning of racially or religiously aggravated: s 28, considered in *Norwood v DPP*, above, and *DPP v M* [2004] EWHC 1453 (Admin), [2004] 1 WLR 2758. Indecent or ‘racialist’ chanting at designated football matches is also an offence: Football Offences Act 1991, s 3.

¹¹⁹ *R v Rogers* [2007] UKHL 8, [2007] 2 WLR 280.

Other offences

1. Obstruction of the highway

As already pointed out, it is an offence under the Highways Act 1980, s 137 if ‘a person without lawful authority or excuse in any way wilfully obstructs the free passage along a highway’. An obstruction in this sense is caused when a meeting or assembly is held on the highway (which for this purpose includes the pavement as well as the road). It is no defence that the obstruction affected only part of the highway leaving the other part clear.¹²⁰ Nor is it a defence that the arrested person was only one of a number of people causing the obstruction,¹²¹ or that the defendant believed that she was entitled to hold meetings at the place in question, or that other meetings had been held there.¹²²

The offence thus gives wide powers to the police to disperse what may be a peaceful assembly and it has been widely used. Following *DPP v Jones*,¹²³ however, it is now recognised that the highway may be lawfully used for some political purposes where this does not interfere with the primary purpose of the highway, which is passage and repassage. Such use will provide a lawful excuse to any charge of obstruction. This is a conclusion which had been reached already in *Hirst v Chief Constable of West Yorkshire*¹²⁴ by the Divisional Court in relation to the Highways Act 1980, a decision which was expressly approved in *Jones*.

A group of animal rights supporters were demonstrating outside a furrier’s shop, and handing out leaflets. They were convicted of obstruction of the highway, contrary to the Highways Act 1980, s 137. In reversing the convictions Glidewell LJ said that the question whether someone was causing an obstruction without lawful excuse was to be answered by deciding whether the activity in which the defendant was engaged was or was not a reasonable user of the highway. This would be for the magistrates to decide, but it was clearly anticipated that the distribution of handbills could be a reasonable user.

In 2002, Westminster City Council was unable to obtain an injunction to stop an anti-war protest by a single individual (Brian Haw), who maintained a vigil over many years in Parliament Square.¹²⁵ Apart from the Highways Act 1980, obstruction of the highway is a public nuisance, which may be prosecuted as an indictable offence at common law.¹²⁶ The view of the CPS, however, is that this is an offence to be used sparingly, and not to be used where there is legislation covering the same ground (as would be the case in the event of an obstruction of the highway).¹²⁷

¹²⁰ *Homer v Cadman* (1886) 16 Cox CC 51.

¹²¹ *Arrowsmith v Jenkins* [1963] 2 QB 561.

¹²² *Ibid.* Cf *Cambs CC v Rust* [1972] 2 QB 426.

¹²³ [1999] AC 240; p 485 above.

¹²⁴ (1987) 85 Cr App R 143. See S Bailey [1987] PL 495.

¹²⁵ *The Guardian*, 5 October 2002. See now Serious Organised Crime and Police Act 2005, ss 132–8.

¹²⁶ *R v Clark (No 2)* [1964] 2 QB 315. See also *News Group Newspapers Ltd v SOGAT 82 (No 2)* [1987] ICR 181. On public nuisance and the ECHR, see *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459.

¹²⁷ CPS, Legal Guidance (2010), And see *R v Rimmington*, above. The Law Commission proposed provisionally that the offence be retained but given statutory effect: Law Commission Consultation Paper No 193 (2009).

2. Protection from harassment

Closely associated with the Public Order Act 1986, ss 4, 4A and 5 is the Protection from Harassment Act 1997, which has been said to be concerned with ‘serious and persistent’ forms of harassment.¹²⁸ The Act is considered briefly in this chapter because it has been used against protestors (particularly animal rights but also environmental protestors), and as a way of regulating the exercise of the right to freedom of assembly.

It is unlawful to pursue a course of conduct which amounts to the harassment of another and which the person pursuing the conduct knows or ought to know amounts to harassment (s 1(1)). This has been extended so that a person must not pursue a course of conduct which involves (a) knowingly harassing two or more persons, with (b) intent to persuade another person ‘not to do something that he is entitled or required to do’, or ‘to do something that he is not under any obligation to do’ (s 1(1A)).¹²⁹ It is a defence that the course of conduct was pursued for the purpose of preventing or detecting crime,¹³⁰ or that it was reasonable in the circumstances (s 1(3)).¹³¹

Apart from being an offence to pursue a course of conduct in breach of ss 1 or 1(1A) (s 2), civil proceedings may be brought by a victim for an injunction to restrain an unlawful course of conduct and for damages suffered as a result (s 3).¹³² An injunction may also be sought where there is a breach of s 1(1A) (s 3A), on this occasion by either the target of the harassment or the persons who are being persuaded to do or not to do something as an instrument of the harassment. It is, moreover, an offence under s 4 to engage in a course of conduct which causes another person to fear on at least two occasions that violence will be used against him or her.

Where a person has been convicted of an offence, a court may issue a restraining order against the person concerned, prohibiting the defendant from doing anything specified in the order which amounts to harassment or which will cause a fear of violence (s 5). A similar power has been introduced in relation to people who have been acquitted (s 5A). Breach of an order is an offence under the Act,¹³³ which has been adapted for application to Scotland (s 8). As pointed out by the Supreme Court, ‘the Act is capable of applying to any form of harassment’, including (i) the repeated offensive publications in a newspaper;¹³⁴ (ii) victimisation in the workplace;¹³⁵ and (iii) campaigns against the employees of an arms manufacturer by political protesters.¹³⁶

¹²⁸ *Ferguson v British Gas* [2009] EWCA Civ 46, [2009] 3 All ER 304, at para [53] (Sedley LJ).

¹²⁹ As inserted by Serious Organised Crime and Police Act 2005, s 125. See also s 126 (similar provisions in relation to harassment of a person in his or her home). The Act was extended by the Protection of Freedoms Act 2012, which introduced a new offence of stalking to the 1997 Act. These provisions are not dealt with here.

¹³⁰ The defence has been held to apply only if the conduct of the defendant is rational: *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935.

¹³¹ See *DPP v Selvanayagam*, *The Times*, 23 June 1999 (conduct cannot be reasonable if in breach of a court injunction).

¹³² See *Huntingdon Life Sciences Ltd v Curtin*, *The Times*, 11 December 1997; *Daiichi Pharmaceuticals UK Ltd v Stop Huntingdon Animal Cruelty* [2003] EWHC 2337 (QB), [2004] 1 WLR 1503; and *Oxford University v Broughton* [2004] EWHC 2543 (QB).

¹³³ See *R v Evans* [2004] EWCA Crim 3102, [2005] 1 WLR 1435.

¹³⁴ *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2002] EMLR 4.

¹³⁵ *Majrowski v Guy's and St. Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224.

¹³⁶ *EDO MBM Technology Ltd v Campaign to Smash EDO* [2005] EWHC 837 (QB) Compare *Hayes v Willoughby* [2011] EWCA Civ 1541, [2012] 1 WLR 1510.

The scope of the powers under the 1997 Act (as amended) is illustrated by the well publicised decision in *Oxford University v Broughton*.¹³⁷

The university obtained injunctions under the Act against a number of leading animal rights activists and animal rights organisations. The conduct of the defendants was jeopardising the completion of new laboratories where it was believed experiments would be conducted on animals. The order prohibited protestors from harassing protected persons and from entering an exclusion zone around the construction site except once a week at a time approved in the injunction.

The most controversial feature of the injunction was the definition of ‘protected persons’. This extended to the members and employees of the university and their families, the employees and shareholders of the contractor, as well as their families, servants or agents, and any person seeking to visit the laboratory or any premises or home belonging to or occupied by a protected person. The High Court rejected a claim that these restraints amounted to an unjustifiable restriction on Convention rights.

Additional restraints on demonstrating outside someone’s home were introduced by the Criminal Justice and Police Act 2001 – as amended in 2005¹³⁸ – in response to the activities of animal rights protestors who picketed the homes of directors and employees of companies said to be engaged in vivisection.¹³⁹ Still further restraints on animal rights groups are to be found in the Serious Organised Crime and Police Act 2005, s 145. These have the effect of making it an offence to interfere with commercial relationships in a manner designed to harm animal research.

3. Breach of the peace

In English law there is no offence of breach of the peace, though the apprehension of a breach of the peace is important in the law of arrest, and for the exercise of police powers under the Police Act 1996, s 89(3) (on which see below).¹⁴⁰ The position is different in Scotland, where the long established common law offence of breach of the peace applies broadly to include the use of violent and threatening language in public, and breaches of public order and decorum.

In a leading case to which reference is still made, it was said that the offence involves conduct which ‘will reasonably produce alarm in the minds of the lieges, not necessarily in the sense of personal fear, but alarm lest if what is going on is allowed to continue it will lead to the breaking up of the social peace’.¹⁴¹ The broad nature of this offence probably explains why, on facts very similar to those in *Beatty v Gillbanks*, the Scottish courts convicted the local leaders of a Salvation Army procession of breach of the peace.¹⁴² Breach of

¹³⁷ [2004] EWHC 2543 (QB).

¹³⁸ Serious Organised Crime and Police Act 2005, ss 126, 127.

¹³⁹ Criminal Justice and Police Act 2001, s 42. The same Act also permits directors of such companies not to publish their home addresses.

¹⁴⁰ See also *Lansbury v Riley* [1914] 3 KB 229 (power of magistrates to bind over to keep the peace when it is apprehended that someone may breach the peace; but power not exercisable unless a breach of the peace is anticipated: *Percy v DPP* [1995] 3 All ER 124 (a non-violent peace protest). This is a useful restraint to be used against those engaged in on-going and persistent campaigns.

¹⁴¹ *Ferguson v Carmochan* (1889) 2 White 278. See *Smith v Donnelly*, below, where *Ferguson* is cited with approval and explained on the basis that ‘it is clear that what is required to constitute the crime of breach of the peace is “conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community”’ (Lord Coulsfield).

¹⁴² *Deakin v Milne* (1882) 10 R(J) 22.

the peace is commonly used by the police in public order situations. During the miners' strike of 1984/85, of the 1,046 charges brought in Scotland, no fewer than 678 of these were for breach of the peace.¹⁴³

Although used to deal with a wide range of anti-social behaviour, this offence may serve as a flexible and adaptable restraint on different forms of political activity and public protest. It is used not only against pickets in trade disputes, but also in response to (i) the selling of a National Front newspaper outside a football ground (Tynecastle Park),¹⁴⁴ (ii) the provocative conduct of participants in an Orange march,¹⁴⁵ (iii) the activities of environmental protestors (sitting in a tree to prevent it being felled by motorway contractors),¹⁴⁶ (iv) the actions of peace movement activists at the Faslane naval base,¹⁴⁷ and (v) a noisy demonstration in the Scottish Parliament.¹⁴⁸

The incorporation of Convention rights provided an opportunity to argue before the Scottish courts that the indeterminacy of the offence of breach of the peace violates art 7 of the ECHR. But the argument failed,¹⁴⁹ as have other challenges to breach of the peace convictions based on arts 10 and 11 of the Convention. In *Jones v Carnegie*,¹⁵⁰ the High Court of Justiciary rejected an attempt to restrict the scope of the offence to cases where there was 'evidence of actual alarm or annoyance'. It is enough that the conduct is 'genuinely alarming and disturbing to any reasonable person'.

The substance of the offence has been narrowed by recent decisions (it is no longer enough to show that the conduct of the accused is annoying, and the offence can no longer be committed in private without any 'public' element).¹⁵¹ On the other hand, the courts have emphasised that the test of whether a breach of the peace has taken place is an objective one and that it is not necessary to show that anyone has actually been alarmed or disturbed.¹⁵² In such circumstances, however, the conduct must be 'flagrant', a requirement which is 'not always helpful'.¹⁵³

Recent cases have shown the courts unwilling to convict for peaceful protest where no one was alarmed or distressed.¹⁵⁴ More recently still, however, in *Maguire v Procurator Fiscal, Glasgow*,¹⁵⁵ the wearing of a provocative shirt – with a pro INLA, anti Remembrance Day, and pro Bloody Sunday remembrance message while attending a Rangers v Celtic football match – was held to be a breach of the peace. The offending conduct was 'not part of a legitimate protest', and was 'genuinely alarmingly and disturbing to any reasonable person'. What is a 'legitimate' protest is, however, highly contestable, and dangerous territory for a court to enter.

¹⁴³ McCabe and Wallington, above, p 164.

¹⁴⁴ *Alexander v Smith* 1984 SLT 176.

¹⁴⁵ *McAvoy v Jessop* 1989 SCCR 301.

¹⁴⁶ *Colhoun v Friel* 1996 SCCR 497.

¹⁴⁷ *Smith v Donnelly* 2001 SLT 1007; *Jones v Carnegie* 2004 SLT 609.

¹⁴⁸ *Jones v Carnegie*, *ibid*.

¹⁴⁹ *Smith v Donnelly*, above.

¹⁵⁰ Note 147 above. The court approved *Alexander v Smith*, above, and *McAvoy v Jessop*, above, though also said that 'peaceful protest, in which the accused did no more than hand out leaflets and hold up a banner and where that did not involve any provocation . . . would be unlikely to justify a conviction for breach of the peace' (p 616). For discussion of the wider issues, see P Ferguson (2001) 5 *Edin Law Rev* 145.

¹⁵¹ See *Harris v H M Advocate* [2009] HCJAC 80, 2009 SLT 1078. See now Criminal Justice and Licensing (Scotland) Act 2010, s 38 (threatening or abusive behaviour which applies also in private).

¹⁵² *Jones v Carnegie*, above.

¹⁵³ *Dyer v Brady* [2006] HCJAC 72, 2006 SCCR 629.

¹⁵⁴ *Ibid*.

¹⁵⁵ [2013] HCJAC 36.

F. Preventive powers of the police

Entry into meetings

In a public place like Trafalgar Square, there can be no doubt of the power of the police to be present and to deal with outbreaks of disorder if they occur. Where a public meeting is held on private premises, the power of the police to attend is less certain. At one time the official view of the Home Office was that except when the promoters of a meeting asked the police to be present in the meeting, they could not go in, unless they had reason to believe that an actual breach of the peace was being committed in the meeting.¹⁵⁶ This view was stated after disorder occurred at a fascist meeting at Olympia in London, when the stewards inflicted physical violence on dissentients in the audience. No police were stationed on the premises, although large numbers had been assembled in nearby streets. Within a year, the court disapproved of the Home Office view of the law.

In *Thomas v Sawkins*¹⁵⁷ a meeting had been advertised in a Welsh town (a) to protest against the Incitement to Disaffection Bill which was then before Parliament, and (b) to demand the dismissal of the Chief Constable of Glamorgan. The meeting was open to the public without payment, and the police arranged for some of their number to attend. The promoter requested the police officers to leave.

A constable committed a technical assault on the promoter thinking that the promoter was on the point of employing force to remove a police officer from the room. There was no allegation that any criminal offence had been committed at the meeting or that any breach of the peace had occurred. When the promoter prosecuted the constable for assault, the magistrates' court found that the police had reasonable grounds for believing that if they were not present there would be seditious speeches and other incitement to violence, and that breaches of the peace would occur; that the police were entitled to enter and remain in the hall throughout the meeting; and that consequently the constable did not unlawfully assault the promoter.

In the Divisional Court these findings were upheld. Lord Hewart CJ was of opinion that the police have powers to enter and to remain on private premises when they have reasonable grounds for believing that an offence is imminent or likely to be committed; nor did he limit this statement to offences involving a breach of the peace. In the opinion of Avory J, 'the justices had before them material on which they could probably hold that the police officers in question had reasonable grounds for believing that, if they were not present, seditious speeches would be made and/or that a breach of the peace would take place. To prevent any such offence or a breach of the peace the police were entitled to enter and remain on the premises.'¹⁵⁸

Although the second objective of the meeting in *Thomas v Sawkins* was admittedly provocative to the local police, it did not suggest an incitement to violence, which was a necessary element in the offence of sedition. Nor does protest against a Bill involve a breach of the peace. It is unclear whether Lord Hewart's opinion is confined to public meetings on private premises or whether it also applies to private meetings and other activities on private premises.

¹⁵⁶ HC Deb, 14 June 1934, col 1968.

¹⁵⁷ [1935] 2 KB 249. See Ewing and Gearty, *The Struggle for Civil Liberties*, ch 6.

¹⁵⁸ [1935] 2 KB 249, at p 256.

May the police enter any private premises if they reasonably believe that any offence is imminent or is likely to be committed? The judgments in the case gave scant consideration to the argument that as soon as the promoter asked the police to withdraw from the premises, this rescinded the open invitation given to the public (including the police) to attend. Did this not make the officers trespassers on private premises from that point onwards?¹⁵⁹ It may be that it is in the public interest that the police should be entitled to enter and remain in any public meeting: but why should a similar right apply to private meetings? Doubts as to the width of *Thomas v Sawkins* are resolved by the Police and Criminal Evidence Act 1984, which preserves the power of the police to enter premises to deal with or prevent a breach of the peace, but otherwise abolishes all common law powers of the police to enter premises without a warrant.¹⁶⁰

Obstruction of the police

The statutory offence of obstructing the police in the execution of their duty activates a common law power of arrest.¹⁶¹ It is particularly important in the law of public order. The leading case is *Duncan v Jones*¹⁶² in 1936, which gave rise to fears about the uses to which the offence could be put.

Mrs Duncan was forbidden by Jones, a police officer, to hold a street meeting at a place opposite a training centre for the unemployed. She refused to hold the meeting in another street 175 yards away. Fourteen months previously, Mrs Duncan had held a meeting at the same spot, which had been followed by a disturbance in the centre attributed by the superintendent of the centre to the meeting. Mrs Duncan mounted a box on the highway to start the meeting but was arrested and charged with obstructing a police officer in the execution of his duty. There was no allegation of obstruction of the highway or of inciting any breach of the peace. The lower court found (a) that Mrs Duncan must have known of the probable consequences of her holding the meeting, viz, a disturbance and possibly a breach of the peace, and was not unwilling that such consequences should ensue, (b) that Jones reasonably apprehended a breach of the peace, (c) that in law it therefore became his duty to prevent the holding of the meeting, (d) that by attempting to hold the meeting, and Mrs Duncan obstructed Jones when in the execution of his duty. The Divisional Court upheld the conviction. Humphreys J remarked that on the facts as found, Jones reasonably apprehended a breach of the peace: it then became his duty 'to prevent anything which in his view would cause that breach of the peace'.

The decision has been strongly criticised on several grounds. First, for reasons of principle. Goodhart remarked:

At first sight it may seem unreasonable to say that a police officer cannot take steps to prevent an act which, when committed becomes a punishable offence. But it is on this distinction between prevention and punishment that freedom of speech, freedom of public meeting and freedom of the press are founded.¹⁶³

¹⁵⁹ *Davis v Lisle* [1936] 2 KB 434; *Robson v Hallett* [1967] 2 QB 939.

¹⁶⁰ 1984 Act, s 17(5), (6); ch 15.

¹⁶¹ Police Act 1996, s 89(2).

¹⁶² [1936] 1 KB 218; Ewing and Gearty, *The Struggle for Civil Liberties*, ch 5.

¹⁶³ (1937) 6 CLJ 22, 30. See also E C S Wade (1937) 6 CLJ 175, and T C Daintith [1966] PL 248.

Second, the decision gave rise to concern about the nature of the power extended to police officers. On one view, it would give a police officer power to prevent the holding of a lawful meeting if he or she suspected not that the meeting itself might be disorderly, but that breaches of the peace might occur as a result of the meeting, whether committed by supporters or opponents of the speakers at the meeting. The reasoning of Humphreys J brings forward in time and widens the preventive powers of the police to a degree that could lead to intolerable restrictions on the liberty of meeting. On this basis the police could forbid a meeting in the students' union of a college from taking place merely because a 'disturbance' had previously occurred in the college after a similar meeting.

Yet despite this criticism and concern, the offence of obstructing a police officer is now an important weapon in the armoury of police powers for controlling public protest. Although *Duncan v Jones* illustrates the power to issue directions as to location where this is considered necessary to maintain the peace, other cases illustrate that the power may be used to issue directions as to numbers. In *Piddington v Bates*,¹⁶⁴ a police officer gave instructions that during a trade dispute at a factory in North London only two pickets would be permitted outside each entrance. When the appellant insisted on joining the pickets, despite a police officer's instructions not to do so, he was arrested for obstruction. The Divisional Court dismissed his appeal against the conviction, in which it was argued that a restriction to two pickets was arbitrary and unlawful. In the view of Lord Parker CJ, 'a police officer charged with the duty of preserving the Queen's peace must be left to take such steps as, on the evidence before him, he thinks are proper'.¹⁶⁵

But apart from this wide power to give directions as to how a demonstration or picket is conducted, more recent developments indicate that the power permits the police to give directions not only to disperse a demonstration but effectively to ban or to prevent one from being held in the first place. In *Moss v McLachlan*,¹⁶⁶ the defendants were stopped at a motorway exit by police officers who suspected that they were travelling to attend a picket line at one of a number of collieries several miles away. When they refused to turn back, the defendants arrested for obstructing a police officer in the execution of his duty. Their appeals against conviction were dismissed, with Skinner J observing that 'The situation has to be assessed by the senior police officers present. Provided they honestly and reasonably form the opinion that there is a real risk of a breach of the peace in the sense that it is in close proximity both in place and time, then the conditions exist for reasonable preventive action including, if necessary, the measures taken in this case.'¹⁶⁷

The exercise of this power was considered by the House of Lords for the first time in *R (Laporte) v Gloucester Chief Constable*,¹⁶⁸ where a coach carrying demonstrators was travelling to RAF Fairford. The coach was stopped by the police some three miles short of its destination, and its occupants prevented by the police from travelling to the site of the demonstration. These steps had been taken because the police suspected that there were a number of hard-line protestors on the coach, which was returned to London along with its occupants under police escort. It was held that the action taken against the applicant Laporte was unlawful and could not be justified; there was no evidence that a breach of

¹⁶⁴ [1960] 3 All ER 660.

¹⁶⁵ *Ibid*, at p 663.

¹⁶⁶ [1985] IRLR 76. See *G S Morris* (1983) 14 ILJ 109. Also *O'Kelly v Harvey* (1883) 15 Cox CC 435.

¹⁶⁷ [1985] IRLR 76, at p 78. For evidence of the practice being adopted by the Scottish police (although inevitably on a different legal base, possibly breach of the peace), see *Miller and Woolfson*, above, at pp 220–1.

¹⁶⁸ [2006] UKHL 55, [2007] 2 AC 105.

the peace was 'imminent', though the position may have been different if the police had intervened at a later stage in the journey, provided the evidence on the ground would have justified such intervention.¹⁶⁹ In the course of its decision, the House of Lords rejected the existence of a wider common law power claimed by the police that they could do whatever was reasonable to prevent a breach of the peace.¹⁷⁰

Containment and 'kettling' of demonstrators

A practice of containment by the police that has emerged in recent years is sometimes referred to as 'kettling'. This involves detaining protestors in large groups for long periods of time until any risk of violence perceived to exist by the police has passed. Apart from the fact that people are being detained against their wishes in this way, there are the additional problems of people being detained for long periods of time in adverse weather conditions, in situations of great discomfort, and without access to food, medicines and other facilities.

It is unclear how long this routine has been used as a standard practice by the police, but its use as a policing tool shot to prominence during May Day protests in 2001, and again at the G20 protests in the City of London eight years later. The use of the practice at the 2001 event led to legal proceedings on the part of two of those who were 'kettled', the question arising whether the police conduct could be justified as an application of the power to take steps to prevent a breach of the peace, and if so whether it violated the Convention rights of the individuals concerned.

In *Austin v Metropolitan Police Commissioner*,¹⁷¹ the police detained a large number of protestors on May Day 2001, for up to seven hours in Oxford Circus, London. It was contended that those detained were without sufficient toilet facilities or food and drink. In proceedings against the police for false imprisonment and violation of ECHR art 5, one applicant complained that she was refused permission to leave the scene to pick up her child, while another was refused permission to leave despite not being a protestor yet caught up in the police response.

Following a detailed analysis of the speeches in the *Laporte* case (above), the Court of Appeal held that the conduct of the police was justified as being necessary to prevent a breach of the peace which they believed to be imminent.¹⁷² So far as the detention of people who were not protestors is concerned, the Court of Appeal held that 'where (and only where) there is a reasonable belief that there are no other means whatsoever whereby a breach or imminent breach of the peace can be obviated, the lawful exercise by third parties of their rights may be curtailed by the police'.¹⁷³

The House of Lords agreed. Although it was noted that art 5 (on the right to liberty) is a Convention right which unusually is not qualified in any way, Lord Neuberger took the view

¹⁶⁹ A point reinforced by *R (on the application of Moos) v Metropolitan Police Commissioner* [2012] EWCA Civ 12.

¹⁷⁰ The case was said to be very different from *Moss v McLachlan* (above), a decision approved though said to have 'carried the notion of imminence to extreme limits'.

¹⁷¹ [2009] UKHL 5, [2009] 1 AC 564. (H Fenwick [2009] PL 737).

¹⁷² [2007] EWCA Civ 989, [2008] QB 660. The Court of Appeal has subsequently emphasised that the legality of containment is to be determined by whether the police officer authorising it had reasonable grounds to believe whether a breach of the peace was imminent. It is not whether the court reasonably believed it to be imminent: *R (on the application of Moos) v Metropolitan Police Commissioner*, above.

¹⁷³ This was said to be 'a test of necessity' which 'can only be justified in truly extreme and exceptional circumstances', and the action taken in such circumstances 'must be both reasonably necessary and proportionate'.

that it was unrealistic to contend that art 5 came into play at all. The decision of the House of Lords is, however, subject to a requirement that the police conduct is proportionate and reasonable,¹⁷⁴ though clearly there will be scope for debate about when that boundary is reached, especially as it was held in *Austin* that a seven-hour detention in cold weather did not violate that standard.¹⁷⁵

The House of Lords decision was surprisingly upheld in *Austin v United Kingdom*.¹⁷⁶ The ECtHR held by a majority that there was no breach of ECHR, art 5, on the ground that the detention of the protestors (and others) was a restriction on freedom of movement rather than a deprivation of liberty. It is true that the majority accepted that ‘the coercive nature of the containment within the cordon; its duration; and its effect on the applicants, in terms of physical discomfort and inability to leave Oxford Circus, point towards a deprivation of liberty’ (para 64).

But the Court also accepted that it must take into account ‘the context in which the measure was imposed’, noting that ‘the measure was imposed to isolate and contain a large crowd, in volatile and dangerous conditions’, and that ‘the police decided to make use of a measure of containment to control the crowd, rather than having resort to more robust methods, which might have given rise to a greater risk of injury to people within the crowd’ (para 66). The decision that there was no deprivation of liberty was ‘based on the specific and exceptional facts’ of the case (para 68).

The complainants in *Austin v United Kingdom* did not argue that there had been a breach of their rights under arts 10 and 11 of the ECHR; but the majority nevertheless reiterated that ‘measures of crowd control should not be used by the national authorities directly or indirectly to stifle or discourage protest, given the fundamental importance of freedom of expression and assembly in all democratic societies’.¹⁷⁷ The Home Affairs Select Committee took a more critical view of police practice in the aftermath of the G20 protests in 2009, where it was said that kettling should only be used ‘sparingly’ and in ‘clearly defined circumstances’ which should be ‘codified’.¹⁷⁸

G. Freedom of assembly and the Human Rights Act 1998

In recent years there has been a growing recognition on the part of the courts of the importance of freedom of assembly,¹⁷⁹ and there have been a number of cases making bold claims about its value.¹⁸⁰ These cases reflect a significant change in judicial attitude that previously had been concerned in a rather one-dimensional way with public order to the neglect of other considerations. The developments in the English courts are reflected to some extent by

¹⁷⁴ This is a requirement of both the decision to contain (*McClure*), and the conditions of containment (*Austin*).

¹⁷⁵ See subsequently, *R (on the application of Moos) v Metropolitan Police Commissioner*, above.

¹⁷⁶ [2012] ECHR 459, (2012) 55 EHRR 14.

¹⁷⁷ *Ibid*, at para 68.

¹⁷⁸ HC 418 (2008–09). Compare *R (on the application of Moos) v Metropolitan Police Commissioner*, above.

¹⁷⁹ On which see H Fenwick (1999) 62 MLR 491, esp pp 492–5.

¹⁸⁰ *Redmond-Bate v DPP* [2000] HRLR 249, and *DPP v Jones*, above.

developments in the European Court of Human Rights,¹⁸¹ but it appears that the growing liberalisation has arisen quite independently of the Human Rights Act 1998,¹⁸² although obviously within its shadow.

It is perhaps still premature to draw too many conclusions about emerging trends, especially as we continue to be reminded that ‘in a democratic society the protection of public order lies at the heart of good government’.¹⁸³ But the recognition of the importance of freedom of assembly parallels the growing appreciation of freedom of expression which is to be found in some of the contemporary case law,¹⁸⁴ and may be explained to some extent by the willingness on the part of some judges to see freedom of assembly as, in effect, an instrument of freedom of expression.¹⁸⁵ It is particularly significant that, in the leading case on freedom of assembly, the then Lord Chancellor should consider the ‘public’s rights of access to the public highway’ as ‘an issue of fundamental constitutional importance’.¹⁸⁶

Changing judicial attitudes are demonstrated in a number of ways. In the first place, there is now a recognition that passage and repassage are not the only lawful uses of the highway. As we have seen, it was acknowledged in *DPP v Jones* that ‘the holding of a public assembly on a highway can constitute a reasonable user of the highway and accordingly will not constitute a trespass’, even if it did not follow that ‘a peaceful and non-obstructive public assembly on a highway is always a reasonable user and is therefore not a trespass’.¹⁸⁷ This recognition at the highest level of the right of lawful assembly on the highway is accompanied by a preparedness on the part of the courts sometimes to read down legislation that is being used to impose an unwarranted restraint on freedom of assembly:

In *Huntingdon Life Sciences Ltd v Curtin*¹⁸⁸ the court allowed the British Union for the Abolition of Vivisection to be removed from an injunction (granted *ex parte*) to restrain three defendants from harassing the plaintiffs, a company which undertook research on animals and which had complained of a sustained and menacing campaign against it and its employees. The injunction had been issued under the Protection from Harassment Act 1997.

In granting the request to vary the injunction, Eady J said that the 1997 Act ‘was clearly not intended by Parliament to be used to clamp down on the discussion of matters of public interest or upon the rights of political protest and public demonstration which was so much part of our democratic tradition’. He had ‘little doubt that the courts would resist any wide interpretation of the Act as and when the occasion arose’, and thought it ‘unfortunate that the terms in which the provisions of the Act were couched were seen to sanction any such restrictions’.¹⁸⁹

¹⁸¹ *Steel v UK* (1998) 28 EHRR 603; *Hashman v UK* (1999) 30 EHRR 241.

¹⁸² See esp *DPP v Jones* [1999] 2 AC 240.

¹⁸³ *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787, at para [41] (Lord Hope).

¹⁸⁴ See ch 17, above.

¹⁸⁵ For an account of the link between these two different freedoms, with a full analysis of *DPP v Jones*, see H Fenwick and G Phillipson [2000] PL 627.

¹⁸⁶ *DPP v Jones*, above, at p 251.

¹⁸⁷ *Ibid*, per Lord Hutton, at p 293.

¹⁸⁸ *The Times*, 11 December 1997. See also *Gate Gourmet London Ltd v TGWU*, above. But cf *Oxford University v Broughton*, above. Also *Hayes v Willoughby*, above, where concerns are expressed by Lord Reed in dissent that the 1997 Act may now be a threat to investigative journalism in light of the Supreme Court’s narrow reading of the defence in s 1(3). But see *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB) – 1997 Act not such a threat to the press.

¹⁸⁹ But see *DPP v Selvanayagam*, *The Times*, 23 June 1999.

There also appears to be a greater willingness on the part of at least some judges to challenge the exercise of discretion by police officers who take steps, including arrest, to disperse an assembly in order to prevent a breach of the peace. In the *Redmond-Bate* case, it was said:

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.

But it should not be overlooked that this last passage is from a case concerned with individuals who had been arrested for refusing to stop preaching on the steps of Wakefield Cathedral when instructed to do so by the police. The same vigorous approach to freedom of assembly has not always been adopted in other cases – such as those involving noisy anti-globalisation or angry anti-war protestors. In these cases Convention rights have yielded to other concerns, notably the need to maintain public order under common law rules created long before the enactment of the Human Rights Act 1998.¹⁹⁰

Together with a continuing flow of legislation restricting freedom of assembly,¹⁹¹ such cases tend to suggest that the main impact of Convention rights in this area will not be to call into question the substantive law, but to constrain the manner of its exercise.¹⁹² This means that the public authorities – local authorities and the police – will be bound to have regard to arts 10 and 11 when exercising discretionary powers, such as the power to arrest in the case of the police. The severe criticism of the heavy-handed policing of the G20 protests in 2009 (in which a bystander died following a violent exchange with the police) suggests that the Act is only slowly having an effect and that there is some way to go before it leads to real practical change on the ground.¹⁹³

¹⁹⁰ *Austin v Metropolitan Police Commissioner*, above, and *R (McClure) v Metropolitan Police Commissioner*, above.

¹⁹¹ Such as the Serious Organised Crime and Police Act 2005.

¹⁹² For a very sober account of the practical impact of the Human Rights Act on freedom of assembly, see A Geddis [2004] PL 853.

¹⁹³ See HC 418 (2008–09). (Home Affairs Committee on the G20 protests); and see also HL 47, HC 360 (2008–09) (detailed examination of right of public protest by JCHR).

CHAPTER 19

State security and official secrets

In the liberal constitution, the protection of liberty is a primary duty of the government. But so too is the protection of the security of the state, whether from external aggression or internal subversion. An uneasy tension exists between personal liberty and national security, and it is the duty of the constitutional lawyer to ensure that the demands of the latter do not become an excuse for unnecessary restrictions on the former.

Although the common law may at first sight appear to take little account of state necessity,¹ national security is a matter to which the courts nevertheless attach considerable importance.² But this does not mean that the judges should withdraw at the mere mention of national security: to do so would seriously compromise the rule of law.³ The terrorist attacks in the United States in September 2001 appeared initially to have induced British judges to move further into the background when national security is raised.⁴ But the House of Lords subsequently made it clear that the ‘war on terror’ will not be accepted as an excuse for the discriminatory violation of Convention rights or the breach of basic common law rules prohibiting the use of evidence obtained by torture.⁵

Today state security, or more commonly national security, is mentioned in a large number of statutes, which typically make special provision for matters relating to national security. Thus the Parliamentary Ombudsman may not investigate action taken with the authority of the Secretary of State for the purposes of protecting the security of the state,⁶ and rights under the Data Protection Act 1998 may be excluded for the purpose of safeguarding national security.⁷ The right of journalists to protect their sources may have to yield to the interests of national security,⁸ as may the right of access to official information under the Freedom of Information Act 2000.⁹ And in some litigation where national security considerations are being contested, the matter may be held in camera, with the citizen assigned a lawyer approved by the state.¹⁰

A. Security and intelligence

There are three principal security and intelligence agencies operating in the United Kingdom, with overlapping responsibilities. These are the security service, the Secret Intelligence Service, and GCHQ; the Defence Intelligence Staff also has intelligence functions.

¹ *Entick v Carrington* (1765) 19 St Tr 1030.

² See *Conway v Rimmer* [1968] AC 910, at pp 955, 993; *A-G v Jonathan Cape Ltd* [1976] QB 752, at p 768.

³ For a powerful statement of the judicial role in national security cases, see A Barak (2002) 116 Harv L Rev 19.

⁴ *Home Secretary v Rehman* [2001] UKHL 47, [2003] 1 AC 153. A Tomkins (2002) 118 LQR 200.

⁵ *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68 (ch 14); and *A v Home Secretary (No 2)* [2005] UKHL 71, [2006] 1 All ER 575 (ch 14). See also Lord Bingham (2003) 52 ICLQ 841, Lord Steyn (2004) 53 ICLQ 1, and Lord Hope (2004) 53 ICLQ 807. But compare *Home Secretary v Rehman*, above, esp per Lord Hoffmann.

⁶ Parliamentary Commissioner Act 1967, Sch 3(5).

⁷ See ch 16.

⁸ Contempt of Court Act 1981, s 10; *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339.

⁹ See ch 11.

¹⁰ See Justice and Security Act 2013, Pt 2 (reversing *Al Rami v Security Service* [2011] UKHL 34, [2012] 1 AC 531), and *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452. Also pp 520–521 below.

Formal machinery for these agencies to bring intelligence to the attention of government is provided by the Joint Intelligence Committee, which was established in 1936 as a sub-committee of the Committee of Imperial Defence.¹¹ Part of the Cabinet Office since 1957, the JIC meets frequently, its main function being to provide ministers and senior officials with ‘coordinated intelligence assessments on a range of issues of immediate and long-term importance to national interests, primarily in the fields of security, defence and foreign affairs’.¹²

As well as the intelligence agencies (the ‘producers’), the JIC includes various intelligence ‘users’, notably the Ministry of Defence and the Foreign Office, the Treasury, the Department of Business, Innovation and Skills, and the Home Office. Other departments may also attend when relevant, as also may representatives of the intelligence agencies of the United States, Canada and Australia. The JIC is a committee of officials whose chairman is responsible for supervising its work and for ensuring that its ‘warning and monitoring role is discharged effectively’.¹³ According to the Butler Committee in 2004,

The JIC thus brings together in regular meetings the most senior people responsible for intelligence collection, for intelligence assessment and for the use of intelligence in the main departments for which it is collected, in order to construct and issue assessments on the subjects of greatest current concern. The process is robust, and the assessments that result are respected and used at all levels of government.¹⁴

The collection of this information at home and abroad gives rise to questions about effective legal and political accountability for security measures. There has, however, been in recent years a welcome lifting of the veil of secrecy which has for so long surrounded the security and intelligence services. This is reflected in part by the open discussion of the JIC and its intelligence assessments in the Butler inquiry, appointed in 2004 to investigate the intelligence coverage available in respect of weapons of mass destruction at the time of the invasion of Iraq. It is reflected more notably in the greater role of legislation in regulating the affairs of the security services, and in particular by the extension of the principle of judicial oversight, and with it the publication of annual reports by the judicial commissioners.

Much of that legislation has been driven by the European Convention on Human Rights. As we have seen,¹⁵ many of the rights set out in the Convention allow for exceptions and these generally include national security, provided that the restriction is prescribed by law and necessary in a democratic society. This is true, for example, of arts 8, 9, 10 and 11. One of the difficulties with the procedures and practices traditionally operating in this country was their relative informality, and the lack of clear legal rules setting out the functions and powers of the security and intelligence services.¹⁶ So to the extent that the activities of the security services violate the private life of the individual, it could not be said that these activities were ‘prescribed by law’. At best, it might be said that they were not ‘prohibited by law’.

¹¹ Lord Butler (Chair), Review of Intelligence on Weapons of Mass Destruction: Report of a Committee of Privy Counsellors, HC 898 (2003–04), para 41.

¹² *Ibid*, para 43.

¹³ <https://www.gov.uk/government/organisations/national-security/groups/joint-intelligence-committee>.

¹⁴ Butler, above, para 43.

¹⁵ See ch 14.

¹⁶ *Malone v UK* (1984) 7 EHRR 14; *Hewitt and Harman v UK* (1992) 14 EHRR 657; and *Khan v UK* (2001) 31 EHRR 1016.

B. Security and intelligence services

The modern security and intelligence services have their origins in the early years of the 20th century, and are concerned mainly with surveillance and the gathering of intelligence at home and overseas. Different methods are used for these purposes, though they have become much more sophisticated with the passage of time and the development of new technology. The main security and intelligence services are MI5 and MI6, though we also give an account below of the work of GCHQ and Defence Intelligence, as well as Counter Terrorism Command. Although CTC is a police unit, it does have some security responsibilities.

Security service

The security service was created in the War Office in 1909 to deal with the fears about German espionage in the period immediately before the First World War. The unit was called MO5, and later MI5. In 1935, MI5 was amalgamated with the section of the Metropolitan Police dealing with counter-subversion and in that year it changed its name to the security service.¹⁷ The domestic security service is, however, still referred to as MI5.

A remarkable feature of these developments is that they took place without statutory authority. The service was set up by executive decision (presumably under the royal prerogative) with functions determined by the executive and accountable only to the executive. In his report on the security service following the Profumo scandal in 1963, Lord Denning wrote:

The Security Service in this country is not established by Statute nor is it recognised by Common Law. Even the Official Secrets Acts do not acknowledge its existence. The members of the Service are, in the eye of the law, ordinary citizens with no powers greater than anyone else. They have no special powers of arrest such as the police have. No special powers of search are given to them. They cannot enter premises without the consent of the householder, even though they may suspect a spy is there. If a spy is fleeing the country, they cannot tap him on the shoulder and say he is not to go. They have, in short, no executive powers. They have managed very well without them. We would rather have it so, than have anything in the nature of a 'secret police'.¹⁸

According to Lord Denning, this absence of legal powers was made up for by the close cooperation between the security service and the police, particularly the Special Branch.¹⁹ The security service would make all the initial investigations relying on its technical resources and specialised field force. But as soon as an arrest was possible, the police were called into consultation and from that point onwards both forces worked as a team. Because of the lack of executive power of the security service, an arrest would be made by the police and if a search warrant were sought, this too would be done by the police.²⁰

Before the enactment of the Security Service Act 1989, the security service was governed by a directive issued by the Home Secretary (Sir David Maxwell Fyffe) in 1952. Addressed to the Director General of MI5,²¹ this provided that, although the security service was not a

¹⁷ For a full account of its origins from non-official histories, see Andrew, *Secret Service*. See also West, *MI5: British Security Service Operations 1909–45*; and *A Matter of Trust: MI5, 1945–72*. For further analyses, see Ewing and Gearty, *The Struggle for Civil Liberties*, ch 2; Gill, *Policing Politics*; Lustgarten and Leigh, *In from the Cold*; Williams, *Not in the Public Interest*, part 2; and Bunyan, *The Political Police in Britain*, chs 3, 4.

¹⁸ Cmnd 2152, 1963.

¹⁹ See p 512 below.

²⁰ Cmnd 2152, 1963, para 273.

²¹ Reproduced in *R v Home Secretary, ex p Hosenball* [1977] 3 All ER 452 in the judgment of Lord Denning MR.

part of the Home Office, the Director General would be responsible to the Home Secretary personally, with a right on appropriate occasions of direct access to the Prime Minister. The directive also stated that the service 'is part of the Defence Forces of the country', and that 'its task is the Defence of the Realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organisations whether directed from within or without the country, which may be judged to be subversive of the state'. The work of the service was to be strictly limited to what is necessary for these purposes and was expressly required to be kept absolutely free from any political bias or influence.

Questions of the political responsibilities of the service were clarified by Lord Denning in his famous 1963 report.²² Although the function of the service is the defence of the realm, political responsibility did not (and does not) lie with the Secretary of State for Defence, but with the Home Secretary and the Prime Minister, who is advised on security matters by the Cabinet Secretary.²³ However, it has been an open question for many years just what degree of political responsibility has existed, particularly in view of the convention that ministers 'do not concern themselves with the detailed information which may be obtained by the Security Services in particular cases, but are furnished with such information only as may be necessary for the determination of any issue on which guidance is sought'.²⁴

Since 1989 the work of the service has changed in response to the new and evolving international position, and the so-called 'war on terror' in particular. During the Cold War the service was concerned largely with counter-subversion and counter-espionage. So far as the former is concerned, it was reported in 1995 that the threat from subversive organisations had decreased to the point where it was assessed as being 'low'. The Communist Party of Great Britain (CPGB) no longer existed, while the main surviving organisation (the Communist Party of Britain) was assessed to be only about 1,100 strong, compared to 25,000–30,000 in the CPGB in the 1970s and 56,000 at its peak in 1942.²⁵ According to the Security Commission, it had been agreed inter-departmentally that the investigation of subversive organisations should be reduced,²⁶ and in 1992 the service assumed a new responsibility in the form of 'Irish republican terrorism', which was transferred from the Special Branch.

Although this step seems clearly to have been inspired by the need to fill the gap in the work of the service caused by the end of the Cold War, it was explained in Parliament that the service already had responsibility for Irish loyalist and international terrorism and for Irish republican terrorism overseas.²⁷ Indeed, it was only the accident of history which had given the police the leading responsibility for Irish republican terrorism, a decision which had been taken in 1883 when the Special Irish Branch was formed to track down Fenians who at the time were placing bombs in London. The security service is now greatly concerned with the domestic implications of international terrorism, though it remains troubled by the risk of Northern Irish terrorist activity (mainly by dissident groups). Otherwise espionage from Russian and Chinese agents continues to be a concern, with the security service reporting that the number of Russian agents has not fallen since the Soviet days.

Secret Intelligence Service, GCHQ and Defence Intelligence Staff

The existence of the Secret Intelligence Service (SIS or MI6 as it is more commonly known) was first officially acknowledged in May 1992, although it was founded in 1909, albeit not in

²² See also Wilson, *The Labour Government 1964–70*, p 481.

²³ Cmnd 2152, 1963, para 238.

²⁴ *Ibid.*

²⁵ Pelling, *The British Communist Party*, p 192.

²⁶ Cm 2930, 1995.

²⁷ HC Deb, 8 May 1992, cols 297–306.

its modern form. Despite the ending of the Cold War, the government is nevertheless of the view that there is a role for the security and intelligence services ‘alongside the armed services and diplomatic services in protecting and furthering the interests of Britain and its citizens at home and abroad’.²⁸ The threats which are said to make the continued existence of these agencies necessary ‘include nuclear, chemical, biological and conventional proliferation of weapons’, as well as ‘terrorism and the threat to our armed forces in times of conflict, serious crime, espionage and sabotage’.²⁹

According to the SIS website,³⁰ the Service ‘mounts covert operations overseas in support of British government objectives,’ and ‘collects intelligence subject to requirements and priorities established by the JIC and approved by ministers’. It uses ‘human and technical’ sources for these purposes, and works with a wide range of foreign intelligence and security services, as well as other British agencies such as GCHQ, the security service (MI5), the armed forces, the Foreign Office, the Home Office, the Ministry of Defence, and HM Revenue and Customs. The service is required to work within the law as laid down by the Intelligence Services Act 1994, and has a key role in the implementation of the government’s National Security Strategy published in 2010.³¹

Although it had been operating at least since 1947, Government Communications’ Headquarters (GCHQ) was not publicly acknowledged to exist until the trial of Geoffrey Prime, an official who was convicted under s 1 of the Official Secrets Act 1911 in 1982 for passing information to the Soviet Union. This was followed by a report of the Security Commission which not only revealed the existence of the centre but also gave an account of the security procedures in operation there, including those for physical and document security.³² It came more prominently to the fore in 1984 when controversially the government announced a trade union ban,³³ one irony of which is that as a result GCHQ ‘has become as well known in political circles as MI5 and MI6’.³⁴

Officially, GCHQ ‘provides government with information’ to ‘support policy-making and operations in the fields of national security, military operations, law enforcement and economic well being’,³⁵ and in doing so works closely with overseas agencies such as the National Security Agency in the United States. The intelligence gathered by GCHQ was said by its website to lie ‘at the heart of the struggle against terrorism’, and to contribute to the prevention and detection of serious crime. GCHQ was said also to supply ‘crucial intelligence to the UK armed forces, wherever they may be deployed’. The Director of GCHQ, like the Chief of SIS, is personally responsible to the Foreign Secretary, subject to the overall responsibility of the Prime Minister for security and intelligence matters. Like SIS, GCHQ has been placed on a statutory footing by the Intelligence Services Act 1994 (on which see below).

Established as Defence Intelligence Staff (DIS) in 1964 following the creation of a unified Ministry of Defence, Defence Intelligence (DI) is run by the Chief of Defence Intelligence. The work of DI includes intelligence collection, and like the other agencies it contributes to the work of the JIC.³⁶ An ‘integral part’ of the Ministry of Defence,³⁷ DI provides intelligence for the armed forces and other government departments, and analyses information from a wide variety of sources, both overt and covert. Also initially having a Cold War role,

²⁸ HC Deb, 22 February 1994, col 155 (Mr Douglas Hurd).

²⁹ Ibid (giving examples of the work of MI6 in the then contemporary world).

³⁰ <http://www.sis.gov.uk/output/what-we-do.html>.

³¹ Ibid. For the National Security Strategy, see Cm 7953, 2010.

³² Cmnd 8876, 1983.

³³ See p 520 below.

³⁴ Official Report, Standing Committee E, 15 March 1994, col 115.

³⁵ HM Government, *National Intelligence Machinery* (2010), p 8.

³⁶ See also HC 115 (1995–6) (Scott Report), para C 2.26.

³⁷ <https://www.gov.uk/defence-intelligence>.

the focus of DI ‘has now shifted towards providing intelligence support to operations overseas, countering the proliferation of weapons of mass destruction, and supporting the global war on terrorism’.³⁸ An important role is alerting ministers and others to impending crises throughout the world.

The Chief of Defence Intelligence is a serving military officer who ‘reports to the Chief of the Defence Staff and the Permanent Secretary of the MOD’.³⁹ However, DI is not governed by the Intelligence Services Act 1994, and therefore not subject to the various processes of scrutiny and accountability in the Act. Nevertheless, under the Regulation of Investigatory Powers Act 2000, the Chief of Defence Intelligence may apply for an interception warrant, and it appears that DI may use the various forms of surveillance authorised by that Act.⁴⁰ But DI does not fall within the definition of the intelligence services in RIPA (which is confined to the security service, the Secret Intelligence Service and GCHQ). Nor is DI the only part of the MOD ‘intelligence activity’.⁴¹ It is funded from the Defence Vote.

Special Branch and Counter-Terrorism Command⁴²

Although not an official security and intelligence service, another agency engaged in work related to state security has emerged from what was previously the police Special Branch, which as we have seen was formed in 1883 in response to a Fenian bombing campaign in London. After three years the word ‘Irish’ was dropped from the Branch’s title and it was expanded to deal with other security problems. After 1945 provincial police forces established their own permanent Special Branch, ‘primarily to acquire intelligence, to assess its potential operational value, and to contribute more generally to its interpretation’.⁴³

In this way the Special Branch assists both the security service and the Secret Intelligence Service in carrying out their statutory duties. Home Office guidelines emphasised that the acquisition of high-grade intelligence is vital to the work of the Special Branch and explained the different ways by which intelligence is gathered: ‘the handling of covert human intelligence sources, intelligence gathering, field enquiries, intelligence passed on from other parts of the police service, and surveillance by conventional and technical means’.⁴⁴ Although terrorism is the ‘key priority’ for the Special Branch,⁴⁵ there is also an acknowledgement that Special Branches in most forces have responsibility for gathering intelligence on threats to public order and community safety from individuals ‘motivated by racial hatred or political conviction’. In addition, the Special Branch gathers intelligence on ‘political and animal rights extremist activity, anti-globalisation and environmental extremism’.⁴⁶

Following the London bombings in 2005, the Metropolitan Police Special Branch was merged with the Anti-Terrorist Branch to form Counter-Terrorism Command (also known as SO 15), which combines the intelligence-gathering role of the former with the investigation role of the latter.⁴⁷ Counter-Terrorism Command (CTC) is said now to be ‘the primary police resource for countering terrorism’, and is a ‘very large and complex command’, with

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Regulation of Investigatory Powers Act 2000, s 6, 41.

⁴¹ Cm 2550, 1994 (Statement on the Defence Estimates), p 41.

⁴² See Bunyan (note 17 above), and Allason, *The Branch: A History of the Metropolitan Police Special Branch 1883–1983*.

⁴³ *Home Office Guidelines on Special Branch Work in the United Kingdom* (2004), para 18.

⁴⁴ Ibid, para 19.

⁴⁵ Ibid, para 20.

⁴⁶ Ibid, para 27.

⁴⁷ *The Times*, 3 October 2006.

a headcount of approximately 1,500 which was ‘still growing’.⁴⁸ As such the CTC has a number of responsibilities, which according to the Metropolitan Police website include ‘detecting, investigating and preventing terrorist threats and networks’. Here CTC works closely with the security and intelligence services. In addition, CTC ‘has the national lead for domestic extremism, a role undertaken by the National Domestic Extremism Unit’, and also deals with ‘sensitive national security investigations, such as Official Secrets Act enquiries’.

In fact, the CTC stands at the apex of a complex National Counter-Terrorism Network of police units of various kinds, explained as follows:

The sort of coalface of countering terrorism is essentially every police force because all officers and staff have a role to be aware and to make contributions to a national effort. Then you have the local force special branches in each force, then the next level up is the counter-terrorism intelligence units, the next level up is the counter-terrorism units, the five larger ones, and at the top, I guess, is the Counter-Terrorism Command in London.⁴⁹

Special Branches thus continue to play an important part as local intelligence gatherers.⁵⁰ It is important to emphasise, however, that Special Branch officers are police officers with no additional powers.

Although the Metropolitan Police Service is the lead force for the National Domestic Extremism Unit, the latter ‘remains a national policing unit’. As such, it ‘supports all police forces to help reduce the criminal threat from domestic extremism across the UK’, with a key responsibility being intelligence gathering on ‘domestic extremism’ and public order issues.⁵¹ In the recent past ‘domestic extremism’ was categorised for policing purposes into five themes: animal rights, extreme right-wing, extreme left-wing, environmental and emerging trends. These terms are not defined, though it has been claimed that that ‘domestic extremism’ only applies ‘to individuals or groups ‘who carry out criminal acts of direct action to further their protest campaign, outside the democratic process’.⁵²

Not being officially part of the formal security and intelligence apparatus of the state, CTC is not governed by the procedures discussed in the following part of this chapter.

C. Legal framework of security and intelligence services

As explained above, it has been necessary to place the security and intelligence services, and the work they do, on a firm statutory base, with some form of statutory oversight. But, of course, it is not enough that there should be legal authority for the work of the security and intelligence services. Also important is the nature and quality of the law and the manner of its exercise: to satisfy the Convention any restriction on Convention rights by the security and intelligence services must be proportionate to the objective which it is sought to be achieved.

⁴⁸ HC 212 (2008–09), Minutes of Evidence, 12 February 2009, Q 97 (Mr Bob Quick QPM).

⁴⁹ *Ibid.*, Q 98.

⁵⁰ *Ibid.*

⁵¹ <http://www.acpo.police.uk/NationalPolicing/NationalDomesticExtremismUnit/AboutNDEU.aspx>.

⁵² *Catt v Metropolitan Police Commissioner* [2012] EWHC 1471 (Admin), [2012] HRLR 23, para 5. The *Catt* case has tended to suggest that such assurances are hollow, and that ‘peaceful protestors’ are also swept up in the surveillance work of the NDEU. See further *Catt v Metropolitan Police Commissioner* [2013] EWCA Civ 192, [2013] 1 WLR 3305. See further ch 16 above.

Security Service Act 1989⁵³

The security service is now governed to some extent by the Security Service Act 1989, which creates a legal basis for the Service and some of its powers (though other legal powers and controls are to be found in the Regulation of Investigatory Powers Act 2000 (RIPA), considered in chapter 16.⁵⁴ It is also the case that the security and intelligence services operate within boundaries defined by the ECHR, which ought to have implications for the Human Rights Act 1998.

1. Statutory functions

In providing for the continuation of the security service, the Security Service Act 1989 defines its function to be ‘the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means’ (s 1(2)). The term ‘national security’ is not defined, although it has been said to be wider than the particular heads specified in the Act.⁵⁵ The service also has the task of safeguarding the economic well-being of the country against threats posed by the actions or intentions of persons outside the United Kingdom (s 1(3)).

By an amendment to the 1989 Act introduced by the Security Service Act 1996, it is also the function of the service to act in support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime. According to the government, this last provision reflects ‘the firm intention’ that the service ‘should be deployed against organised crime’ and that the ‘drug traffickers, the money launderers and the racketeers’ are to become the service’s new targets. The role of the service is to be ‘a supporting one’ in this capacity, the legislation reflecting fully ‘the principle that the public and the law enforcement agencies will retain the primary responsibility’.⁵⁶ Nevertheless, these provisions were extremely controversial and gave rise to concern in Parliament and elsewhere.

So far as these statutory functions of the Service are concerned, it appears that it is pre-occupied with espionage and terrorism. The latter relates mainly to international terrorist groups linked to al-Qaeda, and to Northern Ireland. Although ‘domestic extremist’ groups may aspire to the use of violence, they are thought to present more of a threat to public order than to national security and are thus the responsibility of the National Domestic Extremism Unit based in the Metropolitan Police, and referred to above. According to its website, the Service has suspended activity concerned with serious crime, and did so following the creation of the Serious Organised Crime Agency in 2006 (a body now replaced by the National Crime Agency) at a time when resources were required elsewhere.

In exercising its wide powers, the service continues to be under the operational control of the Director General, who is appointed by the Home Secretary (s 2(4)). The duties of the Director General, who must make an annual report to the Prime Minister and the Home

⁵³ See I Leigh and L Lustgarten (1989) 52 MLR 801; also Ewing and Gearty, *Freedom under Thatcher*, pp 175–88.

⁵⁴ For arrangements in other countries, see S Farson [1992] PL 377 (Canada), and Lee, Hanks and Morabito, *In the Name of National Security* (Australia). See also Lustgarten and Leigh, above, which is strong on Australian and Canadian developments.

⁵⁵ Cm 1480, 1991. Although not ‘easily defined’, it ‘includes the defence of the realm and the government’s defence and foreign policies involving the protection of vital national interests at home and abroad’. What is a vital national interest is ‘a question of fact and degree’, more ‘easily recognised when being considered than defined in advance’.

⁵⁶ HL Deb, 14 May 1996, cols 398–9 (Baroness Blatch). The meaning of detection for these purposes is widely defined: s 1(5), as inserted by the RIPA 2000, s 82(1).

Secretary (s 2), include taking steps to ensure that the service does not take any action to further the interests of any political party (s 2(2)(b)). This is narrower than the rule contained in the Maxwell Fyfe directive which required the service to be kept free from ‘any political bias or influence’, a rule which it is claimed did not prevent the surveillance of the Campaign for Nuclear Disarmament or trade unions involved in pay disputes.⁵⁷

The 1989 Act conferred a new power on the service. This was the power to apply to the Home Secretary for a warrant authorising ‘entry on or interference with property’ (s 3).⁵⁸ Hitherto there was no power to grant any warrant, but it appears that the service may not have been unduly impeded in the absence of such a power. Indeed, in *Attorney-General v Guardian Newspapers (No 2)* Lord Donaldson MR appeared willing to turn a blind eye to the unauthorised entry of private property by the security services, referring to it as a ‘covert invasion of privacy’, which might be considered excusable in the defence of the realm.⁵⁹ This power to apply for a Home Office warrant introduced in 1989, was replaced by comparable provisions in the Intelligence Services Act 1994.

2. Statutory accountability

The 1989 Act is significant for having introduced new procedures for the supervision of the security service. These are modelled on procedures introduced in the Interception of Communications Act 1985, which were discussed in chapter 16. The 1989 Act made provision for the appointment of a Security Service Commissioner, being someone who holds or has held high judicial office (s 4); and also a Security Service Tribunal to hear complaints against the service (s 5). The Commissioner was required to keep under review the power of the Home Secretary to issue warrants to the service.

Lord Justice Stuart-Smith held the office of Security Service Commissioner from its inception. Unlike the Commissioner appointed under the Interception of Communications Act 1985, the Security Service Commissioner did not provide details of the number of warrants issued under s 3 in any one year, explaining that this was because of the ‘comparatively small number of warrants issued under the 1989 Act and the fact that the purpose for which they can be granted is more restricted than under the 1985 Act’.⁶⁰ It may nevertheless have been helpful and re-assuring if this information had been provided.

The practice of the Commissioner was to review all the warrants issued, reviewed and cancelled,⁶¹ and in some cases the products obtained by the operation.⁶² He always found that the procedures examined to have been in good order and warrants to have been properly issued. An exception was in 1999 when in one case an application was said to be ‘thin and lacking in particularity’. After interviewing the responsible officers, he was able to conclude that the application had been properly made and the officers in question were asked to make a supplementary written statement to the Secretary of State to clarify the position.⁶³

The Regulation of Investigatory Powers Act 2000 abolished the office of Security Service Commissioner, with a new Intelligence Services Commissioner now having oversight for all

⁵⁷ Allegations to this effect were made by a retired MI5 officer, Cathy Massiter, in a Channel 4 television programme. For the unsuccessful challenge to the legality of this activity, see *R v Home Secretary, ex p Ruddock* [1987] 2 All ER 518.

⁵⁸ On the way this power is exercised, see Cm 1480, 1991, para 3. Section 3 was replaced by ss 5 and 6 of the Intelligence Services Act 1994 (on which see below).

⁵⁹ [1990] AC 109, at 190. Cf *Entick v Carrington*, above.

⁶⁰ Cm 1480, 1991. And see Cm 3253, 1996.

⁶¹ Cm 4002, 1998, para 5; Cm 4365, 1999, para 7; and Cm 4779, 2000, para 15.

⁶² Cm 4365, 1999, para 7.

⁶³ Notwithstanding this apparent irregularity, the Commissioner was nevertheless able to report that the ‘Secretaries of State have been properly advised’, and that they ‘have exercised their powers under the Act correctly’: Cm 4779, 2000, paras 16 and 17.

the intelligence services (including in some cases those attached to the Ministry of Defence).⁶⁴ The Intelligence Services Commissioner is required to keep under review the way in which both ministers and members of the intelligence services exercise their powers under Parts II and III of the Regulation of Investigatory Powers Act 2000, in so far as the powers relate to the intelligence services. These include powers connected with surveillance.

In addition to oversight by the Commissioner (who must report annually to the Prime Minister), the Regulation of Investigatory Powers Act 2000 provides that the investigatory powers tribunal established by s 65 of the Act may hear complaints against any of the intelligence services,⁶⁵ this replacing the jurisdiction of the tribunal created by the 1989 Act. The IPT has exclusive jurisdiction for dealing with all such complaints concerned with the conduct of the intelligence services, which relates to the complainant, his or her property, or his or her communications. It is also the only body to deal with complaints about the violation of Convention rights.

Serious concerns have been expressed about the procedural rules under which the IPT operates, these departing markedly from normal standards for the conduct of civil litigation. Drafted by the Home Secretary under the authority of RIPA, these require high levels of secrecy in the conduct of the proceedings, in terms of the hearing of the complaint, the disclosure of evidence and the giving of reasons. Nevertheless, the procedures were held by the ECtHR to be inconsistent with the ECHR, art 6, though only after the IPT itself had held certain aspects of the rules to be *ultra vires*.⁶⁶ Complaints to the IPT are rarely successful and there is no appeal.

Intelligence Services Act 1994

So far as the Secret Intelligence Service is concerned, its activities are governed by the Intelligence Services Act 1994, which also applies to GCHQ. As in the case of the Security Service (above), other legal powers and controls are to be found in the Regulation of Investigatory Powers Act 2000 (RIPA), considered in chapter 16. It is also the case here too that the security and intelligence services operate within boundaries defined by the ECHR, which ought also to have implications for the Human Rights Act 1998.

1. Statutory functions

The functions of SIS are stated by s 1(1) to be (a) the obtaining and providing of information relating to the actions or intentions of persons outside the British Islands, and (b) the performing of ‘other tasks relating to the actions or intentions of such persons’. These extraordinarily wide provisions are constrained by s 1(2) which provides that the statutory functions are exercisable only (a) in the interests of national security (with ‘particular reference to the defence and foreign policies of Her Majesty’s Government’), (b) in the interests of the economic well-being of the United Kingdom, or (c) in support of the prevention or detection of serious crime.⁶⁷

The ‘interests of national security’ are not otherwise defined, nor (more surprisingly) is what constitutes ‘serious crime’.⁶⁸ And although ‘a well-worn provision’, it was acknowledged

⁶⁴ RIPA 2000, s 59(2).

⁶⁵ On the jurisdiction of the tribunal, see *A v B* [2009] UKSC 12, [2010] 2 AC 1. A total of 338 complaints were made to the 1989 Act tribunal between 1989 and 1999: Cm 4779, 2000, para 37. In 42 of these cases it appears that the complainant was the subject of a personal file kept by the security service.

⁶⁶ *Kennedy v United Kingdom* [2010] ECHR 682, (2011) 52 EHRR 4.

⁶⁷ The meaning of detection and prevention for these purposes is widely defined: s 11(1A), as inserted by RIPA 2000, s 82.

⁶⁸ See Cm 3288, 1996, para 8.

that a power to take action ‘in the interests of the economic well-being’ of the UK ‘sometimes causes puzzlement as to what it can mean’.⁶⁹ It was explained, however, that the power ‘might be useful’ where ‘substantial British economic interests were at stake or where there was a crisis or a huge difficulty about the continued supply of a commodity on which our economy depended’.⁷⁰ At the very least this appears to authorise the SIS role in gathering economic intelligence to inform policy.

The Act also places GCHQ on a statutory footing, under the authority of the Foreign Secretary. By virtue of s 3, its functions are to:

- ‘monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions’;
- ‘obtain and provide information derived from or related to such emissions or equipment’; and
- provide advice and assistance about language and cryptology to the armed forces, government departments or any other organisation approved by the Prime Minister.

As in the case of SIS the foregoing functions are exercisable only in the interests of national security (with particular reference to the defence and foreign policies of the government); or the interests of the economic well-being of the United Kingdom. These measures were strongly criticised in standing committee as providing a mandate which is ‘wide and sweeping’, inadequately constrained by the ‘partial stricture’ that it be exercised in the interests of national security.⁷¹ It was pointed out in reply, however, that there were a number of safeguards in the Act to prevent the abuse of power (according to the minister there were 11 in total).

So far as the duty of GCHQ to assist in the prevention and detection of crime is concerned, this was said not to be new, but had been going on for ‘decades’. It appears that GCHQ intervenes when criminals use ‘sophisticated communications devices to commit a crime’ and assists in the deciphering of diaries and notebooks kept by criminals in sophisticated codes.⁷² The GCHQ website provides little detail of the work undertaken by the agency in relation to serious crime (or indeed anything else), though ironically in 2013 it had to defend itself from allegations that it had engaged in unlawful data sharing with the US spy agencies.⁷³

2. Statutory powers

The Intelligence Services Act 1994 authorises ‘entry on or interference with property or with wireless telegraphy’ by each of the three security and intelligence agencies, provided that any such action is taken with the authority of a warrant issued by the Secretary of State (or in some cases the Scottish Ministers);⁷⁴ otherwise the action is ‘unlawful’, although unlike the unauthorised interception of communications it is not an offence. A warrant may be issued only if the Secretary of State ‘thinks it necessary’ for the purpose of assisting the agency making the application in carrying out any of its functions, provided that the taking of the action is proportionate to what the action seeks to achieve (s 5).

A warrant issued on the application of either the SIS or GCHQ may not relate to British property, unlike warrants issued to the security service, which may be issued for two such purposes.

⁶⁹ HC Deb, 22 February 1994, col 157 (Mr Hurd).

⁷⁰ Ibid.

⁷¹ Official Report, Standing Committee E, 15 March 1994, col 117.

⁷² Ibid, col 132.

⁷³ See below, p 536.

⁷⁴ See SI 1999 No 1750.

- The first relates to the traditional functions of the service, as defined in s 1(2) and (3) of the Security Service Act 1989, in which case it may relate to property in Britain, without further qualification;
- The second relates to the function of the service added by the Security Service Act 1996, namely to act in support of the police and law enforcement agencies in the prevention and detection of serious crime.

In the latter case the warrant may authorise action in respect of property in Britain, but only if the action is to be taken in relation to offences that involve violence, result in substantial financial gain, or constitute conduct by a large number of persons in pursuit of a common purpose, or if the offence is one which carries a term of three years' imprisonment on conviction for the first time.⁷⁵ Warrants are normally to be issued by a Secretary of State (or in some cases a member of the Scottish Government)⁷⁶ and are valid for up to six months, although they may (but need not) be cancelled before the period of six months expires (s 6).

Apart from the power to interfere with property (albeit with the authority of a warrant), the 1994 Act also contains a remarkable power for the Secretary of State to authorise a person to commit an act 'outside the British Islands' which would be unlawful 'under the criminal or civil law of any part of the United Kingdom' (s 7). The effect of an authorisation under this so-called 'James Bond clause'⁷⁷ is to give the individual committing an offence (or other unlawful act) immunity from legal liability in this country (but not in the country in which the crime or unlawful act may be committed). But authorisation should be given only where the acts to be done are 'necessary for the proper discharge of a function of the Intelligence Service or GCHQ'.

Understandably, these powers gave rise to some concern in Parliament, with one Opposition member pointing out that they grant

the Secretary of State complete power to authorise activities that violate the law of other states as well as that of the United Kingdom. There is no limit on what can be authorised. In extreme cases the use of lethal force will be allowed.⁷⁸

Ministers were, however, rather coy about the way in which the powers would be used, and appeared to think it enough to reassure the House that 'certain actions can be undertaken by the agencies under the specific authority of ministers only.'⁷⁹ They were unwilling to contemplate even an obligation to report annually to the Intelligence and Security Committee (on which see below) on the number and general description of all acts authorised under this section, on the ground that provision was made for the appointment of a judicial commissioner to ensure that the ministers' powers were exercised properly.⁸⁰

3. Statutory accountability

Political responsibility for the agencies (other than MI5) was said to be 'primarily' that of the Foreign Secretary 'under the Prime Minister'.⁸¹ Under the Act, however, the operations of the SIS continue to be under the control of the Chief of the Intelligence Service (s 2), while the operations of GCHQ continue to be under the control of its Director (s 4).

⁷⁵ 1994 Act, s 5, as amended by Security Service Act 1996.

⁷⁶ SI 1999 No 1750.

⁷⁷ HL Paper 152, HC 230 (2008–09), para 53. The government will not reveal the number of occasions on which this power has been used.

⁷⁸ Official Report, Standing Committee E, 17 March 1994, col 174.

⁷⁹ HC Deb, 22 February 1994, col 160.

⁸⁰ Official Report, Standing Committee E, 17 March 1994, col 175.

⁸¹ HC Deb, 22 February 1994, col 154.

Each of the foregoing is responsible for ensuring the efficiency of the respective services, and that no information is obtained by their organisations except so far as is necessary for the proper discharge of their functions. They must also ensure that information is not disclosed by their organisations except ‘so far as necessary’ for the proper discharge of their functions, and that the respective agencies do not take ‘any action to further the interests of any United Kingdom political party’ (ss 2(2)(b), 4(2)(b)). By a strange quirk of drafting (although it may not be unintended) either service may disclose information even though it is not necessary for it to do so in ‘the proper discharge of its functions’.

Thus the SIS may disclose material (without violating the duty of the Chief of the Intelligence Service) on the additional (but not necessarily consequential) ground that it is in the interests of national security, for the prevention or detection of serious crime, or for the purpose of any criminal proceedings (s 2(2)(a)). GCHQ may disclose information falling into the last of these three categories, even though, again, disclosure is not necessary for the proper discharge of its functions, a much narrower incidental power than that possessed by SIS. Both the Chief of Intelligence Service and the Director of GCHQ are required to make an annual report to the Prime Minister and the Foreign Secretary (ss 2(4) and 4(4)).

Following the precedents established in 1985 and 1989, the 1994 Act made provision for the creation of an Intelligence Services Commissioner (appointed by the Prime Minister and being a person who holds or has held high judicial office) and a tribunal for the investigation of complaints about the SIS or GCHQ. The decisions of both the Commissioner and the tribunal (including decisions as to jurisdiction) were not subject to appeal and were not liable to be questioned in any court of law. However, the RIPA 2000 merged the jurisdictions of the Intelligence Services Commissioner and the Security Service Commissioner, and transferred the jurisdiction of the security and intelligence tribunal to the investigatory powers tribunal.

From 2000 to 2006, Lord Brown of Eaton-under-Heywood (a Lord of Appeal in Ordinary since 2004) occupied the office of Intelligence Services Commissioner. As Simon Brown LJ, he had been the first President of the security and intelligence tribunal appointed under the 1994 Act above. Sir Peter Gibson replaced Lord Brown as Commissioner, Sir Peter being a retired member of the Court of Appeal, who like his predecessor appears generally to have been satisfied with the operation of the procedures under the Act.⁸² In common with his predecessor, however, Sir Peter Gibson was unwilling to reveal how many warrants are issued or authorisations granted under the 1994 Act.

Sir Mark Waller, also a retired Court of Appeal judge, succeeded Sir Peter Gibson as Commissioner in 2010. Sir Mark broke with earlier practice by publishing details of the number of warrants and authorisations issued to the security and intelligence services annually.⁸³ The figures published cover both the 1994 Act and RIPA, the figures not broken down by service or power. So far as complaints to the investigatory powers tribunal are concerned, although we know that just under a third of complaints relate to the security and

⁸² HC 902 (2008–09), SG/2009/139, para 31. The Commissioners have, however, drawn attention to a number of ‘errors’ where no valid warrant or authorisation had been issued in relation to covert activity. In 2008, for example, there were 18 such cases: *ibid*, 47.

⁸³ HC 578 (2013–14), SG/2013/132: 2,838 warrants and authorisations were approved across the intelligence services and MOD in 2012, though it was thought worth pointing out that ‘because of a migration onto an electronic system, a number of authorisations were cancelled and authorised again’, and that the total number was not therefore a true representation (p 20). Nevertheless, in 2011 the total was 2,142: HC 497 (2012–13), SG/2012/126, p 22.

intelligence services, there is no detailed information about the grounds for these complaints or of their disposal.⁸⁴

D. Protection for state secrets and national security

Much of the foregoing has been concerned principally with the surveillance and intelligence gathering activities of the state agencies responsible for national security. But the protection of national security is also about protecting classified information from falling into the wrong hands. This may be information of a wide and varied kind, relating to defence and foreign affairs on the one hand, and the work of the security and intelligence services on the other. In this part, we consider some of the different methods adopted to protect such information.

Security service and employment law

Staff employed by the security and intelligence services were traditionally denied the rights normally extended to other workers.⁸⁵ The Trade Union and Labour Relations (Consolidation) Act 1992 gives rights in relation to trade union membership, among other things; the Employment Rights Act 1996 covers a larger area, including rights relating to unfair dismissal. Both of these statutes apply to Crown servants,⁸⁶ but in both cases an exception was made for those in Crown employment in respect of whom there was a ministerial certificate exempting the employment from the protection of the legislation ‘for the purpose of safeguarding national security’.⁸⁷

Certificates were issued excluding the members of the security services and subsequently the staff at GCHQ, where rights in respect of trade union membership were unilaterally withdrawn in controversial circumstances in 1984.⁸⁸ This rather foolish decision did more than anything to draw attention to GCHQ and the work which it does, as well as generating international criticism for breaching the freedom of association guarantees in International Labour Organization Convention 87, an international treaty to which the United Kingdom is a party.⁸⁹ Trade union rights at GCHQ were substantially (but not wholly) restored in 1997.⁹⁰

1. Employment rights

The position now under the Employment Relations Act 1999 is that almost all employment rights apply to members of the security services, with a number of exceptions and qualifications.⁹¹ It is expressly provided that the protections for whistleblowing extended by the Public Interest Disclosure Act 1998 do not apply in relation to employment in the security service,

⁸⁴ Investigatory Powers Tribunal, *Report 2010*, p 14. There were 164 complaints in 2010 in total. The tribunal disposed of 210 complaints in total in 2010, of which only six were in favour of the complainant. It is not known how many of these related to the security and intelligence services, and how many to other bodies (such as local authorities) subject to the tribunal’s jurisdiction.

⁸⁵ For a full account of public service employment law generally, including the position of civil servants, see Fredman and Morris, *The State as Employer*.

⁸⁶ Trade Union and Labour Relations (Consolidation) Act 1992, s 273; Employment Rights Act 1996, s 191. And see ch 26 B.

⁸⁷ Trade Union and Labour Relations (Consolidation) Act 1992, s 275; Employment Rights Act 1996, s 193.

⁸⁸ See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; G S Morris [1985] PL 177.

⁸⁹ But it did not breach the ECHR, art 11: *CCSU v UK* (1988) 10 EHRR 269; S Fredman and G S Morris (1988) 17 ILJ 105.

⁹⁰ For a fuller account, see 12th edition of this work, pp 647–8; also Ewing, *Britain and the ILO*.

⁹¹ See Employment Relations Act 1999, Sch 8, amending the 1992 and 1996 Acts respectively.

SIS or GCHQ. There are, however, procedures introduced after the *Spycatcher* affair designed to enable members of the security services to raise concerns internally.⁹² But the right of workers to be accompanied by a trade union official in grievance or disciplinary matters at the workplace does not apply to the members of the intelligence services.⁹³

It is also provided that in some circumstances an employment-related complaint must be dismissed by the employment tribunal where it is shown that the action complained of was taken for the purpose of safeguarding national security. This applies specifically to cases where the complainant is alleging that he or she has been subjected to a detriment because of trade union membership or activities; or that he or she has been unfairly dismissed.⁹⁴ But it is not only where an individual has been dismissed for reasons of national security that sensitive security matters may be raised in tribunal proceedings. There is a fear that security matters could be ventilated in a hearing where someone has been dismissed because of misconduct, or alleges that he or she has been discriminated against on grounds of race or sex.

2. Procedural exceptions

The Employment Relations Act 1999 introduced a number of procedural changes to address such concerns, although the changes were mildly controversial and led to criticism of the government by the Intelligence and Security Committee (for not going far enough to protect the officials).⁹⁵ These changes related first to the tripartite structure of the tribunal, with the Secretary of State empowered to make regulations to alter the normal composition of the employment tribunal (i) in cases relating to Crown employment proceedings, where (ii) it is expedient to do so in the interests of national security. Further, they relate to the procedure adopted by the tribunal, with the Secretary of State again empowered to make regulations authorising him or her to issue directions to an employment tribunal in Crown employment proceedings where it is expedient in the interests of national security to do so.

The directions may require a tribunal to sit in private, to exclude the applicant or his or her representative from all or part of the proceedings, to take steps to conceal the identity of a particular witness, or to keep the reasons for its decision secret. If either of the last two directions is given, it is an offence to publish anything likely to lead to the identification of the witness, or the reasons for the tribunal's decision.⁹⁶ Regulations made under these powers – which also allow for the appointment of a special advocate to represent the interests of someone (including an applicant) excluded from any proceedings – have been held to be consistent with Convention rights, the Supreme Court holding that they do not breach art 6 (right to a fair trial).⁹⁷ Lord Kerr dissented on the ground that the procedure violated both Convention rights and the common law right to a fair trial.

Security procedures in the civil service⁹⁸

Since 1948 various procedures have been in place to seek to exclude from sensitive positions in the civil service those who are perceived to be a threat to national security. The first of

⁹² See *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247. See also Rimington, *Open Secret*, pp 176–7.

⁹³ Employment Relations Act 1999, s 15. See HL Deb, 8 July 1999, col 1101. The government claimed that ‘the security and intelligence services already have good grievance and disciplinary procedures in place’ (col 1101).

⁹⁴ Employment Tribunals Act 1996, s 10(1), as inserted by the Employment Relations Act 1999, Sch 8. But see *B v BAA plc* [2005] IRLR 927 for the narrowing of the operation of this provision.

⁹⁵ Cm 4532, 1999. Also Cm 4777, 2000.

⁹⁶ Employment Tribunals Act 1996, s 10B, as inserted by the Employment Relations Act 1999, Sch 8.

⁹⁷ See *Tariq v Home Office*, above. For the relevant regulations, see SI 2004 No 1861, esp Sch 2. It should be emphasised, however, that the provisions of the Regulations meet Convention obligations only if construed consistently with these obligations. See *Tariq*, above, and *AB v Ministry of Defence*, UKEAT 0101_09_2407.

⁹⁸ See Fredman and Morris, above, pp 232–6; Robertson, *Freedom, the Individual and the Law*, pp 148–52.

these procedures, the so-called purge procedure, was thought to have been introduced (in 1948) as a result of American pressure following major spy scandals in the immediate post-war period. The aim was to ensure that ‘no one who is known to be a member of the Communist Party, or to be associated with it in such a way as to raise legitimate doubts about his or her reliability, is employed in connection with work, the nature of which is vital to the security of the state’.⁹⁹

1. Development of vetting procedures

The purge procedure was followed by the introduction of positive vetting in 1952, which had been on the agenda at least since the arrest and conviction of Klaus Fuchs in 1950 for communicating atomic secrets to the Soviet Union, for which he was sentenced to 14 years’ imprisonment. Its implementation was a direct consequence of the defection of Donald MacLean and Guy Burgess to Moscow, in the aftermath of which the Foreign Secretary set up a committee under the chairmanship of Sir Alexander Cadogan to examine all aspects of the security arrangements in the Foreign Office. The committee reported in November 1951, approving plans for positive vetting which had already been prepared, and recommending that it should apply widely within the Foreign Service.

The committee proposed that vetting should cover not only ‘political unreliability’ but also ‘the problem of character defects, which might lay an officer open to blackmail, or otherwise undermine his loyalty and sense of responsibility’. The practice of positive vetting was thus introduced as a ‘regular system’ at the beginning of 1952, but without recourse to legislation, or without even informing or seeking the approval of Parliament.¹⁰⁰ It has since been extended well beyond the Foreign Service, and made more transparent, with a number of safeguards introduced to enable vetting decisions to be challenged by aggrieved individuals adversely affected by the process. The procedures were revised in 1985, again in 1990 and 1994, and most recently in 2010.¹⁰¹

2. Current vetting procedures

As with previous vetting procedures, the existing arrangements are not to be found in legislation. Indeed it is not clear that they have even been approved by Parliament. The first question, however, is to be clear why vetting is necessary, with the current statement explaining that there is a need to protect against the threats of ‘terrorism, espionage, or other actions that could threaten the United Kingdom’, with reference also being made to the ‘requirements of international agreements concerning the protection of allies’ information’. These being the concerns with which national security vetting is principally concerned, the need then is to identify and exclude from certain forms of employment those individuals who by their access to sensitive assets (physical, personnel or information) could present a risk.

Security vetting applies not only to full-time civil servants but also to part-time staff and to contractors, and takes three different forms: Counter Terrorist Check (CTC), Security Check (SC) and Developed Vetting (DV), with the level of vetting depending on the nature of the risk. Checks will be made of employee records, criminal records for previous convictions, security service records, and credit rating agencies for any financial irregularities. Checks will also be made for personality traits that may make the individual unsuitable. Reasons for the latter include ‘potential conflicts of interest; vulnerability (direct or indirect) to pressure;

⁹⁹ HC Deb, 25 March 1948, cols 3417–26. See M L Joelson [1963] PL 51. The procedure was applied also to fascists, although communists were the real target.

¹⁰⁰ ‘Not surprisingly the purge procedure has been regarded as of dwindling importance since Positive Vetting has been applied to new entrants to sensitive posts in the civil service for more than thirty years’: Lustgarten and Leigh, p 131.

¹⁰¹ HC Deb, 27 July 2010, col 90WS (Prime Minister).

instances of irresponsible behaviour; poor judgment and lack of maturity; extreme beliefs; and serious physical or mental ill health’.

The current statement on security vetting states that security clearance may be refused or withdrawn where: (a) there are security concerns related to an individual’s involvement or connection with activities, organisations or individuals associated with the threats identified above (or any similar new threats that emerge); (b) personal circumstances, defined as current or past conduct indicating that an individual may be susceptible to pressure or improper influence; (c) instances of dishonesty or lack of integrity casting doubt upon an individual’s reliability; and (d) other behaviours or circumstances indicating unreliability. Employees will normally have an opportunity to ‘discuss, comment on and challenge any adverse information’, unless the opportunity to do so ‘could compromise national security, the public interest or third party confidentiality’.

3. Vetting appeals

These non-statutory procedures are complemented by an extra-statutory appeals mechanism announced in 1997.¹⁰² The Security Vetting Appeals Panel (an NDPB chaired by a ‘senior member of the judiciary’) now hears appeals against the refusal or withdrawal of security clearance.¹⁰³ The Panel has no jurisdiction in cases involving new recruits, nor does it apply to members of the security and intelligence services. But it is otherwise available to those ‘in government departments and other organisations, or those employed by contractors of those departments and organisations, who have exhausted the internal appeals process and who remain dissatisfied with the outcome’. A complaint may be made in writing to the Panel setting out the reasons; the respondent department will reply in writing; and an oral hearing may then be held.

Despite its composition, the SVAP is an advisory and not a judicial body, which makes recommendations to ministers. It has no power to ensure that its recommendations are carried out, and no power to award compensation. Proceedings of the Panel are in principle subject to judicial review.¹⁰⁴ As explained, the SVAP has no authority over the security and intelligence services, though staff and contractors of the latter who have a grievance about their security clearance could complain to the IPT, as indeed could anyone else who believes that a refusal to grant them clearance was as a result of the actions of one of these services. Apart from complaints to the SVAP, a refusal or withdrawal of security clearance could be challenged in statutory proceedings, for example in an employment tribunal where there is alleged race discrimination.¹⁰⁵

Official Secrets Act 1911¹⁰⁶

The Official Secrets Act 1911 served two distinct but related purposes:

- (a) to protect the interests of the state against espionage and the gathering of information which might be useful to an enemy and therefore injurious to state security;
- (b) to guard against the unauthorised disclosure of information which is held by servants of the state in their official capacity, whether or not the information has any direct reference to state security as such.

¹⁰² For an account of the procedures operating before then, see Lustgarten and Leigh, pp 139–49; Fredman and Morris, p 233.

¹⁰³ On NDPBs, see ch 12 above.

¹⁰⁴ *R v Director of GCHQ, ex p Hodges*, *The Times*, 26 July 1988. See also *R v Home Secretary, ex p Hosenball* [1977] 3 All ER 452, 460.

¹⁰⁵ *Tariq v Home Office*, above.

¹⁰⁶ Ewing and Gearty, *The Struggle for Civil Liberties*, ch 2; Bailey and Taylor, *Civil Liberties: Cases and Materials*, ch 8; Andrew, *Secret Service*; Williams, *Not in the Public Interest*, part 1.

The legal sanctions under (b) help to support the sanctions against espionage, since it may in a particular case be possible to prove unauthorised disclosure of information without being able to prove elements of espionage. But they may also serve to protect the corridors of power against disclosure of information and publicity which a government might find politically embarrassing or inconvenient. The Official Secrets Act 1911, on which later Acts have been built, was passed rapidly through Parliament in circumstances in which ministers emphasised purpose (a) as the primary object of the Act, and did not mention purpose (b).

1. Section 1

Section 1(1) of the 1911 Act creates a group of offences, mainly connected with espionage. It is an offence, punishable with 14 years' imprisonment:

if any person for any purpose prejudicial to the safety or interests of the State –

- (a) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; or
- (b) makes any sketch, plan, model, or note which . . . might be or is intended to be directly or indirectly useful to an enemy; or
- (c) obtains, collects, records, or publishes or communicates to any other person any secret official code word, or pass word, or any sketch, plan, model, article, or note, or other document or information which . . . might be or is intended to be directly or indirectly useful to an enemy.

The italicised phrase caused difficulties when charges under s 1 were brought following a non-violent political demonstration against an RAF base, in *Chandler v DPP*.¹⁰⁷

Anti-nuclear demonstrators sought to immobilise an RAF bomber base by sitting down on the runway. They were arrested as they approached the base and charged with conspiring to enter a prohibited place for a purpose prejudicial to the safety or interests of the state, contrary to s 1 of the 1911 Act. The trial judge refused to allow the accused to bring evidence to show that it would be beneficial to the United Kingdom if the government's nuclear policy were abandoned. For a variety of interlocking reasons, the House of Lords unanimously upheld the conviction. The demonstrators admittedly wished to obstruct the use of the airbase and it was immaterial that they believed that such obstruction would ultimately benefit the country. The offences created by the 1911 Act, s 1 were not confined to spying but included sabotage and other acts of physical interference.

During an official secrets trial in 1978, Mars-Jones J indicated that the use of s 1 in situations that fell short of spying and sabotage could be oppressive.¹⁰⁸ Cases since then have been concerned mainly with spying, including the convictions of Geoffrey Prime in 1983,¹⁰⁹ Michael Bettaney in 1984,¹¹⁰ and Michael Smith in 1993,¹¹¹ all of whom had communicated secret information to the USSR. The other celebrated s 1 prosecution in the 1980s was that

¹⁰⁷ [1964] AC 763. For a full account of this important case, see K D Ewing, in Ewing, Campbell and Tomkins (eds), *The Legal Protection of Human Rights*, ch 8.

¹⁰⁸ A Nicol [1979] Crim LR 284; Aubrey, *Who's Watching You?*

¹⁰⁹ *R v Prime* (1983) 5 Cr App R (S) 127.

¹¹⁰ *R v Bettaney* [1985] Crim LR 104.

¹¹¹ Cm 2903, 1995.

of eight signals intelligence officers based in Cyprus.¹¹² But unlike the cases of Prime, Bettaney and Smith, the prosecution failed. A subsequent inquiry by David Calcutt QC revealed that the accused had been unlawfully and oppressively detained while investigations were being conducted by the police and security service.¹¹³

2. Section 2

It is said that section 2 of the 1911 Act created a plethora of over 2,000 different offences related to the misuse of official information.¹¹⁴ In particular, by s 2(1) it was an offence punishable by two years' imprisonment

if any person having in his possession or control . . . any document or information . . . which has been entrusted in confidence to him by any person holding office under Her Majesty . . . communicates the . . . document or information to any person, other than a person to whom he is authorised to communicate it or a person to whom it is in the interests of the State his duty to communicate it.¹¹⁵

Other offences included the unauthorised retention of documents and failure to take reasonable care of documents.

Section 2 plainly extended to the disclosure of information which bore no relation to national security.¹¹⁶ An offence could be committed even though the information was not secret,¹¹⁷ and even though it was disclosed in order to promote rather than undermine British interests abroad.¹¹⁸ The scope of the section – well described as a ‘catch all’¹¹⁹ – was, however, mitigated in two ways. First, as with all offences under the Official Secrets Acts, the consent of the Attorney General in England (or the Lord Advocate in Scotland) was necessary before any prosecution could be brought.¹²⁰ Second, the authorisation which prevented disclosure of information being an offence could be wholly informal and could be implicit in the circumstances of disclosure.

Ministers and many senior civil servants, by what was known as the practice of self-authorisation, were able to decide for themselves how much information to disclose, at least in matters relating to their own duties.¹²¹ Thus, if an off-the-record briefing was given to a journalist (for example, to enable him or her to ‘leak’ the contents of a Bill before it was published in Parliament) no breach of the Official Secrets Acts would have occurred. More than once it had been stressed that s 2 of the 1911 Act was not to be blamed for secrecy in government, since at any time ministers could adopt a more open approach.¹²² Nonetheless, the form of the 1911 Act often presented journalists with a real difficulty in knowing what they might safely publish.

3. Other provisions

Other notable provisions of the Official Secrets Acts include section 6 of the 1920 Act, which effectively removes a suspect's right of silence in a case brought under s 1 of the 1911 Act, by providing that a Secretary of State may authorise the police to call a prospective witness

¹¹² See A W Bradley [1986] PL 363. See also Cmnd 9923, 1986.

¹¹³ Cmnd 9781, 1986.

¹¹⁴ Cmnd 5104, 1972, para 16.

¹¹⁵ In *R v Ponting* [1985] Crim LR 318 the trial judge, McCowan J, directed the jury that the interests of the state are the interests of state as determined by the government of the day.

¹¹⁶ See *Loat v James* [1986] Crim LR 744.

¹¹⁷ *R v Crisp* (1919) 83 JP 121.

¹¹⁸ *R v Fell* [1963] Crim LR 207.

¹¹⁹ Cmnd 5104, 1972, para 17.

¹²⁰ Official Secrets Act 1911, s 8.

¹²¹ Cmnd 5104, 1972, para 18.

¹²² E.g. Cmnd 4089, 1969, p 11; Cmnd 5104, 1972, ch 5.

for questioning about a s 1 offence, and in this event refusal to attend or to give information is itself an offence.¹²³ Also notable is s 7 of the 1920 Act, under which it is an offence to attempt to commit any offence under the Acts or to endeavour to persuade another person to commit such an offence, or to aid and abet or to do *any act preparatory* to the commission of such an offence. Under the 1920 Act, s 8, a court may exclude the public from the trial of an offence under the Acts if the prosecution applies for this on the ground that the publication of evidence would be prejudicial to national safety.

This latter measure, which is employed in s 1 prosecutions¹²⁴ and which has also been employed in s 2 cases,¹²⁵ is an important departure from the general rule of ‘the English system of administering justice’ that ‘it be done in public’.¹²⁶ For if

‘the way the courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice’.¹²⁷

Even if a prosecution is held behind closed doors, the accused and his or her lawyer may not be excluded and sentence must be delivered in open court.¹²⁸ Moreover, s 9 of the 1911 Act confers wide powers of search and seizure, authorising a magistrate to grant a search warrant permitting the police to enter and search premises ‘and every person found therein’, and to seize anything which is evidence of an offence under the Act ‘having been or being about to be committed’.

In cases of ‘great emergency’ where in the interests of the state immediate action is necessary, written authority for such a search under s 9 may be granted by a superintendent of police.

In January 1987 it was reported that the BBC had decided not to broadcast a programme about the Zircon spy satellite in the interests of national security. In so doing the Corporation denied that there had been any government pressure. Two days later, an injunction was obtained by the Attorney General restraining the journalist responsible for the programme, Duncan Campbell, from talking or writing about the contents of the film. He could not be found, however, to be served with the injunction, whereupon the *New Statesman* published details about the contents of the film.

The foregoing was followed by a Special Branch raid of the *New Statesman’s* offices, and subsequently of the BBC’s premises in Glasgow. The latter raid – which lasted for 28 hours – was conducted under the authority of a warrant granted under s 9 of the 1911 Act.¹²⁹ The police filled several police vans with documents, discarded film clips and over 200 containers of film. It was never entirely clear what the police were looking for, and no prosecutions followed. The episode illustrates the extent to which the 1911 Act may be used oppressively, even without a prosecution taking place.¹³⁰

¹²³ Before the Official Secrets Act 1939 amended the 1920 Act, s 6, refusal on demand by a police inspector to disclose the source of information obtained in breach of the Acts was itself an offence (*Lewis v Cattle* [1938] 2 KB 454).

¹²⁴ As in the cases of *Bettaney*, note 110 above, and the Cyprus intelligence personnel, pp 524–5 above.

¹²⁵ As in the *Ponting* case, note 115 above.

¹²⁶ *A-G v Leveller Magazine Ltd* [1979] AC 440, at pp 449–50.

¹²⁷ *Ibid*, at p 450.

¹²⁸ Official Secrets Act 1920, s 8(2).

¹²⁹ The warrant was arguably unlawful, having been issued by a sheriff, not by a justice of the peace: R Black (1987) *J of the Law Society of Scotland* 138.

¹³⁰ For fuller details, see Ewing and Gearty, *Freedom under Thatcher*, pp 147–52. See also A W Bradley [1987] PL 1, 488.

Official Secrets Act 1989

The operation of the Official Secrets Act 1911, s 2, was examined closely by a committee chaired by Lord Franks which reported in 1972.¹³¹ The committee had been appointed after an unsuccessful prosecution of the *Sunday Telegraph* for publishing Foreign Office documents relating to the Labour government's policy towards the Nigerian civil war.¹³²

1. Background to the Act

The Franks committee reported that the law then in force was unsatisfactory and that there should be a new Official Information Act, to protect only certain forms of information, namely:

- (a) classified information relating to defence or internal security, or to foreign relations, or to the currency or to the reserves, the unauthorised disclosure of which would cause serious injury to the interests of the nation;
- (b) information likely to assist criminal activities or to impede law enforcement;
- (c) Cabinet documents (in the interests of collective responsibility);¹³³
- (d) information which has been entrusted to the government by a private individual or concern (for example, for tax or social security purposes or in a census).

The requirement that information of the kind specified in (a) must be classified would make necessary a new system of classifying documents which, unlike the existing system, would have legal consequences. Offences under the proposed new Act were recommended to include the communication by a Crown servant, contrary to his or her official duty, of information subject to the Act; the communication by any person of information of the kinds set out in (a), (b) and (c) which he or she reasonably believed had reached him or her as a result of a breach of the Act; and the use of official information of any kind for purposes of private gain.

The Franks committee therefore recommended that protection of official information by criminal sanctions should continue only where the public interest clearly required this. But no reform of the Official Secrets Acts was forthcoming at that time, although other weaknesses in the law became evident during the so-called ABC trial in 1978.¹³⁴ In 1979 the Conservative government introduced not a Freedom of Information Bill but a Protection of Official Information Bill. This sought to give absolute protection to information regarding security and intelligence, regardless of whether that information was already available to the public.¹³⁵

But the Bill was abandoned by the government in the political controversy surrounding the disclosure at that time that the famous art historian Sir Anthony Blunt had been a Russian spy as a younger man. Pressure for reform was maintained in the 1980s, with interest fuelled by some controversial prosecutions. These included the cases of Sarah Tisdall, a Foreign Office clerk, who was convicted for leaking to the *Guardian* a secret document relating to the delivery of cruise missiles to Greenham Common,¹³⁶ and Clive Ponting, a senior official in the Ministry of Defence, who was acquitted for leaking to an MP documents relating to the sinking of the Argentinian vessel, the *General Belgrano*, during the Falklands War.¹³⁷

¹³¹ Cmnd 5104, 1972.

¹³² See Aitken, *Officially Secret*.

¹³³ See ch 11.

¹³⁴ A Nicol [1979] Crim LR 284.

¹³⁵ HL Deb, 5 November 1979, col 612; cf Cmnd 7285, 1978, para 31.

¹³⁶ For the circumstances, see *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339.

¹³⁷ See Ponting, *The Right to Know*.

2. Substance of the Act

The pressure for reform culminated in the Official Secrets Act 1989, which many would argue does not go far enough.¹³⁸ While repealing s 2 of the 1911 Act, the 1989 Act introduced new restrictions on the unauthorised disclosure of an admittedly narrower range of information.

One category of information protected from disclosure relates to security and intelligence. Section 1 of the 1989 Act provides that it is an offence for security and intelligence staff without lawful authority to disclose any information obtained in the course of employment in the service. In *A v B*¹³⁹ a former intelligence employee was refused permission by the Service to publish his memoirs. It was held that he could not bring judicial review proceedings complaining of a breach of Convention rights (notably art 10), the Supreme Court holding that the investigatory powers tribunal established by RIPA had exclusive jurisdiction to consider such matters. As we have seen, it was also held that the procedures of the latter are not incompatible with Convention rights.

Section 1 also deals with disclosures without lawful authority by civil servants and government contractors, unauthorised disclosure by whom is unlawful only if ‘damaging’ to the work of the security and intelligence services. Sections 2 and 3 make it an offence for a civil servant or government contractor, without lawful authority, to disclose any information relating to defence or international affairs if the disclosure is damaging. In the case of defence, disclosure is defined as being damaging if it damages the capability of the armed forces to carry out their tasks, while in both cases disclosure is damaging if it endangers the interests of the United Kingdom abroad or endangers the safety of British citizens abroad (s 2(2)).¹⁴⁰

It is an offence by s 4 for a civil servant or a government contractor to disclose without lawful authority any information if this results in the commission of an offence, facilitates an escape from legal custody, or impedes the prevention or detection of offences or the apprehension or prosecution of suspects. Section 4 further provides that it is an offence to disclose information ‘relating to the obtaining of information’ (as well as any information obtained) as a result of warrants issued under the Interception of Communications Act 1985 or the Regulation of Investigatory Powers Act 2000, s 5 (phone tapping), or the Intelligence Services Act 1994 (interference with property or unlawful acts done outside the UK). It is thus not an offence under s 4 to disclose information obtained unlawfully without a warrant, although it might be an offence under s 1.

The offences under the Act are committed only where disclosure is made without lawful authority. This corresponds to the former s 2 of the 1911 Act, whereby the offence was committed only if the disclosure was unauthorised. The question of when a Crown servant was authorised to disclose information is, as we have seen, one that gave rise to considerable difficulty, particularly in the case of Cabinet ministers and senior officials.¹⁴¹ By s 7 of the 1989 Act, a disclosure is authorised if it is made in accordance with the official duty of the minister or civil servant concerned, though any refusal of a request by a member of the security services to disclose protected information is (in principle) subject to judicial review.¹⁴²

¹³⁸ For background, see Cm 408, 1988. For analyses, see S Palmer [1990] PL 243; Birkinshaw, *Reforming the Secret State*.

¹³⁹ [2009] UKSC 12, [2010] 2 AC 1.

¹⁴⁰ Section 3 was used successfully against David Keogh, an official in the Whitehall communications centre, who leaked a document setting out the details of a meeting between George Bush and Tony Blair in 2004 about the war in Iraq dealing in particular with the US assault on the Iraqi city of Fallujah. Keogh passed the document to Leo O’Connor, an assistant to a Labour MP. O’Connor was charged and convicted under section 5 of the Act (see below). The trials took place in 2007, and both Keogh and O’Connor received jail sentences. See Ewing, *Bonfire of the Liberties*, pp 154–8.

¹⁴¹ See Cmnd 5104, 1972, para 18.

¹⁴² See *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247.

An offence may be committed not only by the official disclosing the information, but also by a third party, such as a newspaper, which reports it. Although it is no longer an offence to receive information protected against disclosure (as it was under s 2 of the 1911 Act), it is an offence for the recipient to disclose the information without lawful authority, knowing or having reasonable cause to believe that it is protected from disclosure (s 5). In effect, it is an offence for a newspaper to publish protected information which has been leaked without authority. Controversially, there is no public interest defence available in this or indeed in other cases, the government having rejected such a measure.¹⁴³

In these circumstances, however, a newspaper is liable only if the disclosure is damaging and is made knowing or having reasonable cause to believe that it is damaging. There have been no prosecutions of newspapers since the Act was introduced.

Official secrets and human rights

Many of the offences under the Official Secrets Acts are associated with the publication of information. Many prosecutions have been for the same reason.

The question that now arises is whether these measures are consistent with the guarantees of freedom of expression in the ECHR and whether the Human Rights Act provides a defence to anyone prosecuted under the Official Secrets Acts 1911–89. This is a question that has become more urgent in recent years following another spate of unauthorised disclosures by a number of former members of the security and intelligence services in the late 1990s. These include Richard Tomlinson, who published a book in Russia and also material on the internet identifying individuals who recruited for the security and intelligence services.

They also include David Shayler, who fled to France after a number of high-profile revelations about the activities of the security service. On his return from France, Mr Shayler was charged, convicted and imprisoned under the Official Secrets Act 1989. In some of the preliminary litigation, the House of Lords held that although Mr Shayler was entitled to the protection of freedom of expression under the Human Rights Act, the Official Secrets Act was designed to protect national security and the restriction it imposed on freedom of expression was justified.¹⁴⁴ No proceedings were brought against a former director of M15 who published her memoirs in 2001 in a blaze of publicity, the book also being serialised in the *Guardian* newspaper in the same year.

The question whether the Official Secrets Acts are compatible with the Human Rights Act was raised in *Attorney-General v Blake*¹⁴⁵ where it was held that the Attorney General was entitled to an account of profits earned by a former member of the security and intelligence services for a publication which was made in breach of a contractual obligation not to disclose material obtained as a result of his employment. In the course of the case it was argued that s 1 of the Official Secrets Act 1989 is ‘drawn too widely’ because it criminalises disclosure of information when no damage results, by focusing on the ‘status of the individual who makes the disclosure, rather than on the nature of the information itself’.

But although the House of Lords preferred not to deal with this point, Lord Nicholls drew attention to another factor which appears to be decisive in an action where the Human Rights Act is relied on by a member of the security and intelligence services. This was the undertaking not to disclose information that Blake had voluntarily given when he joined the service. According to Lord Nicholls, neither Blake nor any other member of the service should have an incentive to break this undertaking. He continued:

¹⁴³ Cm 408, 1988.

¹⁴⁴ *R v Shayler*, above. The affair has generated a body of case law. See also *Attorney-General v Punch* [2002] UKHL 50, [2003] 1 AC 1046, and *R (Bright) v Central Criminal Court* [2001] 2 All ER 244.

¹⁴⁵ [2001] 1 AC 268.

It is of paramount importance that members of the service should have complete confidence in all their dealings with each other, and that those recruited as informers should have the like confidence. Undermining the willingness of prospective informers to co-operate with the services, or undermining the morale and trust between members of the services when engaged on secret and dangerous operations, would jeopardise the effectiveness of the service. An absolute rule against disclosure, visible to all, makes good sense.¹⁴⁶

It is unclear when – if ever – the prosecution of a disclosure in breach of the Official Secrets Act 1989 would be regarded as a disproportionate protection of national security. But in the *Shayler* case, the House of Lords seemed satisfied that there were adequate internal safeguards to enable a member of the security service to bring wrongdoing to the attention of the authorities without the need for unauthorised public disclosure in the press. Although the Human Rights Act thus may not present a serious obstacle to prosecutions under the Official Secrets Act 1989, political circumstances nevertheless may make it difficult to proceed with such a charge, as highlighted by the case of Kathryn Gun, a GCHQ official who was charged under the 1989 Act for allegedly leaking an email from US spies to their British counterparts.

It was claimed that the email – sent on 31 January 2003 and published by the *Observer* – tended to show that the Americans wanted British support to find out the voting intentions and negotiating positions of some UN Security Council member states on the forthcoming resolutions about Iraq. The charges were subsequently withdrawn, in the face of Ms Gun's defence that she leaked the email 'to save lives from being lost in a war'. According to the BBC, the government was concerned that this 'could persuade a jury and would lead to the reputation of the Official Secrets Act being damaged'. It was also explained that 'the government had made a political calculation that a random selection of a dozen jurors would be likely to be so instinctively anti-war that an acquittal would be likely'.¹⁴⁷

Defence advisory notices

The Official Secrets Acts impose important restrictions on press freedom in the sense that they effectively control the information which might be made available. And as we saw in chapter 17 G, the action in equity for breach of confidence has the capacity to do much the same. Indeed, it was this which formed the basis for controlling the press during the so-called *Spycatcher* affair in 1987.

But there are other restrictions and fetters on press freedom, which have been introduced in the interests of national security. One of these is the system of 'DA' notices (known previously as 'D' notices),¹⁴⁸ a form of extra-legal censorship in which the press cooperates with the government. It is to be emphasised, however, that the system is voluntary and is not legally binding, with the broadcasters and publishers determining whether or not to comply. A DA notice is a means of providing advice and guidance to the media about defence and counter-terrorist information, the publication of which would be damaging to national security.

DA notices are issued by the Defence, Press and Broadcasting Advisory Committee (DPBAC), an advisory body composed of senior civil servants and editors from national and regional newspapers, periodicals, news agencies, television and radio. A Permanent Under-Secretary of State in the Ministry of Defence chairs the committee, which includes four members representing government departments responsible for national security (Home Office, Ministry of Defence, Foreign Office and Cabinet Office), and 15 members nominated

¹⁴⁶ Ibid, at p 287.

¹⁴⁷ BBC News, 26 February 2004.

¹⁴⁸ D Fairley (1990) 10 OJLS 430; Williams, *Not in the Public Interest*, ch 4.

by the media (with Google now being represented). The committee normally meets twice a year to review the operation of the system.

The system was overhauled in 1993 (following a review by the committee itself) in the light of international changes (in particular the break-up of the Soviet Union), and the increased emphasis on openness in government. As a result, the number of standing notices was reduced from eight to six, and their content and style revised to make them more relevant and user-friendly. It was as a result of this review that the name of the notices was changed from D to DA notices and that of the committee to Defence, Press and Broadcasting Advisory Committee, 'better to reflect the voluntary and advisory nature of the system'.¹⁴⁹

Further revision in May 2000 led to a reduction in the number of notices from six to five (although from time to time it may be found necessary to issue a DA notice on a particular subject). The five DA notices are now published on the committee's website,¹⁵⁰ and deal respectively with Military Operations, Plans and Capabilities (DA Notice 1); Nuclear and Non-Nuclear Weapons and Equipment (DA Notice 2); Ciphers and Secure Communications (DA Notice 3); Sensitive Installations and Home Addresses (DA Notice 4); and United Kingdom Security and Intelligence Services and Special Forces (DA Notice 5).

Each of the notices gives details of the kind of information which editors are requested not to publish, usually information which relates to defence or anti-terrorist capabilities, or to individuals who might be a terrorist target. The notices also include a 'rationale' explaining their purpose. The secretary of the committee plays a key role in advising the media on the interpretation of notices, and 'is available at all times to Government departments and the media to give advice on the system'. In September 2001 he advised the media to minimise speculation about imminent military action in Afghanistan for fear of helping the 'enemy'.¹⁵¹

It is a problem that DA notices are inevitably drafted in general terms, although it is the application of a DA notice to a particular set of circumstances on which the secretary is expected to give guidance, after consultation with government departments as appropriate. This advice is also sometimes referred to as a 'D Notice' rather than advice given under the authority of a DA Notice. It was claimed in 2009 that 'since 1997 there have been 30 occasions where the committee secretary has written to specific editors when a breach in the D-Notice guidelines is judged to have occurred', with editors being reminded of the 'content of the code'.¹⁵²

The committee makes clear, however, that the secretary is not 'invested with the authority to give rulings nor to advise on considerations other than national security'; and, on the other hand, that the 'notices have no legal standing and advice offered within their framework may be accepted or rejected partly or wholly'. Compliance with the DA notice system does not relieve the editor of responsibilities under the Official Secrets Acts; nor indeed will it necessarily prevent legal proceedings being brought to restrain any publication or broadcast.¹⁵³ It seems that correspondence from the secretary is intended to be confidential.¹⁵⁴

¹⁴⁹ HC Deb, 23 July 1993, col 454 (WA).

¹⁵⁰ www.dnotice.org.uk.

¹⁵¹ *The Independent*, 27 September 2001. In April 2009 it was reported that the Committee contacted the media about photographs that had been taken of a senior police officer as he entered No 10 Downing Street. The photographs showed in some detail the contents of a document the police officer had been carrying, revealing information about a sensitive police undercover operation in a terrorist investigation: *Daily Telegraph*, 9 April 2009.

¹⁵² <http://www.defenceviewpoints.co.uk/articles-and-analysis/d-notices-uk-s-defence-self-censorship-system>. A more recent example is reported in *The Guardian*, 17 June 2013.

¹⁵³ See *A-G v BBC*, *The Times*, 18 December 1987 regarding the broadcast by the BBC of a radio series (*My Country Right or Wrong*) about the security service.

¹⁵⁴ *The Guardian*, 17 June 2013.

The Defence Select Committee reviewed the ‘D’ notice system as long ago as 1980 and concluded (with reservations) that ‘D’ notices should be maintained, despite sharp divisions within the press about the value of the scheme which, judged in legal terms, is manifestly imperfect and imprecise.¹⁵⁵

E. Political scrutiny

One of the main questions relating to security and intelligence services in any country is one of accountability. Such agencies inevitably operate in the shadows, and will understandably avoid any attempt to shine a spotlight on their activities. Accountability is nevertheless important, not only to ensure that the agencies in question act within boundaries of their legal mandate, but also to re-assure the public on behalf of whom they act that their conduct underpins rather than subverts the liberal values they are entrusted to defend. We have already encountered some forms of accountability in the form of the Commissioners appointed under RIPA and the ISA. There is also a question of parliamentary scrutiny.

Home Affairs Committee

In 1992 the Home Affairs Select Committee invited the Director General of the Security Service to appear before it, possibly in private. In a series of remarkable exchanges, the invitation was declined after consultation with the Home Secretary, who later said that he would consider whether the committee might meet her informally, ‘perhaps over lunch’. This stance was adopted following the convention ‘under which information on matters of security and intelligence is not placed before Parliament’, which the Home Secretary regarded ‘as binding in relation to Departmental Select Committees no less than in relation to Parliament itself’.

In the Home Secretary’s view, the security service was not to be regarded as falling within the ambit of any select committee, although this need not ‘prevent the Director General from having a meeting with [the Chairman of the Committee] and one or two senior members on an informal basis to discuss the work of the Security Service in general terms providing that the Government’s position is understood’. Mrs Rimington (the then Director General) was said to share this view and would ‘accordingly be in touch with [the Chairman] to invite [him] and a couple of [his] senior colleagues to lunch’.

As the Home Affairs Committee said, however, an informal lunch with Mrs Rimington (who was ‘permitted to lunch with the press’), ‘while a welcome move towards openness’, was ‘no substitute for formal parliamentary scrutiny of the Security Service’. The Committee was of the view that the service fell within its terms of reference and that ‘the value-for-money of the Security Service and its general policy are proper subjects for parliamentary scrutiny as long as such scrutiny does not damage the effectiveness of the Service’. Thus thwarted, the committee then reviewed the various options for enhanced parliamentary scrutiny of the service.¹⁵⁶

Notwithstanding the compelling case for scrutiny, the government responded by saying that in 1989 Parliament had considered very carefully the question of oversight.¹⁵⁷ It had concluded in favour of preserving the existing approach to accountability, by which the Director

¹⁵⁵ HC 773 (1979–80); J Jaconelli [1982] PL 37.

¹⁵⁶ HC 265 (1992–3).

¹⁵⁷ Cm 2197, 1993.

General of the Security Service is responsible to the Home Secretary of the day, who is himself or herself accountable to Parliament for the work of the security service. (It is, however, a strange kind of accountability which labours under a convention which prevents matters relating to security and intelligence from being placed before Parliament.)

The government also referred to the procedures for judicial oversight of the service by means of a commissioner and a tribunal under the Security Service Act 1989. In the government's view, this system had worked well in the three and a half years since the 1989 Act had come into force, although, once again, it is a strange kind of oversight which examines only the exercise of specific statutory powers rather than the work of the service as a whole, and more importantly which has no base in Parliament itself. Nevertheless, the government accepted that the position should be examined afresh.

An opportunity to do just that was provided by the Intelligence Services Act 1994, where important concessions in the direction of democratic accountability were made, although it is still open to question whether they go far enough. Thus in 1998 the then Home Secretary (Mr Jack Straw) refused a request from the Home Affairs Select Committee to take evidence from the Director General of the Security Service in a public session, offering instead a briefing from the Director General.¹⁵⁸ Reporting in 1999, the Committee concluded that 'the accountability of the security and intelligence services to Parliament ought to be a fundamental principle in a democracy'.¹⁵⁹

Nevertheless the Home Affairs Committee met a similar response in 2013, when again it invited the Director General of the Security Service to appear before it.¹⁶⁰ This time the Home Secretary's intervention was all the more unfortunate for the fact that the Director General had only recently appeared before another parliamentary committee, the Intelligence and Security Committee (on which see below), along with the heads of SIS and GCHQ.¹⁶¹ Although an unprecedented event, the latter was criticised by some for 'deferential' questioning on the part of the parliamentarians, with the more robust Home Affairs Select Committee having follow-up questions for the Director General.

It is reported that the Home Affairs Committee particularly wanted to question the Director General about claims that the *Guardian* had endangered national security by publishing information leaked by whistleblower Edward Snowden (on which see below). But although the Director General agreed in principle to appear before the Committee, the Home Secretary intervened on the ground that she did not believe 'it would be appropriate or necessary for the oversight provided by the ISC to be duplicated by another committee'. It is now up the Home Affairs Committee to flex whatever muscles it has to insist on its right to call witnesses rather than continue to complain that 'Ministers should take care not to dictate to parliamentary committees which witnesses can be called and for what reasons'.¹⁶²

¹⁵⁸ HC 291 (1998–9), app 1.

¹⁵⁹ HC 291 (1998–9), para 48. The best the Home Affairs Committee had been able to secure had been a private briefing from Director General of the Security Service in 2007 about the government's Counter-Terrorism proposals (after he had addressed the Society of Editors on the same subject): HC 43 (2007–08). The HAC did not report the briefing's content as evidence, and although it is acknowledged that the briefing 'informed' the committee's report, it is not clear how. On the speech to the Society of Editors, see J Evans, 'Defending the Realm', Speech by Director General of the Security Service, 15 October 2009; see also HL Paper 152, HC 230 (2008–09), paras 55–56.

¹⁶⁰ *The Guardian*, 4, 11 December 2013, on which this account draws. For an account of the Home Secretary's subsequent appearance before the Home Affairs Committee (on 16 December 2013), see *The Guardian*, 16 December 2013 (Andrew Sparrow).

¹⁶¹ Intelligence and Security Committee, Uncorrected Transcript of Evidence, 7 November 2013.

¹⁶² *The Guardian*, 11 December 2013.

Intelligence and Security Committee¹⁶³

One of the reasons given by successive Home Secretaries for refusing the Home Affairs Committee's request to examine security chiefs was that Parliament had 'given' responsibility for overseeing the security service to the Intelligence and Security Committee. This is a most curious committee which is modelled on the Select Committee system, but which has a number of important differences, beginning with the fact that it is established by statute – the Intelligence Services Act 1994 – rather than by the Standing Orders of the House of Commons (or House of Lords). Any changes to the operation of the committee must thus be sanctioned by statute, and this was done most recently in the Justice and Security Act 2013.¹⁶⁴

The ISC consists of nine members drawn from both the House of Commons and the House of Lords (although none may be a minister of the Crown). Each member of the ISC is appointed by the House of which he or she is a member, but only after being nominated by the Prime Minister, after consulting the Leader of the Opposition. The main functions of the ISC are set out in the Justice and Security Act 2013, s 2, which provides that the committee may examine or otherwise oversee the 'expenditure, administration and operations' of the three main security services. It may also examine and oversee other security and intelligence work of the government, in accordance with a Memorandum of Understanding agreed with the Prime Minister.¹⁶⁵

Although the 2013 Act was largely a progressive measure in terms of enhancing the role of the committee, it nevertheless remains the case that the government thus continues to have greater control over the ISC than over the other select committees, and that the recent reforms to the latter have largely washed over this committee.¹⁶⁶ Indeed, apart from the foregoing, the Prime Minister has a statutory right to veto the committee's examination of ongoing operational matters, while the power of the committee to call for papers is subject to a statutory veto of the Home Secretary, even though this veto may only be exercised where the information is 'sensitive' (as defined) and should not as a result be disclosed in the interests of national security.¹⁶⁷

In 2013 the committee was chaired by a former Cabinet minister (Sir Malcom Rifkind) and included among its other eight members one member of the House of Lords, as well as MPs from the three major political parties. The secretariat of the committee is drawn from the Cabinet Office, not from Parliament.¹⁶⁸ The committee has been required by statute since 1994 to make an annual report on the discharge of its functions to the Prime Minister, which must then be laid before Parliament, although parts of the report may be held back, after consultation with the committee, if it appears to the Prime Minister that the publication of any matter would be prejudicial to any of the agencies.¹⁶⁹ Some of the reports are badly disfigured by redaction, to the point of futility on some issues.¹⁷⁰

¹⁶³ See M Supperstone [1994] PL 329.

¹⁶⁴ The evolving statutory base of this Committee raises nice questions about the potential for judicial review, questions that so far show no evidence of having been contemplated. This could arise in a most interesting way in relation to the powers of the Committee, were it ever to seek to maximise its statutory powers.

¹⁶⁵ Justice and Security Act 2013, s 1(5). The Memorandum of Understanding must be laid before but not necessarily approved by Parliament (s 1(6)).

¹⁶⁶ See ch 8 above.

¹⁶⁷ 2013 Act, above, Sch 4.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, s 3.

¹⁷⁰ See Cm 4309, 1999 (Sierra Leone).

In its first report, the committee commented that because of the nature of its work ‘it must have access to national security information’, with the result that committee members ‘have all been notified under the Official Secrets Act 1989’. The constitutional position was that the committee was ‘now operating within the “ring of secrecy”’, reporting directly to the Prime Minister on its work and, through him or her, to Parliament. An important development reported in 1999 was the appointment of an investigator by the committee to enable it more fully to examine different aspects of agencies’ activities.¹⁷¹ The committee’s annual reports reveal that it has examined a wide range of issues. These include the priorities and plans of the agencies, their financing, and personnel management issues.

An interesting issue raised in the annual reports for 1997–98 and 1998–99 respectively relates to the destruction of security service files. It was noted in 1998 that 110,000 files had been destroyed since 1992, the vast majority of which related to subversion, on targets about whom the service was no longer conducting any investigations. For historians of the British state this was a tragedy and ensures that there can be no accountability of the security service even long after the event. Following concerns that the service was solely responsible for the review and destruction of files and that some form of ‘independent check should be built into the process’, it was agreed that Public Record Office officials should be involved in the examination of files identified by the security service for destruction.¹⁷²

The committee has also issued specific reports on a number of contentious issues, including most notably the publication of the so-called Mitrokhin Archive. This consisted of material held by the KGB which Mr Mitrokhin had removed from Russia and which identified a number of British citizens as Soviet agents. A number of these individuals were subsequently named in public, although none was prosecuted, their identities having been known to the authorities for many years. The report of the ISC in fact provides a fascinating insight into the working of the intelligence services at a number of levels. It was revealed, for example, that the security service had failed to consult the Law Officers about whether one of the alleged spies should be prosecuted, taking the view that prosecution would not be in the public interest.

As the ISC pointed out, however, this was a decision that ought to have been for the Attorney General to make. More recent international events have led the committee to investigate the adequacy and assessment of the evidence relating to ‘weapons of mass destruction’ claimed to have been held by Iraq in the period before the invasion of that country in 2003.¹⁷³ In a separate report, some light was cast on the role of British agents in the detention of British nationals by the United States in Afghanistan and Guantanamo Bay, as well as Iraq, though there were obvious constraints on the ability of the committee to conduct a meaningful investigation. Nevertheless, the committee found evidence of some concerns being expressed by British intelligence officers, and also revealed that intelligence officers had interviewed detainees without the knowledge of ministers.¹⁷⁴

¹⁷¹ Cm 4532, 1999; and see Cm 4073, 1998; also HC 291 (1998–9), para 14.

¹⁷² Cm 4073, 1998, and Cm 4532, 1999. For more recent annual reports giving an account of other concerns (such as security vetting, the Official Secrets Act, relationships with the media, the use of interception evidence in legal proceedings, document security, torture and rendition, cyber security, and greater government access to communications data) see Cm 5542, 2002; Cm 5837, 2003; Cm 6240, 2004; Cm 6510, 2005; Cm 7299, 2008; Cm 7542, 2009; Cm 7807, 2010; Cm 7844, 2010; Cm 8114, 2011; Cm 8403, 2012; and HC 547, 2013.

¹⁷³ Cm 5972, 2003.

¹⁷⁴ Cm 6469, 2005.

F. Conclusion

The transparency and accountability of the security and intelligence services have been greatly strengthened since the publication of earlier editions of this book, when the very existence of these bodies was barely known. (Indeed, the existence of GCHQ was only officially recognised in the 1980s.) The same is true of the legal framework by which these bodies are governed, with statutory regulation from the 1980s onwards having been driven in large part by the demands of the ECHR, and the developing jurisprudence of the ECtHR.

But while it is important to acknowledge steps in the direction of greater transparency, accountability and legality, it is also important to acknowledge the limitations of these developments. There is constant concern that the security and intelligence services stray beyond their brief, with confidence in the adequacy of the existing legal and political structures having been shaken by two developments in particular. The first relates to persistent allegations about the complicity of British security and intelligence personnel in the mistreatment of terrorist suspects by foreign governments. These allegations, the subject of important litigation,¹⁷⁵ were given credibility by Sir Peter Gibson who reported in 2013 that ‘UK intelligence officers were aware of inappropriate interrogation techniques and mistreatment’.¹⁷⁶

The other cause for concern relates to the allegations by the whistleblower Edward Snowden, a former employee of the National Security Agency in the United States. Among the many troubling disclosures are those relating to the alleged involvement of GCHQ in a covert operation to intercept, store and analyse the data of millions of people. As reported in the *Guardian* newspaper, this secret project code-named *Tempora* enables GCHQ to have access to the phone calls, email messages, internet use and social media activity, thereby permitting GCHQ ‘to access and process vast quantities of communications between entirely innocent people’.¹⁷⁷ The audacity of the programme has raised serious questions about the effectiveness of the political scrutiny of GCHQ, while also providing a launch-pad for a fresh round of legal challenges.¹⁷⁸

¹⁷⁵ These cases are dealt with elsewhere in this book. See *R (Binyam Mohamed) v Foreign Secretary* [2010] EWCA Civ 65, [2011] QB 218 (ch 26 below); *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 131 (ch 26 below).

¹⁷⁶ Sir Peter Gibson (chair), *Report of the Detainee Inquiry* (2013), para 7.6. Also important is the powerful JCHR report on complicity in torture: HL Paper 152/HC 230 (2008–09). The latter report also highlights the unwillingness of ministers to account to Parliament for the work of the security services.

¹⁷⁷ *The Guardian*, 21 June 2013 (‘GCHQ taps fibre-optic cables for secret access to world’s communications’).

¹⁷⁸ *The Guardian*, 8 July, 8 August, 3 October 2013.

CHAPTER 20

Special and emergency powers

In times of grave national emergency, normal constitutional principles may have to give way to the overriding need to deal with the emergency. In Lord Pearce's words, 'the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings'.¹

Thus, the European Convention on Human Rights, art 15, permits a member state to take measures derogating from its obligations under the Convention 'in time of war or other public emergency threatening the life of the nation'. The United Kingdom government has exercised the right of derogation in respect of events in Northern Ireland, and more recently in response to international terrorism in the aftermath of events in the United States on 11 September 2001.²

But even under such circumstances no derogation is permitted from art 2 (which protects the right to life) except in the case of deaths resulting from lawful acts of war, art 3 (which prohibits the use of torture), art 4(1) (which prohibits slavery) and art 7 (which bars retrospective criminal laws). Thus even in grave emergencies there are limits beyond which a state may not go, and it is open to question whether and how far 'the desirability of an effective remedy for judicial review must yield to the higher interests of the State'.³

This chapter is concerned with special or emergency powers to deal with special or emergency circumstances. They begin with (i) the use of troops to assist the civil authorities (as was the case in Northern Ireland from 1969 to 2007),⁴ progressing in severity to (ii) the enactment of legislation introducing special powers to deal with terrorism, legislation justified initially as being 'temporary' and as such to require renewal every five years. It is now 'permanent', with special powers having been normalised.

The other concern of this chapter is with (iii) emergency powers (as for example to deal with other threats to the life or needs of the community, or in times of war), concluding most severely with (iv) the introduction of martial law (a matter which in recent times has been of historical interest only in Great Britain). It should be said, however, that the nature of the emergencies which governments face has changed over the course of the last 100 years or so, and so has the nature of the response. It is many years since it has been necessary to declare a state of emergency.

A. Use of troops in assisting the police

Authority for use of troops

In chapter 18 we examined the main powers available to the police in maintaining public order. But in the 19th century and earlier, when there was less political freedom and police

¹ *Conway v Rimmer* [1968] AC 910, at p 982.

² See ch 14 B.

³ *R v Home Secretary, ex p Adams* [1995] All ER (EC) 177, at p 185 (Steyn LJ). See *R v Home Secretary, ex p Cheblak* [1991] 2 All ER 319 where judicial review yielded rather too easily. Compare the thoughtful discussion of this issue by Sedley J in *R v Home Secretary, ex p McQuillan* [1995] 4 All ER 400, at pp 420–1. See now *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68 (p 553 below).

⁴ For details, see 14th edn of this book, pp 628–9.

forces were weaker, the local magistrates were expected to call in detachments of soldiers to restore order when necessary. By contrast with 19th-century practice, the ‘civil power’ that may call in the armed forces today appears no longer to be the local magistracy, but the Home Secretary, acting on a request from a chief officer of police.⁵ It is then for the Secretary of State for Defence to respond to the call.

For the last 100 years or so, the police, with greater or less difficulty depending on the circumstances, have been able to control and contain public protest in Great Britain, though not in Northern Ireland. Apart from unrest in Glasgow in 1919, it has not been necessary to deploy troops for peace-keeping activities in Great Britain on any occasion since the First World War.⁶ They have been required, however, to maintain essential services during strikes (for example, the firefighters’ strike in 2003),⁷ and on occasion to deal with extreme terrorist action (for example, the occupation of the Iranian embassy in London in May 1980), as well as to assist with the disposal of carcasses during the foot and mouth epidemic on British farms in 2001.⁸

The use of the troops for peace-keeping activities may be illustrated by a rather late example, the Featherstone riots in 1893.⁹ When the police were engaged elsewhere, a small detachment of soldiers was summoned to protect a colliery against a riotous crowd, which broke windows and set buildings on fire.

As darkness was falling, a magistrate called on the crowd to disperse and he read the proclamation from the Riot Act. When the crowd did not disperse, the magistrate authorised the soldiers to fire and their officer decided that the only way to protect the colliery was to fire on the crowd.

Two members of the crowd were killed. A committee of inquiry held that the action of the troops was justified in law, though it is difficult to see how such a conclusion could be justified today.

A decision to call in the troops to restore order was, in the past at least, a decision enabling firearms to be used to repress the disturbances. But in modern times the police are trained to use and equipped with firearms ‘to deal with armed criminals and political terrorists not posing any extraordinary problem or capable of posing a limited threat’.¹⁰ The occasions on which firearms may be carried are governed by police rules, and this may involve the use of lethal force, as was tragically revealed by the death of Jean-Charles de Menezes in the aftermath of the London terrorist bombings in July 2005. An error of judgment on the part of a police officer could lead to criminal proceedings, and any use of lethal force must now be examined by the Independent Police Complaints Commission.¹¹

Matters would now have to be exceptionally grave before the armed forces were called upon to restore and maintain order, as emphasised by events such as the miners’ strike of 1984/85 and the fuel protests of September 2000.¹² Despite large-scale public disturbances, national coordination of policing, together with new training and operational methods, meant that it was unnecessary to deploy the army in either of these situations for peace-keeping

⁵ HC Deb, 8 April 1976, col 617.

⁶ See Williams, *Keeping the Peace*, pp 32–5.

⁷ Cm 3223, 1996, pp 27–8.

⁸ The armed forces provide assistance to other departments in a number of ways: apart from counter-drug activities, it includes fishing protection and assistance in natural emergencies: Cm 5109, 2001, p 3. See also Cm 6041, 2003, para 1.6. Some legal cover for this activity will be provided by the Emergency Powers Act, s 2, authorising the use of troops for urgent work of national importance.

⁹ Report of the Committee on the Disturbances at Featherstone, C 7234, 1893. And see HC 236 (1908).

¹⁰ Cmnd 6496, 1976, p 95.

¹¹ See ch 15 above.

¹² On which see H Fenwick and G Phillipson (2001) 21 LS 535.

purposes.¹³ It is now clear, however, that the use of troops during the miners' strike was nevertheless contemplated, though there is no evidence that they would have been used for peace-keeping purposes.¹⁴

Authority for use of force

Reference has been made politically to 'the limitations on the availability of military support to the civil power in Great Britain'.¹⁵ But whatever may be the rules today that govern the decision that the armed forces should be called in, their legal authority to act in a situation of riot seems to rest on no statutory or prerogative powers of the Crown, but simply on the duty of all citizens to aid in the suppression of riot and on the duty of the armed forces to come to the aid of the civil authorities.¹⁶

In place of the common law rules on the use of force in the prevention of crime, s 3 of the Criminal Law Act 1967 now provides:

A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

Thus, the use of firearms must be justified by the necessity of the situation and does not become legal by reason of the decision to call in the troops. Indeed, the use of excessive force or the premature use of firearms would render the officer in command and the individual soldiers personally responsible for death or injuries caused. Issues of liability are decided by the criminal or civil courts after the event,¹⁷ and may give rise to court-martial proceedings.¹⁸

One of the most notorious examples in modern times of the use of excessive force by the troops was in Derry/Londonderry on 30 January 1972, when 13 citizens were shot dead, and another 14 were wounded, one fatally. A lengthy inquiry (which took 12 years to complete) conducted by Lord Saville concluded in 2010 that none of the victims 'was posing a threat of causing death or serious injury, or indeed was doing anything else that could on any view justify their shooting'.¹⁹ But although the soldiers in question were identified by the inquiry (though they remain anonymous), none has been prosecuted, and it is unlikely for a number of reasons that they ever will be.²⁰

In modern conditions, the proposition that to call in the troops makes possible the use of firearms needs to be qualified in the sense that it is no longer correct, as was said in 1893, that a soldier can act only by using deadly weapons.²¹ To call in the army to deal with civil unrest would indeed be of incalculable political significance. But the British army's experience in Northern Ireland suggests that there are many other ways of dealing with hostile crowds which are more effective and less deadly than firing into them – batons, riot shields, water cannon, rubber bullets and even CS gas – and the armed forces do not have a monopoly on the use of CS gas.²²

¹³ See McCabe and Wallington, *The Police, Public Order and Civil Liberties*, pp 49–50.

¹⁴ *The Guardian*, 3 January 2014.

¹⁵ HC Deb, 8 April 1976, col 617 (Mr Roy Jenkins, Home Secretary).

¹⁶ *Charge to Bristol Grand Jury* (1832) 5 C & P 261.

¹⁷ See *R v Clegg* [1995] 1 AC 482, and *Bici v Ministry of Defence* [2004] EWHC 786 (QB).

¹⁸ Armed Forces Act 2006, Pt 2.

¹⁹ The Bloody Sunday Inquiry Report (2010). See earlier HC 220 (1971–2) (Widgery Report), on which see C A Gearty (1994) 47 CLP 19, at p 33.

²⁰ There was, however, unusually an apology from the government delivered to the House of Commons by the Prime Minister.

²¹ C 7234, 1893, pp 10, 12.

²² On the power to make it available to the police, see ch 10 above.

Legal liability for excessive force

The use of the troops to assist the civil authorities for a sustained period of time has arisen most recently in relation to events in Northern Ireland. These events have also tested the legal authority of the soldier when deployed in such circumstances, and it has been suggested that the legal position of the soldier called to assist the civil authorities in Northern Ireland to contain terrorist or political violence may not be the same as that of his or her counterpart called to assist the civil authorities elsewhere for other purposes.

There is little authority in English law concerning the rights and duties of a member of the armed forces of the Crown when acting in aid of the civil power; and what little authority there is relates almost entirely to the duties of soldiers when troops are called upon to assist in controlling a riotous assembly. Where used for such temporary purposes it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform. But such a description is in my view misleading in the circumstances in which the army is currently employed in aid of the civil power in Northern Ireland . . .

In theory it may be the duty of every citizen when an arrestable offence is about to be committed in his presence to take whatever reasonable measures are available to him to prevent the commission of the crime; but the duty is one of imperfect obligation and does not place him under any obligation to do anything by which he would expose himself to the risk of personal injury . . . In contrast to this a soldier who is employed in aid of the civil power in Northern Ireland is under a duty, enforceable under military law, to search for criminals if so ordered by his superior officer and to risk his own life should this be necessary in preventing terrorist acts. For the performance of this duty he is armed with a firearm, a self-loading rifle, from which a bullet, if it hits the human body, is almost certain to cause serious injury if not death.²³

It has been said by the government, however, that ‘service personnel are given certain specific powers under the law (for example, to make arrests and carry out searches) in order to enable them to carry out effective support to the RUC [now the Police Service of Northern Ireland]. In exercising these powers and in seeking to uphold the law, service personnel remain accountable to the law at all times. They have no immunity, nor do they receive special treatment. If service personnel breach the law, they are liable to arrest and prosecution under the law. This applies equally to the use of force, including lethal force.’²⁴ Arrest and other powers were extended to members of the armed forces by legislation applying only in Northern Ireland.²⁵

Considerable controversy has, nevertheless, arisen from time to time as a result of the use of firearms by the military, not only in relation to the events in Derry/Londonderry referred to above. Between 1969 and 1994 the security forces are said to have been responsible for 357 deaths in Northern Ireland, including 141 who were republican ‘military activists’, 13 who were loyalist equivalents and 194 who were civilians. Eighteen of these deaths led to criminal charges, with a total of six convictions being secured, one for attempted murder, one for manslaughter and four for murder.²⁶

²³ *A-G for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105, at pp 136–7 (Lord Diplock).

²⁴ Statement on the Defence Estimates 1994, p 36.

²⁵ Justice and Security (Northern Ireland Act) 2007, ss 21 (powers of stop and question), 22 (powers of arrest), 23 (powers of entry), 25 (powers of search of detained persons). These powers are additional to any existing common law or statutory powers and are ‘not to be taken to affect those powers or Her Majesty’s prerogative’ (emphasis added), to which we may ask: what prerogative?

²⁶ Gearty and Kimbell, *Terrorism and the Rule of Law*, pp 57–8.

In *Attorney-General for Northern Ireland Reference (No 1 of 1975)*,²⁷ the accused was a soldier on foot patrol who shot and killed a young man in an open field in a country area in daylight. The shot had not been preceded by a warning shot and the rifle was fired after the deceased ran off after having been told to halt. The area was one in which troops had been attacked and killed by the IRA and where a surprise attack was a real threat. When the accused fired, he believed that he was dealing with a member of the IRA, but he had no belief at all as to whether the deceased had been involved or was likely to be involved in any act of terrorism. In fact, the deceased was an 'entirely innocent person who was in no way involved in terrorist activity'.

After the soldier's acquittal for murder, the House of Lords held that the stated circumstances (where 'he fires to kill or seriously wound an unarmed person because he honestly and reasonably believes that person is a member of a proscribed organisation [in this case the Provisional IRA] who is seeking to run away, and the soldier's shot kills that person') raised an issue for the tribunal of fact as to whether the Crown had established beyond reasonable doubt that the shooting constituted unreasonable force. According to Lord Diplock, 'there is material upon which a jury might take the view that the accused had reasonable grounds for apprehension of imminent danger to himself and other members of the patrol if the deceased were allowed to get away . . . , and that the time available to the accused to make up his mind was so short that even a reasonable man could only act intuitively'.²⁸

On the other hand, in *R v Clegg*²⁹ it was held that a soldier who used excessive force in self-defence leading to the death of the victim was guilty of murder rather than manslaughter.

'Shoot to kill' allegations

The use of firearms by the authorities in Northern Ireland gave rise to allegations of a shoot-to-kill policy, these being directed at both the RUC and the armed forces.³⁰ The allegations were sufficiently serious that an inquiry was appointed in the 1980s under the chairmanship of Mr John Stalker, the Deputy Chief Constable of Greater Manchester.³¹ Mr Stalker was removed from the inquiry in controversial circumstances, and it was completed by the Chief Constable of West Yorkshire, but no evidence was published to substantiate the allegations.³²

The controversy was revived following the decision of the European Court of Human Rights in *McCann v United Kingdom*,³³ which concerned the fatal shooting of three IRA activists in Gibraltar in 1987.

²⁷ [1977] AC 105. See also *Farrell v Defence Secretary* [1980] 1 All ER 166; *R v Bohan and Temperley* (1979) (5) BNIL; *R v Robinson* (1984) (4) BNIL 34; *R v McAuley* (1985) (10) BNIL 14. See also R J Spjut [1986] PL 38 and [1987] PL 35.

²⁸ [1977] AC 105, at p 138.

²⁹ [1995] 1 AC 482.

³⁰ See *Farrell v UK* (1983) 5 EHRR 466, *McCann v UK* (1995) 21 EHRR 97, *McKerr v UK* (2002) 34 EHRR 20; *Jordan v UK* (2003) 37 EHRR 2; *Finucane v UK* (2004) 37 EHRR 656; and *Kelly v United Kingdom*, App No 30054/96. See also *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807.

³¹ See Stalker, *Stalker*.

³² See HC Deb, 25 January 1988, cols 21–35.

³³ (1995) 21 EHRR 97.

Three known IRA personnel were shot by four SAS officers while it was thought that they were about to detonate a bomb, to the danger of life on Gibraltar.

It transpired that this belief was erroneous and that the suspects were not only unarmed, but that they also were not in possession of bomb equipment at the time of their deaths. They were nevertheless shot 29 times (one suspect being shot 16 times). By a majority of 10 to 9, the Court held that there had been a breach of art 2 which in protecting the right to life was said to rank as 'one of the most fundamental provisions in the Convention'.³⁴ There was no evidence of 'an execution plot at the highest level of command in the Ministry of Defence or in the Government'; although 'all four soldiers shot to kill', on the facts and in the circumstances the actions of the soldiers did not in themselves give rise to a violation of art 2.

But it was held that the operation as a whole was controlled and organised in a manner that failed to respect art 2, and that the information and instructions given to the soldiers rendered inevitable the use of lethal force in a manner which failed to take adequately into consideration the right to life of the three suspects. Having regard 'to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might in some respects, at least, be erroneous, and to the automatic recourse to lethal force when the soldiers opened fire', the Court was not persuaded that 'the killing of the three terrorists constituted the force which was no more than absolutely necessary in defence of persons from unlawful violence'.³⁵

Allegations of a shoot-to-kill policy of the security forces in Northern Ireland gave rise to litigation – in the European Court of Human Rights and in the domestic courts under the Human Rights Act – at the instance of bereaved families concerned that adequate steps have not been taken to investigate the deaths of people allegedly killed by the RUC.³⁶ Although critical of government conduct that served only to 'add fuel to fears of sinister motives',³⁷ the ECtHR has yet to find evidence of a shoot-to-kill policy. Nor did the Saville inquiry, before which it had been submitted that the use of lethal force was encouraged or tolerated by the State.³⁸

B. Legislative responses to terrorism – what is terrorism?

Legal origins

Special legislation dealing with terrorism was first introduced in Britain in 1974, following the Birmingham pub bombings in that year.³⁹ Although said by its author to be

³⁴ Art 2(1) provides that 'Everyone's life shall be protected by law', while art 2(2) provides by way of qualification that 'Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence . . .'

³⁵ The political reaction to the decision was very critical of the Court: see e.g. HL Deb, 29 January 1996, col 1225. Compare C Gearty, 'After Gibraltar', *London Review of Books*, 16 November 1995.

³⁶ See cases referred to in note 30 above.

³⁷ *Jordan v United Kingdom*, above, para 144. Also *Kelly v United Kingdom*, above.

³⁸ The Bloody Sunday Inquiry Report, above.

³⁹ Special powers to deal with threats to security in Northern Ireland are, however, almost as old as the Province itself. See Civil Authorities (Special Powers) Act 1922, replaced by Northern Ireland (Emergency Provisions) Act 1973, amended in 1975 and 1977 and re-enacted in 1978, 1987, 1991 and 1996. On the 1922 Act, see Calvert, *Constitutional Law in Northern Ireland*, ch 20; Campbell, *Emergency Law in Ireland 1918–1925*; and Ewing and Gearty, *The Struggle for Civil Liberties*, ch 7. The 1973 Act was preceded by the Diplock Report, Cmnd 5185, 1972.

‘drastic’,⁴⁰ the Prevention of Terrorism (Temporary Provisions) Act 1974 was at least subject to the formality of annual renewal by Parliament, while subsequent Prevention of Terrorism (Temporary Provisions) Acts expired after five years: hence the reference to temporary provisions in their short titles.

Confined to the situation in Northern Ireland, the early anti-terrorism legislation was controversial because of its threat to civil liberties. Critics were concerned by its ‘proscription’ of the IRA, and its introduction of exclusion orders, preventing British citizens resident in Northern Ireland from travelling to the rest of the country. But although a short and tightly drawn measure, it was only the start and its focus on the IRA soon expanded as anti-terrorism powers extended.

Perhaps inevitably, these temporary provisions became permanent, with the Terrorism Act 2000 being designed to implement the recommendations of an *Inquiry into Legislation Against Terrorism* conducted by Lord Lloyd of Berwick in 1996.⁴¹ Passed just after the Belfast Agreement in 1999, and just before the 9/11 attacks in New York and Washington in 2001, the 2000 Act has become a cornerstone in the government’s response to international as well as domestic terrorism.

The Belfast Agreement was thus not the occasion to repeal special powers to deal with terrorism. On the contrary, the 9/11 attacks on the United States by individuals linked to al-Qaeda led to the introduction of additional powers in the United Kingdom addressed specifically to international terrorism, though many of these powers – contained in the Anti-terrorism, Crime and Security Act 2001 – were to prove even more contentious than the provisions of the Terrorism Act 2000 they complement.⁴²

Terrorism defined

Special powers to deal with terrorism having thus gradually expanded, the first question for consideration is simply this: to what activity do the restrictions apply? Here, one of the most controversial features of the Terrorism Act 2000 is the wide definition of terrorism in s 1 to mean action or the threat of action (including action outside the United Kingdom) which (a) falls within s 1(2); (b) is designed to influence a government (or an international governmental organisation), or to intimidate the public or a section of the public; and (c) is made for the purpose of advancing a political, religious, racial or ideological cause.

Much of the concern relates to the wide scope of the action falling within s 1(2), which applies not only to serious violence, serious damage to property and the endangering of human life, but also to creating ‘a serious risk to the health or safety of the public or a section of the public’, as well as seriously interfering with or seriously disrupting an electronic system. Section 1 also makes it clear that the Act applies to terrorist activity overseas, as well as that directed at the British government. The action to which the section applies may be action outside the United Kingdom and the government it is designed to influence may be the government of the United Kingdom (or a part thereof), or of a country other than the United Kingdom.⁴³

This wide definition gave rise to a great deal of comment and a number of difficult questions were raised as the Bill was passing through Parliament. A good example is the following:

If someone decided to break into a mink farm in order to release the mink from their cages, or to break into a research station and destroy the animals’ cages, that would clearly be an act

⁴⁰ Jenkins, *A Life at the Centre*, p 394.

⁴¹ Cm 3420, 1996. See also the important report by Gearty and Kimbell, *Terrorism and the Rule of Law*.

⁴² See A Tomkins [2002] PL 205 and H Fenwick (2002) 65 MLR 724.

⁴³ See *R v F* [2007] EWCA (Crim) 243, [2007] 2 All ER 193.

of serious violence. It would be a criminal act – and one that I deplore. But why should such organisations be classified as terrorist under [section] 1?⁴⁴

The Home Secretary conceded that this conduct might well fall under s 1, but felt that the answer to the potentially wide scope of the legislation lay in the self-restraint of the prosecuting authorities.⁴⁵ The Home Secretary also drew attention to the Human Rights Act 1998 and to arts 5 and 6 of the ECHR as a ‘profound safeguard against the disproportionate use of the powers’ in the Act.⁴⁶

There was nevertheless still concern about the application of the definition to international terrorism. One recurring question was whether British-based support for the anti-apartheid activities of the ANC in South Africa before the end of apartheid would have been caught by the Act. Other concerns related to

international campaigns, such as those that support, for example, the actions of the Kurds resisting being driven from their lands by the building of dams, the resistance of the Ogoni in Nigeria to the theft and pollution of their lands, and the resistance of the Amazon Indians to the destruction of their rainforests. All those campaigns of resistance have involved incidents of violent collision with those who would destroy people’s livelihoods and lives.⁴⁷

Although the government expressed the view that support for such international causes ‘will not even remotely come under the [Act]’, it has since been held that ‘the terrorist legislation applies to countries which are governed by tyrants and dictators’.⁴⁸

Terrorist organisations

Having identified ‘terrorism’ in Part I, the Terrorism Act 2000 retains and expands in Part II the power to proscribe terrorist organisations. Reflecting the political origins of the 2000 Act, the 14 bodies specifically proscribed are all connected with events in Northern Ireland.

Rather fortuitously in light of events post-enactment, however, there is a power in the 2000 Act to add to the list by order (s 3).⁴⁹ This power to add to the list of proscribed bodies has been exercised in respect of another 52 organisations, said to be involved in terrorist activities in different parts of the world, but thought to operate in or from this country.⁵⁰ Before an organisation may be added to the list, the Secretary of State must believe that it is ‘concerned in terrorism’ (s 3(4)), which means not only that it commits or prepares acts of

⁴⁴ HC Deb, 14 Dec 1999, col 155 (Mr Douglas Hogg). There was also the case of the women who attacked the Hawk aircraft with hammers, as well as the case of the Trident Ploughshares 2000 organisation, which attacked the Trident submarine – *ibid*, col 200.

⁴⁵ Thus, ‘I believe that we must have some confidence in the law enforcement agencies and the courts. If we look back at the past 25 years, we can see that the powers have been used proportionately in the face of an horrific threat from terrorism in Ireland and from international terrorism’ (HC Deb, 14 Dec 1999, col 155). See also at col 165 (independence of the police, the DPP and the Attorney General). The consent of the DPP is necessary before any prosecution (s 117).

⁴⁶ *Ibid*, col 160. It was also claimed by a former minister from the Opposition benches that ‘the integrity of Ministers is often bolstered by the knowledge of the existence of judicial review’ (HC Deb, 14 Dec 1999, Mr Tom King).

⁴⁷ HC Deb, 14 December 1999, col 160 (Mr Alan Simpson).

⁴⁸ *R v F* [2007] EWCA (Crim) 243, [2007] 2 All ER 193. In the same case it was said that ‘there is no exemption from criminal liability for terrorist activities which are motivated or said to be morally justified by the alleged nobility of the terrorist cause’.

⁴⁹ Terrorism Act 2006, s 21, amending 2000 Act, s 3.

⁵⁰ See Home Office, *Proscribed Terrorist Organisations* (2013). Of these 52, 50 were banned under the original powers in the 2000 Act, and the other two as a result of the 2006 amendments.

terrorism, but that it promotes or encourages terrorism or is ‘otherwise concerned in terrorism’ (s 3(5)). To promote or encourage for these purposes may include to glorify.

The Secretary of State also has the power to remove an organisation by order from the proscribed list, following an application by the organisation or any person affected by the organisation’s proscription (s 4). Given that it is an offence to be a member of a proscribed organisation (on which see later), this could be a bold move, particularly if the application is refused. If the Secretary of State refuses the application, an appeal may be made to the Proscribed Organisations Appeal Commission, which is required to apply the principles of judicial review (s 5), with a right of appeal from the Commission on a point of law to the Court of Appeal, Court of Session or Court of Appeal in Northern Ireland, as appropriate (s 6).⁵¹

In general, a decision to proscribe an organisation is not subject to judicial review, with a proscribed organisation being expected by the courts to use the statutory de-proscription procedure,⁵² where it may be represented by a special advocate appointed by one of the government’s law officers.⁵³

In *R v Z*⁵⁴ the question was whether the Real IRA was a proscribed organisation. The proscribed organisations in the Schedule include the IRA but not the Real IRA, a newly formed splinter group that did not accept the peace process. Reading the legislation very widely, the House of Lords held that the term IRA applied to an organisation ‘whatever relationship (if any) it has to any other organisation of the same name’. Although there was a risk that ‘a group within the extended IRA family would be proscribed which was currently non-violent’, Lord Bingham concluded that ‘it might well have been thought unlikely that a body bearing the name IRA or any variant of it would be at all friendly to parliamentary democracy’.⁵⁵

It is an offence to be a member (or to profess membership) of a proscribed organisation (s 11), a measure said to be of ‘extraordinary breadth’.⁵⁶ It is a defence under s 11(2) if the defendant can prove that the organisation was not proscribed while he or she was a member, a burden read down by the House of Lords to be evidential rather than legal. This is despite the fact that Parliament had clearly intended otherwise when enacting the 2000 Act, providing a nice example of how the Human Rights Act, s 3 is binding on future or subsequently enacted legislation.⁵⁷ It is an offence to invite support for such an organisation (s 12), or to organise a meeting (whether in public or private) in support of such an organisation. Breach of these provisions could lead to imprisonment of up to ten years or to a fine or both, after a conviction on indictment (s 12(6)).

In addition to the foregoing, it is an offence under s 13 for a person in a public place to wear an item of clothing or wear, carry or display an article ‘in such a way or in such circumstances as to arouse reasonable apprehension that he is a member or supporter of a proscribed organisation’ (s 13(1)). Conduct violating s 13 may also be unlawful under the Public Order Act 1936, s 1, whereby it is an offence to wear a political uniform in public. Although the

⁵¹ See *Lord Alton of Liverpool v Home Secretary* [2008] EWCA Civ 443, [2008] 1 WLR 2341, which together with the decision of the POAC which the Court of Appeal upholds, gives a good insight into the proscription procedure in the Home Office.

⁵² *R (Kurdistan Workers’ Party) v Home Secretary* [2002] EWHC (Admin) 644.

⁵³ 2000 Act, Sch 3, para 7.

⁵⁴ [2005] UKHL 35, [2005] 2 AC 645.

⁵⁵ *Ibid*, para [20].

⁵⁶ *Attorney-General’s Reference No 4 of 2002* [2004] UKHL 43, [2005] 1 AC 264, para [47] (Lord Bingham).

⁵⁷ *Ibid*.

1936 Act was designed initially for use against Mosley's blackshirts, it was used successfully in 1975 against IRA pall-bearers at a funeral in Coventry, dressed in dark pullovers, dark berets and dark glasses.⁵⁸ The restrictions in the Terrorism Act 2000 are wider, there being no need to show that the demonstration of support amounts to the wearing of a uniform: an emblem such as a ring is enough.

Terrorist funds

Part III of the Terrorism Act 2000 (as amended in 2001) deals with terrorist property, defined to mean both money and property likely to be used for the purposes of terrorism, including any resources of a proscribed organisation (s 14). It is an offence to solicit, receive or give money or property for terrorist purposes (s 15). The Act contains additional measures first introduced in 1989 'to strike at the financial roots of terrorism',⁵⁹ at a time when it was thought that the IRA (then the main target) had an annual income of £3–4 million, generated not only by robbery and extortion, but also by apparently legitimate business activity which gave the organisation 'an assured income and a firmer base'.⁶⁰

So, apart from the direct financing of terrorism, it is an offence to use or possess money or property for terrorist purposes (s 16). Although property for this purpose includes magazines and other literature, it has been held that s 16 does not violate the ECHR, art 10, since it falls well within art 10(2).⁶¹ It is also an offence to be involved in 'an arrangement' whereby money or property is made available for terrorist purposes (s 17). This is intended to cover various banking transactions, including an arrangement whereby money or other property is made available to a lawful business and either that money, or the profits of that activity, is 'intended to be used for terrorist purposes'.

Section 18 contains the so-called laundering offence, making it unlawful to enter into an arrangement 'which facilitates the retention or control by or on behalf of another person of terrorist property', by concealment, removal from the jurisdiction, transfer to nominees or 'in any other way'. This is an extremely wide provision, in the sense that 'an estate agent collecting rent from office premises might be totally unaware that the ultimate beneficiaries of the profits are a company operating for the benefit of a terrorist organisation'. Moreover, 'if charged, the statutory defence made available under section 18(2) would place a reverse burden upon [the accused]'.⁶²

Where someone suspects that another person has committed an offence under ss 15–18, it is an offence to fail to inform the police as soon as reasonably practicable (s 19).⁶³ There is an exception for employees who have informed their employer in accordance with any procedure for reporting concerns of this kind (although if the employer has no procedure there would be no defence for failing to notify the police). There is also an exception for lawyers in relation to information obtained from a client in connection with the provision of legal advice. But there is no exception for journalists,⁶⁴ although there is a general defence of reasonableness from which journalists might benefit.⁶⁵

⁵⁸ *O'Moran v DPP* [1975] QB 864.

⁵⁹ HC Deb, 6 Dec 1988, col 212 (Mr Douglas Hurd).

⁶⁰ *Ibid*, col 213.

⁶¹ *O'Driscoll v Home Secretary* [2002] EWHC 2477 (Admin).

⁶² Lord Carlile, *Report on the Operation in 2004 of the Terrorism Act 2000* (2005), para 42. Lord Carlile was the government's independent reviewer of the terrorism legislation, who carried out his reviews under statutory authority. He was replaced in 2011 by David Anderson QC. See notes 79 and 157 below.

⁶³ Amended by the Counter-Terrorism Act 2008, s 77.

⁶⁴ A point raised in Parliament at Second Reading in the Commons: HC Deb, 14 Dec 1999, col 181 (Fiona Mactaggart). See also *J J Rowe* [2001] Crim LR 527, at pp 537–8.

⁶⁵ HL Deb, 23 May 2000, col 653 (Lord Bassam).

Section 21 deals with the position of police informers, so that it is not an offence for a person to withhold information under ss 15–18 if acting with the express consent of the police; nor is it an offence to be involved in a money-laundering arrangement after informing the police that the money or other property in question is terrorist property. The latter provision would protect the bank or other body which is the medium for the unlawful action and also give the police access to information about the arrangement. Additional measures introduced by the Anti-terrorism, Crime and Security Act 2001 – ss 21A and 21B – impose duties of disclosure on the financial services industry.

Where a person is convicted of an offence under ss 15–18, a court may make an order for the forfeiture of money or property destined for terrorist use or which was the subject of an arrangement for handling or laundering terrorist funds (s 23). There are powers for the seizure, detention and forfeiture in civil proceedings of cash intended to be used for terrorist purposes, as well as cash which represents the resources of a proscribed organisation or property obtained through terrorism. The powers of forfeiture may be exercised even though no criminal proceedings have previously been brought in connection with the cash.⁶⁶

C. Legislative responses to terrorism – terrorist investigations, police powers and terrorist offences

Terrorist investigations

Part IV of the 2000 Act deals with ‘terrorist investigations’ defined to mean the investigation of one of five matters: the commission, preparation or instigation of acts of terrorism; an act which appears to have been done for the purposes of terrorism; the resources of a proscribed organisation; the possibility of making a proscription order under s 3; and the commission, preparation or instigation of an offence under the Terrorism Act 2000 itself, or the Terrorism Act 2006, Part 1 (s 32).

Sections 33–36 empower the police to impose *cordons* for up to 28 days in the course of terrorist investigations and to order people to leave the area, to leave premises in the cordoned area and to remove vehicles from the area. An order designating a cordoned area, may be made by a police officer of the rank of superintendent or above, although it may also be made by an officer of lesser rank where necessary ‘by reason of urgency’ (s 34(2)). There are few formalities associated with the exercise of this power.⁶⁷

There are extensive powers conferred on the police to obtain *information for the purposes of a terrorist investigation*. By virtue of s 37 and Sch 5, a justice of the peace may issue a search warrant (all premises or specific premises), if there are reasonable grounds for believing that there is material on the premises to which the application relates which is likely to be of substantial value to the investigation (Sch 5, para 1(5)), and does not consist of items subject to legal privilege or excluded or special procedure material (as defined by PACE) (para 4).⁶⁸

⁶⁶ Anti-terrorism, Crime and Security Act 2001, s 1 and Sch 1.

⁶⁷ Thus, if made orally, the designation is to be confirmed in writing as soon as reasonably practicable; and it can only be made for 14 days in the first instance, to be renewed as necessary. There is no reporting to the Home Secretary or to anyone else on the exercise of this power, and not even an annual reporting obligation on the number of times the power is exercised. These powers may also be exercised in some circumstances by the British Transport Police and by the Ministry of Defence Police following amendments introduced by the 2001 Act.

⁶⁸ For legal privilege or excluded or special procedure material, see ch 15 above. Separate provisions deal with police access to confidential customer information held by banks, extended in 2001 to include a police power to monitor bank accounts (with the authority of a circuit judge or sheriff) and to freeze accounts. See Terrorism Act 2000, Sch 6 and Anti-terrorism, Crime and Security Act 2001, ss 4–16, and Schs 2 and 3.

In the case of excluded or special procedure material, a constable may apply to a circuit judge or a district judge (magistrates' court) for an order requiring the person in possession to produce it for the constable to take away or have access to it (paras 5–10). For these purposes, documents may be taken away and examined to determine if they should be seized, provisions which do not apply to items subject to legal privilege.⁶⁹ There is no provision in the Terrorism Act 2000 requiring the application for an order to be made *inter partes*.⁷⁰

Where an order is not complied with or where access to the material is needed more immediately, the constable may apply to a circuit judge or a district judge (magistrates' court) for a warrant to search the premises (again specific premises or all premises) for the excluded or special procedure material (paras 11 and 12). A circuit judge or a district judge (magistrates' court) may also issue an order requiring a person to provide an explanation of any material which has been produced or seized under the foregoing provisions (para 13).

In cases 'of great emergency', a police officer of the rank of superintendent or above may by written order authorise conduct which would otherwise require a judicial warrant (para 15).⁷¹ Amendments introduced in 2001 make it an offence to fail to provide information to the police if the person in question 'knows or believes' that the information 'might be of material assistance' in preventing the commission by another person of an act of terrorism.⁷²

Police powers

Police powers of arrest, search, and stop and search are dealt with in Part V of the Terrorism Act 2000. They apply to someone who is a terrorist, defined to mean not only someone who has committed an offence under the Act, but also someone who has been 'concerned in the commission, preparation or instigation of acts of terrorism'. For this purpose terrorism carries the meaning set out in s 1 (s 40).

Section 41 gives a power to a constable to *arrest without a warrant* a person whom 'he reasonably suspects to be a terrorist'.⁷³ A person so arrested may be detained for up to 48 hours, in contrast to the normal 24 or 36 hours. A lawful arrest is a precondition of any such detention.⁷⁴ Further detention must be authorised by a warrant issued by a judicial authority (a district judge (magistrates' courts) in England and Wales; a sheriff in Scotland; or a county court judge or resident magistrate in Northern Ireland).⁷⁵

A person should not be detained without charge for more than 14 days in total from the time of arrest.⁷⁶ Controversial amendments introduced in 2006 extended the period of

⁶⁹ Counter-Terrorism Act 2008, ss 1–9. The same applies to the search powers under the 2000 Act, s 43. See below.

⁷⁰ Compare the procedures under PACE 1984: see ch 15. For the procedure to be followed in such cases see *R v Middlesex Guildhall Crown Court, ex p Salinger* [1993] QB 564.

⁷¹ In cases of great emergency, such a police officer may also require a person to provide an explanation of any material seized in pursuance of an order under para 15 (para 16).

⁷² Anti-terrorism, Crime and Security Act 2001, s 117, inserting a new s 38 B into the Terrorism Act 2000.

⁷³ See *O'Hara v Chief Constable of the RUC* [1997] 1 All ER 129. Section 41 does not appear to meet the objections raised about its predecessors, namely that they permitted the police to arrest and detain someone who has not and is not suspected of having committed an offence. This remains the case and doubt has been raised about whether this power is consistent with art 5 of the ECHR. See J J Rowe [2001] Crim LR 527, esp pp 532–3 where the author refers to concerns raised in Parliament by Lord Lloyd as the Bill was being enacted.

⁷⁴ *Forbes v HM Advocate* 1990 SCR 69.

⁷⁵ The detained person may be excluded from the proceedings in which such an application is made: see *Ward v Police Service of Northern Ireland* [2007] UKHL 50, [2007] 1 WLR 3013.

⁷⁶ As originally enacted the period of detention was seven days; the increase to 14 days was made by the Criminal Justice Act 2003, s 306.

14 days to 28 days with appropriate judicial authority. But this was reversed by the Protection of Freedoms Act 2012, though there are also provisions to enable the 28 day period to be reinstated in urgent circumstances when Parliament is dissolved, there apparently being no need for such powers when Parliament is in session).⁷⁷

In addition to powers of arrest and detention, a police officer may apply to a justice of the peace for a warrant to *enter and search* any premises on reasonable suspicion that a person concerned with the commission, preparation or instigation of acts of terrorism will be found there (s 42). The Terrorism Act 2006 also authorises a police constable to apply to a justice of the peace for a warrant to enter and search premises for terrorist publications prohibited by section 2 (publications that encourage or glorify terrorism).

Moreover, the 2006 Act authorises a police officer to *stop and search* a person whom ‘he reasonably suspects to be a terrorist’. This may be done in order ‘to discover whether he has in his possession anything which may constitute evidence that he is a terrorist’ (s 43(1)). A police officer may also *search* a person arrested under s 41 ‘to discover whether he has in his possession anything which may constitute evidence that he is a terrorist’ (s 43(2)).

Other – highly controversial – *stop and search powers* were contained in s 44,⁷⁸ which are much wider than the more limited powers in s 43. These will be considered in the following section. Otherwise, Part V includes wide-ranging powers to stop, detain and question individuals at ports and borders with a view to determine whether the individuals in question are or have been ‘concerned in the commission, preparation or instigation of acts of terrorism’.⁷⁹ There is also a power to search the person and his or her property, and to seize property.

Police powers of stop and search

Now repealed, the power in the Terrorism Act 2000, s 44 referred to immediately above enabled a senior police officer to grant an ‘authorisation’ for renewable periods of 28 days, which in turn ‘authorised’ a constable in uniform in the area or place specified in the authorisation to stop and search vehicles and pedestrians. An authorisation – which ceased to have effect within 48 hours unless approved by the Secretary of State (s 46(4)) – could only be given if ‘expedient for the prevention of acts of terrorism’.

The over-use of the foregoing stop and search powers was widely criticised, with 8,000–10,000 uses each month in 2008 being said by the government’s independent reviewer of terrorist legislation to be ‘alarming’.⁸⁰ They were also found (eventually) to breach Convention rights:

⁷⁷ Protection of Freedoms Act 2012, inserting a new Terrorism Act 2000, Sch 8, Part 4. A number of safeguards have been introduced to contain the exercise of this power should it ever be reinstated.

⁷⁸ This provision has its origins in Prevention of Terrorism (Temporary Provisions) Act 1989, s 13A (inserted by the Criminal Justice and Public Order Act 1994, s 81); and s 13B (inserted by the Prevention of Terrorism (Additional Powers) Act 1996).

⁷⁹ Terrorism Act 2000, s 53, and Sch 7. The power to detain is for a period of up to nine hours, during which time there is a duty to provide ‘any information’ that may be requested, without formal provision being made for the presence of a lawyer (though such provision is made in an accompanying code of practice). Aspects of these powers have been held to be compatible with Convention rights: see Home Office, *Review of the Operation of Schedule 7* (2012). For an account of the extensive use of the power and concerns about the scope of Sch 7, see D Anderson, *The Terrorism Acts in 2012* (2013), ch 10. For criticism in relation to a controversial use of Sch 7 (in the case of David Miranda), see A W Bradley, *The Guardian*, 21 August 2013 (letter to editor).

⁸⁰ Lord Carlile, *Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (2009), para 147.

In *Gillan and Quinton v United Kingdom*, the House of Lords held that the exercise of this power against a student and a journalist at an arms fair in East London did not breach their Convention rights.⁸¹ This was despite the fact that the Metropolitan Police have turned what were enacted as temporary powers into permanent powers, with each 28 day authorisation being renewed on its expiry, so that there was a rolling series of authorisations.

The European Court of Human Rights took a different view, holding that the s 44 powers violated the right to private life in art 8 of the ECHR, and that the arbitrary nature of the powers were such that they could not be said to be in accordance with law for the purposes of justification under art 8(2).⁸² In the House of Lords in contrast, Lord Bingham had doubted whether 'an ordinary superficial search of the person can be said to show a lack of respect for private life'.

The offending provisions of the 2000 Act were duly repealed and replaced, by a more tightly drawn power the government presumably believes is consistent with its Convention obligations.⁸³ The replacement power provides that stop and search may be invoked by the authorisation of a senior police officer who (a) 'reasonably suspects that an act of terrorism will take place', and (b) 'reasonably considers' that the authorisation is 'necessary to prevent such an act'. There are tighter geographical and temporal factors now to be considered in making an authorisation, in the sense that the area covered must be no greater than necessary to prevent the suspected act of terrorism, while the duration of the authorisation must be no longer than necessary (s 47A(1)).

Once made, the authorisation empowers a constable in uniform to stop and search a vehicle, its driver and passengers, and anything else in the vehicle (s 47A(2)). Once made, an authorisation also enables a constable in uniform to stop and search a pedestrian, and to search anything the pedestrian may be carrying (s 47A(3)). In both cases, the replacement power retains an equivalent to the original legislation restricting the power of stop and search to 'be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism' (s 47A(4)). Crucially, however, 'the power conferred by such an authorisation may be exercised whether or not the constable reasonably suspects that there is such evidence' (s 47A(5)).

It is thus the case that the 2012 amendments retain the power of random stop and search, which was perhaps the greatest departure in the Terrorism Act 2000, s 45 from what was referred to by Lord Brown in *Gillan* as 'our traditional understanding of the limits of police power'.⁸⁴ Further provisions relating to the exercise of the power of stop and search are to be found in the Terrorism Act 2000, Sch 6B, also introduced by the 2012 Act (s 61(2), Sch 5). This deals with the way in which the power is exercised (no removal of any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves); and the obligation to provide a written statement relating to the exercise of the power (to be provided only on request within 12 months of the incident).

The replacement powers also provide that an authorisation is valid for only 14 days, unlike the previous provisions by which the authorisation was valid for up to 28 days. Like the provisions it replaces, however, the new law provides for a power of renewal of an authorisation, provided the tighter grounds for invoking the power have been met. It ought also to be noted that consistently with the requirements of the replaced provisions, an authorisation by a

⁸¹ *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12, [2006] 2 AC 307.

⁸² *Gillan and Quinton v United Kingdom* [2009] ECHR 28, (2010) 50 EHRR 45.

⁸³ Protection of Freedoms Act 2012, s 59.

⁸⁴ [2006] UKHL 12, [2006] 2 AC 307.

senior police officer is valid for only 48 hours unless confirmed (with or without modifications) by the Home Secretary.

Terrorist offences

Part VI of the 2000 Act contains a number of offences designed to frustrate terrorist activity, beginning with section 54 which deals with ‘weapons training’. Thus, it is an offence to provide or receive instruction or training in the making or use of firearms, radioactive material, explosives, or chemical, biological or nuclear weapons. However, it is a defence if the accused can ‘prove that his action or involvement was wholly for a purpose other than assisting, preparing for or participating in terrorism’ (s 54(3)).

It is also an offence to direct the activities of an organisation which is concerned in the commission of acts of terrorism (s 56), and to possess any article for a purpose connected with the commission, preparation or instigation of acts of terrorism (s 57). It is a defence to prove that the article was not in the possession of the individual for a terrorist purpose, and while the burden of proof is on the defendant (s 57(2)), it has been said that this is ‘evidential rather than persuasive or legal’.⁸⁵ Sufficient evidence of possession may be established where the accused and the article in question are both present on the premises (s 57(3)).⁸⁶

Moving on, sections 58 and 58A of the 2000 Act deal with intelligence gathering for terrorist purposes. The former – found not to violate Convention rights⁸⁷ – makes it an offence for a person to collect or record any information of a kind likely to be useful to a person committing or preparing an act of terrorism. The latter – inserted by the Counter-Terrorism Act 2008 – is designed to protect conspicuous high-risk potential targets of terrorist activity and is thus apparently unexceptionable.

The section 58A offence thus applies to conduct by the accused which elicits or attempts to elicit information about an individual who is or who has been a member of the armed forces, the intelligence services or the police. The offence is committed in respect of information of a kind that is likely to be useful to someone committing or preparing an act of terrorism. It is also an offence to publish or communicate such information.

One problem with s 58A is that it has emerged – perhaps unwittingly – as a serious threat to free speech, with journalists and photographers claiming that it was being used by the police to prevent them from taking photographs of police officers in particular. It would be unfortunate if the press were to be prevented by this or any other measure from photographing police officers while performing their duties, particularly where they are recording examples of excessive force.

Admittedly, section 58A (2) does provide that it is a ‘defence for a person charged with an offence under this section to prove that they had a reasonable excuse for their action’. Nevertheless, this is a matter that attracted the attention of the government’s independent reviewer of terrorist legislation, who expressed the following concern:

It should be emphasised that photography of the police by the media or amateurs remains as legitimate as before, unless the photograph is *likely* to be of use to a terrorist. This is a high bar. It is inexcusable for police officers ever to use this provision to interfere with the rights of individuals to take photographs. The police must adjust to the undoubted fact that the scrutiny of them by members of the public is at least proportional to any increase in police powers – given the ubiquity of photograph and video enabled mobile phones.⁸⁸

⁸⁵ See HL Deb, 23 May 2000, col 754 (Lord Bassam). Sufficient evidence of possession may be established where the accused and the article in question are both present on the premises (s 57(3)).

⁸⁶ Compare *R v DPP, ex p Kebeline* [2000] 2 AC 326.

⁸⁷ *Jobe v United Kingdom*, App No 48279/09, 14 June 2011.

⁸⁸ Lord Carlile, *Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (2009), para 197.

By virtue of s 59 it is an offence to incite terrorism overseas, a measure designed to ‘deter those who use the United Kingdom as a base from which to promote terrorist acts abroad’.⁸⁹

D. Legislative responses to terrorism – detention without trial, control orders, TPIMs and secret justice

Detention without trial

One of the most symbolically important provisions of the Terrorism Act 2000 was the repeal of the provisions in the Northern Ireland (Emergency Provisions) Act 1996 dealing with the detention without trial – or internment – of terrorist suspects. Although the power to intern was retained until the commencement of the 2000 Act,⁹⁰ it was in practice discontinued in 1975, having proved to be not only highly controversial but also of questionable effect.⁹¹ In *Ireland v United Kingdom*,⁹² the European Court of Human Rights held that these procedures violated art 5 of the ECHR, but that derogation could be justified under art 15.⁹³

A fresh derogation was made to authorise new powers of detention without trial contained in Part 4 of the Anti-terrorism, Crime and Security Act 2001. These highly contentious measures provided that the Secretary of State could issue a certificate in respect of an individual whose presence in the United Kingdom was reasonably believed to present a risk to national security and who was reasonably suspected of being a terrorist (s 21(1)). A terrorist for this purpose was defined with reference to international terrorism (s 21(2)), and terrorism carried the same meaning for this Act as it did for the Terrorism Act 2000.

Where a certificate was issued that someone was a suspected international terrorist, the individual could be refused leave to enter or remain in the United Kingdom, or deported or removed in accordance with immigration law (s 22). But there might be circumstances where removal or deportation was prevented by ‘a point of law which wholly or partly relates to an international agreement’ or to ‘a practical consideration’ (s 23). An example of the former would be art 3 of the ECHR which – as construed by the Strasbourg Court – prevents the deportation of individuals to countries where they might suffer inhuman or degrading treatment or punishment.⁹⁴

In these cases the 2001 Act provided that the suspected international terrorist could be detained indefinitely without trial (s 23). An appeal lay to the Special Immigration Appeals Commission by someone who had been certified as a suspected international terrorist (s 25) and the Commission was required to cancel a certificate if it concluded that there were no reasonable grounds for the suspicion. The Commission was required to review any certificate after six months and at three-monthly intervals thereafter.⁹⁵ There was an appeal on a point of law to the Court of Appeal or the Court of Session (s 27).⁹⁶

⁸⁹ HC Deb, 14 Dec 1999, col 162.

⁹⁰ See HC Deb, 9 January 1996, col 37. Cf Cm 2706, 1995, p 33.

⁹¹ For background, see Cm 1115, 1990. A full account of the procedures is given in *Ireland v UK* (1978) 2 EHRR 25.

⁹² (1978) 2 EHRR 25.

⁹³ It was also held, however, that the techniques employed to interrogate interned suspects violated art 3 as inhuman and degrading treatment.

⁹⁴ See *Chahal v UK* (1996) 23 EHRR 413.

⁹⁵ A review could also be conducted at the request of the certified individual if the Commission considered that the review should be held because of a change of circumstances (s 26).

⁹⁶ By virtue of an amendment made by the 2001 Act, the Special Immigration Appeals Commission is now a superior court of record (s 27).

In *A v Home Secretary*⁹⁷ these provisions relating to detention were dealt a fatal blow by the House of Lords. Proceedings were brought by nine foreign nationals who were being or who had been detained indefinitely without trial.⁹⁸ The Special Immigration Appeal Commission upheld the government's decision to derogate from the Convention but also granted a declaration that the legislation was incompatible with art 14 of the ECHR to the extent that it discriminated against foreign nationals. The government's appeal on this latter point was upheld by the Court of Appeal, but the declaration was reinstated by the House of Lords in a majority decision of 8:1.

The House of Lords agreed that there was a public emergency threatening the life of the nation, thereby justifying the derogation from art 5 of the Convention. But the House of Lords also concluded that the steps taken against foreign nationals were disproportionate and discriminatory. As a result, the derogation order was quashed.⁹⁹ Moreover, a declaration was issued under the Human Rights Act 1998 that s 23 of the 2001 Act was incompatible with art 5 and 14 of the ECHR, 'in so far as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status'.

The *A* case is a good example of the limitations of the Human Rights Act, in the sense that although declared incompatible with Convention rights, the offending provisions nevertheless remained on the statute book and in force. Equally, although the Convention rights of the individuals were clearly violated by their detention without trial, the House of Lords had no power to compensate them for the losses they suffered and continued to suffer. Sections 21–32 of the 2001 Act were not repealed until the Prevention of Terrorism Act 2005 was passed, and detainees were required to bring subsequent proceedings in the European Court of Human Rights to recover compensation for the violation of their Convention rights.¹⁰⁰

Control orders

In removing the power of indefinite detention (albeit in a 'prison with three walls' – in the sense that the detainees were always free to leave the United Kingdom), the Prevention of Terrorism Act 2005 introduced new powers of executive restraint.¹⁰¹ These were called control orders, with a control order being defined as 'an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism' (s 1(1)).

The 2005 Act provided for two kinds of control orders: (i) non-derogating control orders made by the Home Secretary, which were not to impose obligations inconsistent with the individual's right to liberty under ECHR, art 5; and (ii) derogating control orders which could impose obligations inconsistent with art 5, made only by a court on an application by the Home Secretary. Before the power to make derogating control orders could be invoked, procedures set out in the 2005 Act, s 6 had first to be complied with.

⁹⁷ [2004] UKHL 56, [2005] 2 AC 68. See A Tomkins [2005] PL 259; M Arden (2005) 121 LQR 604; M Elliott (2010) 8 *Int J of Const Law* 131.

⁹⁸ Two exercised their right to leave the country, one had been released on bail, one had been released without conditions, and one had been transferred to Broadmoor Hospital on grounds of mental illness.

⁹⁹ See subsequently SI 2005 No 1071.

¹⁰⁰ *A v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29.

¹⁰¹ The Bill was bitterly contested in Parliament and the government had to make a number of concessions to secure its passage. See J Hiebert (2005) 68 MLR 676.

But these latter powers were never invoked, so that only non-derogating control orders were ever made. This, however, was not a significant constraint, as there was wide scope for making non-derogating control orders, where ‘necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity’ (s 1(3)). The conditions that could be imposed on individuals merit careful reading. By virtue of s 1(4), they were as follows:

- a prohibition or restriction on his possession or use of specified articles or substances;
- a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities;
- a restriction in respect of his work or other occupation, or in respect of his business;
- a restriction on his association or communications with specified persons or with other persons generally;
- a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence;
- a prohibition on his being at specified places or within a specified area at specified times or on specified days;
- a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom;
- a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order;
- a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force;
- a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;
- a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;
- a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;
- a requirement on him to allow himself to be photographed;
- a requirement on him to cooperate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means;
- a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand;
- a requirement on him to report to a specified person at specified times and places.

These provisions were used to impose what has been described as a form of house arrest,¹⁰² and questions were inevitably raised about whether the tight conditions imposed under

¹⁰² For details (drawn from evidence to the JCHR), see K D Ewing and J-C Tham [2008] PL 668.

ostensibly non-derogating control orders were consistent with Convention obligations.¹⁰³ This is a matter on which the House of Lords disagreed sharply, with Lord Brown occupying the middle ground in holding that a control order imposing detention at home for up to 16 hours a day is the maximum that could be imposed consistently with the right to liberty under art 5 of the ECHR.¹⁰⁴

Most recently in *Home Secretary v AP*,¹⁰⁵ the person subject to a control order with a 16 hour detention requirement was subsequently required to live some 150 miles away from his family to avoid contact with ‘radical elements’. The Supreme Court upheld a Divisional Court decision to quash this requirement, holding that restrictions on private life can be taken into account in determining that in exceptional cases the circumstances give rise to a violation of ECHR, art 5.

Control orders were abolished in 2011, following a commitment in the Coalition agreement ‘urgently’ to review the regime as part of a wider review of counter-terrorism legislation. While the control order regime was perhaps less restrictive of liberty than detention in prison, more people were the subject of control orders than were ever detained under the 2001 Act, the control order regime – unlike the detention regime – applying equally to British nationals as to the nationals of other countries.¹⁰⁶

Terrorism protection and investigation measures

Although control orders have been abolished, the Terrorism Protection and Investigation Measures Act 2011 reintroduced provisions very similar, though not quite as restrictive. Under the replacement provisions the Secretary of State may issue a notice of terrorism protection and investigation measures (a ‘TPIM notice’), provided conditions A to E in section 3 are met. These are respectively that:

- the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity (the ‘relevant activity’) (Condition A);
- some or all of the relevant activity is new terrorism-related activity (Condition B);
- the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for TPIMs to be imposed on the individual (Condition C);
- the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual’s involvement in terrorism-related activity, for the specified TPIMs to be imposed on the individual (Condition D);
- a court gives the Secretary of State permission to impose a TPIM notice, unless he or she reasonably considers that on grounds of urgency TPIMs should be imposed without such permission (Condition E).

TPIM notices may be imposed for a period of up to a year, though they may be renewed by the Home Secretary (on one occasion only), provided that conditions A, C and D above are

¹⁰³ For a sceptical view of whether the constraints on liberty under non-derogating orders are compatible with art 5, see HL Paper 122, HC 915 (2005–06) (Joint Committee on Human Rights).

¹⁰⁴ *Home Secretary v JJ* [2007] UKHL 45, [2008] AC 385.

¹⁰⁵ [2010] UKSC 24, [2011] 2 AC 1.

¹⁰⁶ A total of 18 orders had been made in the first year of the scheme’s operation. Of these, 11 were made against people who had been detained under the 2001 Act, but nine of these were removed after five and a half months when the individuals in question were served with notice of intention to deport. By the end of 2010, a total of 48 people had been the subject of a control order. For details, see Carlile, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2010), para 15.

met. The normal procedure for the imposition of a TPIM is for an application to be made by the Home Secretary to the High Court, which must consider whether any decisions of the minister relating to the application are ‘obviously flawed’,¹⁰⁷ and whether to grant permission for the measures to be imposed on the individual. It is expressly provided that the court may consider the application in the absence of the individual; without the individual having been notified of the application; and without the individual having been given an opportunity of making any representations to the court (s 6(4)).

It is then provided that in determining an application for a TPIM, ‘the court must apply the principles applicable on an application for judicial review’ (s 6(6)), having just enacted that the proceedings can be conducted in breach of one of these principles, namely the requirement of procedural propriety. An application may be granted only if the court concludes that the Home Secretary’s decisions in relation to Conditions A, B and C are not ‘obviously flawed’. However, a finding that a decision in relation to Condition D is obviously flawed does not mean that the application cannot be granted, with the court empowered to give directions to the Home Secretary about the measures to be imposed on the individual (s 6(10)).

Although a TPIM notice may thus be issued in the absence of the respondent, provision is made for the review of such notices by a court in the presence of the respondent, this to be held ‘as soon as reasonably practicable’ (s 8). The purpose is to review the decisions of the Home Secretary that ‘the relevant conditions were met and continue to be met’ (s 9(1)). In performing this role, the court must again comply with the principles of judicial review (s 9(2)), and in doing so may quash the TPIM notice; quash measures specified in the TPIM notice; give directions to the Home Secretary in relation to the revocation of the TPIM notice, or the variation of measures specified therein (s 9(5)).

Otherwise, the court must decide that the notice is to continue in force (s 9(6)). These powers may be exercised only after the Home Secretary has consulted the police about the possibility of criminal charges being brought against a person in respect of whom TPIM measures are contemplated (s 10). Where a TPIM notice is issued, the police should be informed by the Home Secretary, and steps should be taken by the police to ‘secure that the investigation of the individual’s conduct, with a view to a prosecution of the individual for an offence relating to terrorism, is kept under review throughout the period the TPIM notice is in force’ (s 10(5)(a)).

Although the 2011 Act includes ostensibly more robust safeguards for the individual than the control order regime it replaced, no one should be under any illusions about the substance of the powers conferred on the minister. The 12 categories of restraint provided for in the Act relate to what are referred to as overnight residence measures, travel measures, exclusion measures, movement directions measures, financial services measures, property measures, electronic communication device measures, association measures, work or study measures, reporting measures, photography measures, and monitoring measures. These are largely self-explanatory, though a fair amount of detail relating to the scope of each is provided for in the Act.

It would not be appropriate necessarily to apply all of these measures to everyone who is the subject of a TPIM notice: to do so would be a violation of Condition D and would invite more carefully targeted measures being imposed by the High Court (though of course it is always open to a minister to test the court by taking measures greater than might be required by the circumstances). But they are nonetheless formidable powers.¹⁰⁸

¹⁰⁷ Specifically, the decisions relating to Conditions A, B, C and D.

¹⁰⁸ D Anderson, *Report on Terrorism Prevention and Investigation Measures Act 2011 in 2012 (2013)*, where it is reported that 10 men were subject to TPIMs, none of whom were British citizens.

Special advocates and secret trials

Returning to the now replaced non-derogating control order regime, these were also made by the Home Secretary with the permission of a High Court judge, which usually had to be granted before the control order was made (2005 Act, s 3(1)(a)). In urgent cases (or in the case of the people who had been detained under the repealed provisions of the 2001 Act), such permission was not required, though all control orders in these cases had to be referred immediately to the High Court for confirmation (s 3(1)(b),(c)). Confirmation could be refused where the Home Secretary's decision to make a control order had been 'obviously flawed' (s 3(3)(b)).

Although the government was thus required by political pressure to provide for judicial involvement in the control order system, the proceedings were nevertheless conducted largely in secret, in order to prevent the disclosure of evidence that would be contrary to the public interest. Much of the evidence against an individual who was the subject of a control order would be based on intelligence reports, the releasing of which (even to the subject of the control order) might reveal details about the work of the security and intelligence services or the identity of informers that the government would rather keep quiet.

Under the Civil Procedure Rules governing control order cases, the subject of a control order could be (i) excluded from part of the proceedings; (ii) denied access to all the evidence being used against him or her; and (iii) be refused a copy of the full decision of the Court if the public interest so required.¹⁰⁹ It is true that a Special Advocate could be appointed to represent his or her interests before the court, but this would be a person not chosen by the person subject to a control order, and in any event there were restrictions in the procedural rules on the ability of the Special Advocate to communicate with the controlled person or his or her legal representative.¹¹⁰

This curious procedure was nevertheless upheld by the House of Lords (again divided), which rejected a challenge that the procedure violated ECHR, art 6, with Baroness Hale taking the view that it would be possible for the courts to provide the controlled person with sufficient procedural protection.¹¹¹ Following the decision of the Strasbourg court in the *A* case,¹¹² the House of Lords (sitting as a bench of nine) subsequently held that the Civil Procedure Rules were to be read in such a way as to ensure that the controlled person has 'sufficient information about the allegations against him to give effective instructions to the Special Advocate'.¹¹³

In light of the foregoing, it is thus not surprising that similar procedural measures apply to applications for TPIMs as they did for control orders. With the authority of the 2011 Act above, the Civil Procedure Rules make similar if not identical provision for (i) the making of anonymity orders, (ii) the holding of hearings in private, (iii) the withholding of evidence from the respondent and his or her legal representatives ('closed material'), (iv) the appointment of a special advocate, (v) prohibiting the special advocate from communicating with the respondent and his or her legal representatives, and (vi) withholding reasons from the respondent.¹¹⁴

¹⁰⁹ For a discussion, see Ewing, *Bonfire of the Liberties*, ch 7.

¹¹⁰ On the rise and spread of the special advocate, see J Ip [2008] PL 717.

¹¹¹ *MB and AF v Home Secretary* [2007] UKHL 46, [2007] 3 WLR 681. See K D Ewing and J-C Tham, above.

¹¹² *A v United Kingdom*, above.

¹¹³ *Home Secretary v AF* [2009] UKHL 28, [2009] 3 All ER 643, at para 81 (Lord Hope).

¹¹⁴ CPR, Part 80.

E. Emergency powers

Emergency powers in the First World War

Before the mid-19th century it was the practice in times of national danger to pass what were often known as Habeas Corpus Suspension Acts.¹¹⁵ Such Acts took various forms. Some prevented the use of habeas corpus for securing speedy trial or the right to bail in the case of persons charged with treason or other offences. Others conferred wide powers of arrest and detention which would not normally have been acceptable. After the danger was over, it was often the practice to pass an Indemnity Act to protect officials retrospectively from liability for illegal acts which they might have committed.

During the two world wars, however, habeas corpus was not suspended but extremely wide powers were conferred on the executive. The Defence of the Realm Acts 1914–15 empowered the Crown to make regulations by Order in Council for securing public safety or for the defence of the realm.¹¹⁶ In *R v Halliday, ex p Zadig*, the House of Lords held that this general power was wide enough to support a regulation authorising the Secretary of State to detain persons without trial on the grounds of their hostile origins or associations.¹¹⁷ In a powerful and memorable dissent, Lord Shaw of Dunfermline declined to infer from the delegation of a general power to make regulations for public safety and defence the right to authorise the detention of a man without trial and without being accused of any offence.

Although the powers of the executive were wide, it was still possible to challenge defence regulations in the courts.

In *Attorney-General v Wilts United Dairies Ltd*,¹¹⁸ an attempt by the Food Controller to impose a charge of two pence a gallon as a condition of issuing licences for the supply of milk was held invalid, on the ground that the Food Controller's power under defence regulations to regulate the supply of milk did not confer power to impose charges upon the subject. Doubt was also expressed whether a regulation conferring such a power would have been within the general power to make regulations for the public safety or the defence of the realm.

In *Chester v Bateson*¹¹⁹ a defence regulation empowered the Minister of Munitions to declare an area in which munitions were manufactured to be a special area. The intended effect of such a declaration was to prevent any person without the consent of the minister from taking proceedings to recover possession of any dwelling-house in the area, if a munitions worker was living in it and duly paying rent. It was held that Parliament had not deliberately deprived the citizen of access to the courts and that the regulation was invalid, since it could not be shown to be a necessary or even reasonable way of securing the public safety or the defence of the realm.

¹¹⁵ Dicey, *The Law of the Constitution*, pp 229–37.

¹¹⁶ For a fascinating account of these powers and their operation, see Rubin, *Private Property, Government Requisition and the Constitution, 1914–1927*. See also Ewing and Gearty, *The Struggle for Civil Liberties*, ch 2.

¹¹⁷ [1917] AC 260. See D Foxton (2003) 119 LQR 455.

¹¹⁸ (1921) 37 TLR 884.

¹¹⁹ [1920] 1 KB 829.

Such decisions explain the passing after the war of the wide Indemnity Act 1920 and a separate Act relating to illegal charges, the War Charges Validity Act 1925.

Emergency powers in the Second World War

Following the declaration of the second world war, the Emergency Powers (Defence) Act 1939 empowered the making of regulations by Order in Council which appeared necessary or expedient for the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of any war in which His Majesty might be engaged and the maintenance of supplies and services essential for the life of the community. There followed a list of particular purposes for which regulations could be made, including the detention of persons in the interests of public safety or the defence of the realm. To avoid another *Wilts United Dairies* case, the Treasury was empowered to impose charges in connection with any scheme of control under Defence Regulations.¹²⁰

Provision was made for laying regulations before Parliament after they were made, and for their annulment by negative resolution within 28 days.¹²¹ Compulsory military service was imposed by separate National Service Acts, and compulsory direction of labour to essential war work was authorised by the Emergency Powers (Defence) (No 2) Act 1940. Although access to the courts was not barred, the scope for judicial review of executive action was limited. Thus the courts could not consider whether a particular regulation was necessary or expedient for the purposes of the Act which authorised it.¹²² The courts could, however, hold an act to be illegal as being not authorised by the regulation relied on to justify it.¹²³

Special problems of judicial control arose in relation to the power of the executive to authorise detention without trial in the interests of public safety or the defence of the realm. Under Defence Regulation 18 B, the Home Secretary was empowered to detain those whom he had reasonable cause to believe came within specified categories (including persons of hostile origin or association) and over whom it was necessary to exercise control. Persons detained could make objections to an advisory committee appointed by the Home Secretary. The Home Secretary had to report monthly to Parliament on the number of persons detained and the number of cases in which he had not followed the advice of the committee.

It was open to a detainee to apply for habeas corpus, but such applications had little chance of success in view of the decision of the House of Lords in *Liversidge v Anderson*.¹²⁴

Despite a powerful dissenting judgment by Lord Atkin, in that case the House took the view that the power to detain could not be controlled by the courts, if only because considerations of security forbade proof of the evidence on which detention was ordered. The words 'had reasonable cause to believe' only meant that the Home Secretary must have a belief which in his mind was reasonable. The courts would not inquire into the grounds for his belief, although apparently they might examine positive evidence of mala fides or mistaken identity.¹²⁵ Stress was laid on the responsibility of the Home Secretary to Parliament.

¹²⁰ Treasury regulations imposing charges required confirmation by an affirmative resolution of the House of Commons.

¹²¹ On parliamentary control of delegated legislation, see generally ch 22.

¹²² *R v Comptroller-General of Patents, ex p Bayer Products* [1941] 2 KB 306. See also *Pollok School v Glasgow Town Clerk* 1946 SC 373.

¹²³ *Fowler & Co (Leeds) Ltd v Duncan* [1941] Ch 450.

¹²⁴ [1942] AC 206; and see C K Allen (1942) 58 LQR 232 and R F V Heuston (1970) 86 LQR 33.

¹²⁵ Lord Wright, at p 261. The majority decision in *Liversidge v Anderson* cannot now be relied on as an authority, either on the point of construction or in its declaration of legal principle: *R v Home Secretary, ex p Khawaja* [1984] AC 74, at p 110 (Lord Scarman), and see *Ridge v Baldwin* [1964] AC 40, at p 73 (Lord Reid).

In only one case did a person who had been detained under the regulation secure his release by habeas corpus proceedings, the individual in question having been wrongly informed of the reason for his detention.¹²⁶

Emergency powers in peace-time

A distinguishing feature of the war-time powers described above is that they were ad hoc measures, repealed shortly after the wars ended. Emergencies of different kinds may arise in peace-time. Until quite recently the concern of governments was with the consequences of large-scale industrial action organised by trade unions, which might disrupt the supply of essential services. It was for this reason that provision was made in the Emergency Powers Act 1920 for declarations of a state of emergency and the making of emergency regulations.¹²⁷ These powers applied where there were events of such a nature as to deprive the community or a substantial part of the community of the essentials of life.

Although designed principally to deal with industrial action, the Emergency Powers Act 1920 was also capable of being used where an emergency was caused in other ways, such as natural disaster or a serious nuclear accident.¹²⁸ In practice, however, the Act was used only in response to strikes by coalminers, dockers and power workers, and was last used in 1974. In all it was used on 12 occasions,¹²⁹ and it has now been repealed with new emergency powers to be found in Part II of the Civil Contingencies Act 2004, an altogether much more wide-ranging measure. The 2004 Act extends the circumstances in which emergency powers may be used.

An emergency is now defined to mean an event or situation that threatens human welfare, the environment, or the security of the United Kingdom (s 19). These terms are widely defined to include matters such as loss of life and damage to property; contamination of land, water or air and flooding; and war and terrorism. As a result, it ought not to be necessary for governments to take additional ad hoc powers to deal with war should such an event arise, though equally the taking of such powers would hardly be a surprise. Unlike the 1920 Act, the 2004 Act's emergency powers can be invoked without a state of emergency being declared and without the need to invoke the Act being considered by Parliament.

There will, however, be an opportunity for Parliament to consider the emergency regulations which are made by the government to deal with the emergency (s 20). These regulations may be made by the Queen in Council (s 20(1)), but in some circumstances it may be possible for the regulations to be made by a senior minister, defined to include the Prime Minister, Foreign Secretary, Home Secretary and Chancellor of the Exchequer (s 20(2)). Regulations may be made where it is necessary to prevent, control or mitigate the effect of the emergency, provided the measures in question are in 'due proportion' to the situation they are designed to address (s 21). The power to make regulations under the 2004 Act has yet to be invoked.

Emergency powers and emergency regulations

The emergency regulations may be made for a wide range of purposes, such as protecting human life, health and safety, and protecting or restoring property (s 22). There are in fact

¹²⁶ *R v Home Secretary, ex p Budd* [1942] 2 KB 14. The Divisional Court ordered Budd's release, but the Home Secretary thereupon made a new order for his detention. On Regulation 18 B generally, see Simpson, *In the Highest Degree Odious*.

¹²⁷ See Ewing and Gearty, *The Struggle for Civil Liberties*, chs 2 and 4.

¹²⁸ See HC Deb, 14 February 1996, col 629 (WA).

¹²⁹ For a full account, see Morris, *Strikes in Essential Services*; also G S Morris [1980] PL 317 and C Whelan (1979) 8 ILJ 222.

no fewer than 12 purposes for which the regulations may be made. In addressing these purposes, extensive powers may be taken in the regulations. These include the requisition or destruction of property (with or without compensation), and prohibiting freedom of movement or freedom of assembly (s 22(3)). Some of the powers are vague and open ended, such as the power to prohibit ‘other specified activities’ (s 22(3)(h)).¹³⁰

Also wide is the power to confer jurisdiction on a court or tribunal (including a court or tribunal established by the regulations) (s 22(3)(n)). Other powers relate to the deployment of the armed forces (s 22(3)(l)). But emergency regulations may not impose military conscription or prohibit strikes or other industrial action (s 23(3)). There are also limits on the power to create criminal offences by emergency regulations, on the penalties that may be imposed for such offences, and on the ability to alter criminal procedure (s 23(4)). All such offences must be tried in the magistrates’ court in England and Wales or in the Sheriff Court in Scotland (s 23(4)).

The emergency regulations may apply without parliamentary approval for up to seven days, but lapse thereafter if such approval is not forthcoming (s 27). They may be amended by Parliament (s 27(3)). Once approved, the regulations are valid for 30 days unless revoked (s 26), but they may be renewed for further periods of up to 30 days (s 27(4)). The emergency regulations will not apply to Scotland or Wales unless the First Minister or the Welsh Assembly respectively has been consulted (s 29). Once made, the regulations may be subject to judicial review, including under the Human Rights Act.

The government had originally proposed that emergency regulations should have the status of primary legislation in what appeared as an attempt to limit the scope for judicial review. According to the Joint Committee established to consider the draft Bill, however, there was no need to exclude human rights protection in this way, given that the judges are not overly activist in dealing with challenges to emergency powers, and are unlikely to prevent government taking action to protect public safety.¹³¹ The government accepted these criticisms and the Bill was amended so that emergency regulations are to be treated as what they are, namely secondary legislation for the purposes of the Human Rights Act.

F. Martial law

The context

Martial law is perhaps the ultimate and gravest form of emergency power, and the severest threat to the rule of law. But it is one with which in this country at least we have no experience in modern time, and for that reason alone it would be wrong to state the principal aspects of martial law as if they were part of present-day law. Moreover, the Petition of Right 1628 contains a prohibition against the issue by the Crown of commissions of martial law giving the army powers over civilians, at least in peacetime, and the meaning of this prohibition is far from clear today.¹³²

In times of national emergency, Parliament has preferred to give the civil and military authorities wide powers of governing by means of temporary legislation (and perhaps now by emergency regulations). Any discussion of the possible operation of martial law must therefore assume that Parliament itself is prevented by the urgency of events from giving the necessary powers to the military authorities. If Parliament is sitting but refuses to pass

¹³⁰ Defined in turn to mean ‘specified by, or to be specified in accordance with, the regulations’: s 22(4).

¹³¹ HL Paper 184, HC 1074 (2002–03), para 149.

¹³² Cf *Marais v General Officer Commanding* [1902] AC 109, at p 115.

emergency legislation or approve emergency regulations, there would seem to be great difficulty, from a constitutional standpoint, in accepting that extraordinary powers of the military arise by process of common law.¹³³

If, however, a state of civil war or insurrection were to erupt, it is conceivable that Parliament would no longer be in control. If in these circumstances the administration of justice breaks down because the courts are unable to function, it follows as a matter of fact that the acts of the military in seeking to restore order cannot be called into question in the courts so long as this situation lasts. But if martial law is to be contemplated in such circumstances, then as the Law Officers said in 1838 in relation to the power of the governor of Lower Canada, martial law ‘can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible’.¹³⁴

It is important to be clear that if the executive should ever proclaim martial law, the proclamation will not in itself increase the legal authority or powers of the military: it merely gives notice to the population of the course of action the government, or in the absence of which the military, proposes to adopt to restore order. It is also clear that as also pointed out by the Law Officers in 1838, when the regular courts continue in operation, any persons arrested by the military must be delivered to the courts to be dealt with according to law: ‘there is not, as we conceive, any right in the Crown to adopt any other course of proceeding’.¹³⁵

Meaning of martial law

The term martial law may be given a variety of meanings. In former times martial law included what is now called military law.¹³⁶ In international law, martial law refers to the powers exercised by a military commander in occupation of foreign territory. In the present context, martial law refers to an emergency amounting to a state of war when the military may impose restrictions and regulations on citizens in their own country.¹³⁷ In such a situation of civil war or insurrection, the ordinary functioning of the courts gives way before the tasks of the military in restoring the conditions that make normal government possible.

Unlike the use of armed force for restoring order during riots, when the military are subject to direction by the civil authorities and to control by the courts if excessive force is used, under martial law the military authorities are (for the time being) the sole judges of the steps that should be taken. These steps might involve taking drastic measures against civilians, for example, the removal of life, liberty or property without due process of law, but possibly accompanied by the creation of military tribunals to administer summary justice. Such tribunals are not to be confused with the courts-martial which regularly administer *military law*.

An attempt to describe the doctrine of martial law must be based on case law arising out of the Boer War, the civil war in Ireland early in the 1920s, and incidents in the earlier history of British colonies. In 1902, in the *Marais* case, the Privy Council significantly extended the doctrine of martial law by holding that a situation of martial law might exist although the civil courts were still sitting. During the Boer War martial law had been proclaimed over certain areas of Cape Colony: Marais, a civilian, sought in the Supreme Court at Cape Town to challenge the legality of his arrest and detention for breach of military rules in an area subject to martial law.

¹³³ Cf *Egan v Macready* [1921] 1 IR 265, 274. In addition, short of a military coup or an extreme emergency, on a scale difficult to anticipate, in which human survival becomes the only criterion, it must be assumed that the government continues to control the armed forces and to be responsible for their use to Parliament.

¹³⁴ Opinion of J Campbell and R M Rolfe, 16 January 1838; Keir and Lawson, p 231.

¹³⁵ *Ibid.*

¹³⁶ See Armed Forces Act 2006.

¹³⁷ Keir and Lawson, *Cases in Constitutional Law*, ch III C; Heuston, *Essays in Constitutional Law*, pp 150–62.

Lord Halsbury, on behalf of the Judicial Committee, declared that where war actually exists, the ordinary courts have no jurisdiction over the military authorities, although there might often be doubt as to whether a situation of war existed, as opposed to a mere riot or other disturbance.¹³⁸ Once a war situation had been recognised to exist, the military would presumably be able to deal with the inhabitants of an area under martial law on the same footing as the population of a foreign territory occupied during a war between states, subject only to the possibility of being called to account for their acts in civil courts after the resumption of normal government at a later date.

Martial law in Ireland

The British government sought to take advantage of *Marais* during the serious disturbances in Ireland in 1920–21. Early in 1920 the Westminster Parliament passed the Restoration of Order in Ireland Act, which gave exceptional powers to the executive, created new offences, provided for civilians to be tried and sentenced by properly convened courts-martial and prescribed the maximum penalties that could be imposed. Yet, in December 1920, martial law was proclaimed in areas of Ireland and the general officer commanding the army declared *inter alia* that any unauthorised person found in possession of arms would be subject to the death penalty.

The GOC also established informal military courts for administering summary justice. In *R v Allen*, the King's Bench Division in Ireland refused to intervene where a death sentence had been imposed by such a military court on a civilian for possession of arms. The court held that a state of war existed in the area in question; that military acts could not therefore be questioned in the civil courts even though the latter were still operating; and that the military authorities could take the lives of civilians if they deemed it to be absolutely essential. It was immaterial that Parliament had not authorised the death penalty for unauthorised possession of arms.¹³⁹

The decisions of other Irish courts were not all so favourable to the army.

In *Egan v Macready*,¹⁴⁰ O'Connor MR distinguished the *Marais* case, holding that the Restoration of Order in Ireland Act 1920 created a complete code for military control of the situation which excluded the power of the army to impose the death penalty where Parliament had not granted this; he ordered the prisoner to be released by issuing habeas corpus.

In *R (Garde) v Strickland*,¹⁴¹ the court in strong terms asserted its power and duty to decide whether or not a state of war existed which justified the application of martial law, holding also that, as long as that state existed, no court had jurisdiction to inquire into the conduct of the army commander in repressing rebellion.

In the only decision by the House of Lords, *Re Clifford and O'Sullivan*, on facts similar to those in *R v Allen* it was held that the courts could not, by issuing a writ of prohibition,

¹³⁸ *Marais v General Officer Commanding* [1902] AC 109. And see *Tilonko v A-G of Natal* [1907] AC 93.

¹³⁹ [1921] 2 IR 241. See Campbell, *Emergency Law in Ireland 1918–1925*. For Cabinet discussion of martial law in Ireland, see Jones, *Whitehall Diary*, vol 3, part I.

¹⁴⁰ [1921] 1 IR 265, criticised by Heuston, above, p 158.

¹⁴¹ [1921] 2 IR 317.

review the proceedings of a military tribunal set up under a proclamation of martial law.¹⁴² This decision turned on the technical scope of the writ of prohibition, at that time considered to be available only against inferior bodies exercising judicial functions.¹⁴³ The House of Lords regarded the military tribunal in question, which was not a regularly constituted court-martial, as merely an advisory committee of officers to assist the commander in chief; moreover its duties had already been completed.¹⁴⁴ It followed that the army's decision to take the life of a citizen did not become subject to judicial control merely because an informal hearing had been given to the civilian by a military tribunal.

After martial law ends

After termination of the state of martial law, the courts will have jurisdiction to review the legality of acts committed during the period of martial law.¹⁴⁵ It is not possible to state with any certainty what standards will be applied by the courts in respect either of criminal or civil liability. There is no doubt that at common law many acts of the army will be treated as having been necessary for dealing with the situation, and will be justified; nor is there likely to be liability at common law for damage to person or property inflicted accidentally in the course of actual fighting.¹⁴⁶

But what is not clear is whether the test should be that of strict necessity or merely bona fide belief in the necessity of the action, whether a stricter standard may be required in the case of some acts than in others, or where the burden of proof should lie. There is also some uncertainty as to the legal effect of superior orders,¹⁴⁷ while in the past it was usual after martial law for an Act of Indemnity to be passed giving retrospective protection to the armed forces. Following *Wright v Fitzgerald*,¹⁴⁸ it would seem that in interpreting an Indemnity Act, the courts presume that Parliament does not intend to indemnify a defendant for wanton or cruel acts unjustified by the circumstances.

That said, the extent of protection depends on the terms of the Indemnity Act, which may be both explicit and very wide,¹⁴⁹ though the presence of Convention rights casts a fresh light on any pre-existing common law rules or indemnity legislation. It is true that the ECHR, art 15 permits derogation from Convention rights in the event of a public emergency threatening the life of the nation. But while the circumstances giving rise to the need to proclaim martial law must be assumed to fall within the scope of this provision, it is to be recalled that there are a number of Convention rights that cannot be compromised, even in such an extreme public emergency.

In the event of martial law being proclaimed, those responsible would thus be liable after the event not only at common law (to the extent not authorised by common law or protected by an Indemnity Act), but also for any violations of core Convention rights, notably arts 2 (right to life), 3 (inhuman or degrading treatment or punishment), 4 (slavery or servitude) and 7 (no retrospective criminal laws). In the event of a failure of the domestic courts (for any reason) to enforce these rights in the aftermath of martial law, it would be possible to seek a resolution in Strasbourg, assuming that the governing authorities had not denounced the ECHR in the meantime.

¹⁴² [1921] 2 AC 570.

¹⁴³ Ch 25.

¹⁴⁴ The House expressly refrained from discussing the merits of other remedies that might be available, for example, a writ of habeas corpus.

¹⁴⁵ See *Higgins v Willis* [1921] 2 IR 386.

¹⁴⁶ *Burmah Oil Co v Lord Advocate* [1965] AC 75; and ch 10.

¹⁴⁷ Compare *Keighley v Bell* (1866) 4 F&F 763 and *H M Adv v Hamton* (1861) 4 Irv 58, esp p 69.

¹⁴⁸ (1798) 27 St Tr 765, discussed by P O'Higgins (1962) 25 MLR 413.

¹⁴⁹ See the notorious example in *Phillips v Eyre* (1870) LR 6 QB 1 and cf Indemnity Act 1920.

The ECHR thus ought to create a contemporary obstacle to an undiluted form of martial law, even with the power of derogation in art 15.

G. Conclusion

It should thus be clear that there is a wide range of special and emergency powers available to the government and law enforcement agencies, starting with the use of the troops to assist the civil power, through to the special powers taken to deal with terrorism, through to the taking of more serious emergency powers, to the introduction of martial law. It has not been necessary in modern times to contemplate taking steps at the latter end of the continuum, though martial law was declared in Ireland at a time when it was part of the United Kingdom.

The declaration of martial law should not be forgotten, providing an insight into the likely response of the civil and military authorities in the event of what appears at the moment to be the unlikely possibility of civil insurrection. Also long forgotten today is the use of emergency powers. Although such powers were renewed and expanded in 2004, it has not been necessary for them to be invoked since the 1970s, perhaps due in part to the strengthening of the capacity of the ordinary law enforcement agencies to deal with civil unrest and related problems.

Perhaps the main change that has taken place in this field has been the normalisation of special powers to deal with terrorism. These were powers that started as emergency powers, which have not only gradually expanded but have also become permanent. The response to terrorism has thus been at a considerable cost to traditional liberties formally protected by the common law, the ECHR, and the Human Rights Act, and a constant challenge to the rule of law, the preservation of which is often their justification. Freedoms lost are rarely recovered.

We have seen measures which compromise in varying degrees of severity the right to liberty (art 5), the right to privacy (art 8), the right to freedom of expression (art 10), and the right to freedom of association (art 11), as well as the right to private property (First Protocol, art 1). It has also led to permanent changes to the criminal justice system, for although the special provisions of the Terrorism Act 2000 (Part VII) relating to Northern Ireland have lapsed,¹⁵⁰ key provisions have been re-enacted in another form, albeit with modifications.¹⁵¹

Yet the foregoing measures by no means exhaust the restraints that have been introduced since 9/11 in particular, with further restrictions on freedom of expression,¹⁵² and the additional restraints on private property.¹⁵³ Other departures from standard practice include the provisions authorising the post-charge questioning of terrorist suspects,¹⁵⁴ and the requirement that those convicted of a terrorist offence register with the police (under notification procedures),¹⁵⁵ and are thereby subject to foreign travel restriction orders, which do exactly as their name suggests.¹⁵⁶

While a case can doubtless be made to explain all of this as being a necessary response to particular circumstances, care needs to be taken to avoid restrictions that are over-broad, and that terrorist activity is not used as a cover to take powers that bear little relationship to the public emergency by which they were initially justified.¹⁵⁷

¹⁵⁰ See the 14th edition of this book, pp 646–9, for an account of these measures.

¹⁵¹ Justice and Security (Northern Ireland) Act 2007.

¹⁵² See p 551 above.

¹⁵³ See Counter-Terrorism Act 2008, ss 62–73, and Terrorist Asset-Freezing etc Act 2010.

¹⁵⁴ Counter-Terrorism Act 2008, s 22.

¹⁵⁵ *Ibid*, ss 40–61.

¹⁵⁶ *Ibid*, s 58.

¹⁵⁷ For a thoughtful discussion of some of the issues raised, see D Anderson, *The Terrorism Acts in 2012*, above.

PART IV

Administrative law

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CHAPTER 21

What is administrative law?

The role of the courts in securing judicial review of the decisions of public authorities is a feature of government in the United Kingdom of great constitutional significance. This significance has increased during the last 25 years, both because of the number of cases coming to the courts¹ and the content of the leading cases. This may be why judicial review is sometimes thought to be the only part of administrative law that lawyers need to know. But this is no more correct than to say that employment lawyers need study only the law of unfair dismissal or tort lawyers the law of negligence. Certainly, the law of judicial review, outlined in chapters 24 and 25, is a vital part of administrative law, but the part must not be mistaken for the whole.

A formal definition of administrative law is that it is a branch of public law concerned with the composition, procedures, powers, duties, rights and liabilities of the various organs of government that are engaged in administering public policies. These policies are either laid down by Parliament in legislation or developed by the government and other authorities in the exercise of their executive powers. On this approach, administrative law includes at one end the principles and institutions of constitutional law outlined in earlier chapters; and at the other the detailed rules in statutes and secondary legislation that govern the provision of complex social services (such as social security and education), the regulation of economic activities (such as financial services), the control of immigration, and environmental law. The constitutional theorist would focus on the former; the practitioner the latter.

It will be evident that there is no ‘bright line’ demarcating constitutional and administrative law. Building on the account of constitutional principles already given, this part of the book deals with aspects of administrative law relevant to all areas of government. These are the powers of the executive to make secondary, or delegated, legislation; the system of administrative justice whereby tribunals and inquiries and the Parliamentary Ombudsman make decisions or provide redress for individual grievances; judicial review; and the liability of public authorities, notably central government, to be sued for damages. The aim will be to identify the key rules and processes that help to ensure that lawful and just standards of public administration are observed.²

A. The functions and development of administrative law

Functions of administrative law

One important function of administrative law is to enable the tasks of government to be performed, including by recognising administrative agencies and their powers to act on behalf

¹ In 1981, 533 applications for judicial review were made, of which 376 were allowed; in 1994, 3,208 were made and 1,260 allowed: Bridges, Meszaros and Sunkin, *Judicial Review in Perspective*, app 1. In 2008, 7,169 applications were made and leave was granted in 914 cases (*Judicial and Court Statistics 2008*).

² For fuller accounts, see the textbooks on administrative law by (respectively) Cane, Craig, Endicott, and Wade and Forsyth. Also Richardson and Genn (eds), *Administrative Law and Government Action*; Harlow and Rawlings, *Law and Administration*; Taggart (ed.), *The Province of Administrative Law*; and Beatson, Matthews and Elliott, *Administrative Law: Text and Materials*.

of the state and of the community at large. A second function is to govern the relations between public bodies, for example, between the Secretary of State and a local authority or between two local authorities.³ A third function is to govern the relations between a public agency and the individuals or private bodies over whose affairs the agency exercises power. We have seen that at the heart of the ‘rule of law’ is the principle of government according to law.⁴ Since every public agency needs legal powers to perform its tasks, it necessarily follows that the agency must not go outside its powers. The content and extent of powers granted will reflect the social, economic and political values recognised in society. The granting of powers is subject both to express conditions or limitations, and also to implied requirements, such as the duty to exercise powers in good faith.

Individuals are affected by administrative powers in many ways, sometimes to their benefit and sometimes to their detriment. An individual’s rights are seldom absolute: thus a landowner whose farm is required for a new reservoir does not have an absolute right to prevent acquisition of the land for a lawful purpose that is considered to be in the public interest. Nor do parents with a seriously ill child have an absolute right to medical treatment for him or her in the NHS when this is not recommended on clinical grounds.⁵ Conversely, the powers of public authorities should not themselves be regarded as absolute. Private individuals, local communities and minority groups, all have a right to legal protection when confronted with the coercive powers of the state. Since there are few absolutes, the law has to determine the form and extent of that protection and the basis on which disputes may be resolved. The more fundamental the rights of the individual affected, the greater ought to be the degree of protection.⁶

The constitutional background to administrative law

Earlier chapters described the structure of central government; the responsibility of ministers to Parliament; the use of public bodies to regulate public utilities; and the effect of public powers on the individual’s rights and liberties. The legislative supremacy of Parliament is relevant to administrative law, since (except where a conflict with EU law arises) no court can hold that the powers of an agency created by Act of Parliament are invalid or inoperative, although the Human Rights Act 1998 permits a statute to be declared incompatible with Convention rights. Where an agency’s powers do not come from an Act of Parliament, but from other legislative measures (such as legislation enacted in Northern Ireland, Scotland or Wales, or ministerial regulations) the courts may review the legality of the agency’s powers, as well as the decisions taken in reliance on those powers.

In a modern legal system, the way that disputes arising out of administration are handled is of constitutional significance. Where, as in Germany, there are separate superior courts, one entrusted with interpreting the constitution and one dealing with disputes between the citizen and the administration, a distinction between constitutional and administrative law can be based on the actual work done by the two courts. In the United Kingdom such a distinction cannot be drawn: although the section of the High Court in England and Wales dealing with judicial review was in 2000 re-named the Administrative Court, appeals from the court go along with other civil cases to the Court of Appeal and thence the Supreme Court. Issues of constitutional significance may arise from civil cases brought against public

³ See respectively *R (Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin), [2011] LGR 553; *Bromley BC v Greater London Council* [1983] AC 768.

⁴ Ch 4.

⁵ *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129.

⁶ This principle was expressly approved in respect of judicial review in *R v Ministry of Defence, ex p Smith* [1996] QB 517, 554.

officials⁷ as well as from cases involving criminal justice⁸ and judicial review.⁹ The fact that the Human Rights Act makes it unlawful for public authorities to act inconsistently with the Convention rights is another reason why administrative and constitutional cases cannot be separated. The criminal law as such falls outside administrative law, but the operations of the police and the penal system often give rise to disputes about the exercise of powers (for example, over the rights of convicted prisoners against the prison authorities).¹⁰ The procedures of Parliament fall outside administrative law, but the rules of public audit affect the working of government departments,¹¹ and parliamentary procedures for the scrutiny of delegated legislation may be relevant in cases of judicial review.¹²

Historical origins of administrative law

During the 19th century the Court of King's Bench extended its controlling jurisdiction beyond the justices of the peace to the new administrative bodies springing up in the form of councils and boards. Since they exercised statutory powers, disputes about the limits of their power could be settled by means of the prerogative writs. These procedures for judicial control over inferior courts were used to review the exercise of powers by local authorities and, in the 20th century, by ministers of the Crown.¹³ Given the scale of government in the 21st century, the need for judicial review of executive decisions to be available is undiminished.

Inevitably, the supervisory role of the courts has developed as patterns of government have changed. Judicial review of decisions by ministers is complementary to, not a substitute for, ministerial responsibility to Parliament. Remarkably, in the three legal systems of the United Kingdom, the grounds of judicial control have never been defined in legislation. However, by the common law doctrine of precedent, principles have developed both for policing the limits of powers and for reviewing the use of discretionary powers. In 2010, Lord Bingham, the leading judge of our time, declared this principle as being at the heart of the rule of law.

Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purposes for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.

This principle applies whenever public power is exercised, regardless of whether it is derived from legislation or, as a matter of common law, from the royal prerogative.¹⁴ It is the detailed application of this general principle that we will examine in chapters 24 and 25.

In Scotland, the detailed history is different but the general form of the development has been similar. The remedies for controlling inferior tribunals and administrative agencies were obtained from the Court of Session by the procedures used for civil litigation between private parties. But the principles upon which judicial control was founded were remarkably similar to those developed in English law.¹⁵ The sheriff court exercised an important role in

⁷ E.g. *Austin v Metropolitan Police Commissioner* [2009] UKHL 5, [2009] 1 AC 564.

⁸ E.g. *Boddington v British Transport Police* [2010] 1 AC 345.

⁹ E.g. *R (Purdy) v DPP* [2009] UKHL 45, [2009] 4 All ER 1147.

¹⁰ E.g. *R (Daly) v Home Secretary* [2001] 2 AC 532; and see *Roberts v Parole Board* [2005] UKHL 45, [2005] 2 AC 738.

¹¹ See Turpin, *Government Procurement and Contracts*.

¹² Ch 22; and see *HM Treasury v Mohammed Jabar Ahmed* [2010] UKSC 2, [2010] 2 AC 534.

¹³ See e.g. *R v Glamorganshire Inhabitants* (1700) 1 Ld Raym 580 (review of rates levied by county justices to pay for repairs to bridge), *Board of Education v Rice* [1911] AC 179 and *Local Government Board v Arlidge* [1915] AC 120, on which see Dicey, *The Law of the Constitution*, app 2, [2010] 2 AC 534.

¹⁴ E.g. *CCSU v Minister for Civil Service* [1985] AC 374; *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61, [2009] 1 AC 453.

¹⁵ See e.g. *Moss Empires Ltd v Glasgow Assessor* 1917 SC (HL) 1. Also *Stair Memorial Encyclopaedia, The Laws of Scotland*, vol 1, title Administrative Law (reissue 2000); Clyde and Edwards, *Judicial Review*.

enabling many local administrative disputes to be settled judicially.¹⁶ Since 1900, much of the development in government has been by statute law applying both in England and Scotland; the response of the Scottish courts has been similar to that of the English courts.

In Scotland, as well as Northern Ireland and Wales, there is now a layer of devolved government to which administrative law applies. Apart from questions as to the extent of the devolved powers, which must be decided in accordance with the devolution legislation,¹⁷ decisions by the devolved governments are subject to the same process of judicial review as are decisions of other public bodies.

Dicey's misconception

The study of administrative law in Britain was formerly impeded by a misleading comparison which the constitutional writer, A V Dicey, drew over a hundred years ago between the law in France (*droit administratif*), under which separate administrative courts (headed by the Conseil d'Etat) determined disputes concerning the exercise of administrative power, and the common law in England.¹⁸ Dicey contrasted what he saw as the disadvantages in the French system of administrative courts with the advantages enjoyed in Britain where the common law, as Dicey saw it, subjected executive actions to control by the same courts and on the same principles as governed relationships between private citizens. Dicey believed that the common law gave the citizen better protection against the executive than the French system. Unfortunately, he overlooked the weaknesses of the archaic law that then protected the Crown and government departments from being sued.¹⁹ Moreover, his denial that *droit administratif* existed in England led many to suppose that there was no such thing as administrative law in the United Kingdom. In the landmark decision of *Ridge v Baldwin* in 1964 Lord Reid said: 'We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it'.²⁰ Lord Diplock described the rapid development of 'a rational and comprehensive system of administrative law' as having been 'the greatest achievement of the English courts' in his judicial lifetime.²¹ Another judge has written that in this area of common law, 'the judges have in the last 30 years changed the face of the United Kingdom's constitution'.²²

Administrative law in Europe is today a fertile ground for comparative research and analysis.²³ Despite many developments on both sides of the English channel that have occurred since Dicey wrote, the French system of *le contentieux administratif* is based on the use of separate administrative courts, whereas the British system relies heavily on the superior civil courts. In both systems, the essential principles of judicial control are judge-made and do not derive from codes or statutes. In France, the price paid for a separate administrative jurisdiction is a complex body of law at the divide between the civil and administrative courts; and conflicts between the two systems of courts must (if necessary) be settled by the *Tribunal des conflits* or by legislation. But the French system has developed rules of procedure (for example, regarding

¹⁶ *Brown v Hamilton DC* 1983 SC (HL) 1.

¹⁷ Ch 2 B.

¹⁸ *The Law of the Constitution*, ch 12 and app 2. For critiques of Dicey's approach, see F H Lawson (1959) 7 *Political Studies* 109, 207; and H W Arthurs (1979) 17 *Osgoode Hall LJ* 1. See also Brown and Bell, *French Administrative Law* and, for a recent appraisal of the French system, J-M Sauvé [2008] PL 531.

¹⁹ These defects were very evident after the First World War: see J Jacob [1992] PL 452.

²⁰ [1964] AC 40, 72.

²¹ *Re Racal Communications Ltd* [1981] AC 374, 382; and *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed* [1982] AC 617, 641. And see Lord Diplock [1974] CLJ 233; Lord Scarman [1990] PL 490.

²² S Sedley, in Richardson and Genn (note 2 above), p 36.

²³ See e.g. Schwarze, *European Administrative Law*.

the obtaining of evidence from government departments) and rules of substantive liability (for example, regarding liability for harm caused by official acts) which take account of the public setting of the disputes. The latter rules often impose special duties upon public authorities (for example, liability without fault in some circumstances),²⁴ not merely immunities.

By contrast, the British approach (as we shall see in chapter 26) has been to apply the same general principles of liability in contract and tort to public bodies as well as to private citizens.²⁵ The position is different regarding judicial review of official decisions, since this jurisdiction has no direct counterpart in private law. The Administrative Court is able to provide a fair and effective decision when the legality of official acts is challenged, and in cases of urgency it may act very quickly indeed.

The development of administrative law

The explosion of government in the 20th century did not wait for lawyers and academic writers in Britain to acquire an understanding of administrative law. The first books on the subject by that name appeared in the late 1920s.²⁶ At that time a narrow approach was taken to the subject, confining it to delegated legislation and the exercise of judicial powers by administrative bodies. In 1955 the Committee on Administrative Tribunals and Inquiries was appointed to review (a) the constitution and working of statutory tribunals appointed in connection with the functions of ministers and (b) the operation of administrative procedures that included the holding of public inquiries or hearings on behalf of ministers, especially in relation to the compulsory purchase of land. This committee (the Franks committee) reported in 1957.²⁷ In examining the post-war use of tribunals and inquiries, Franks adopted a pragmatic approach, finding it difficult to distinguish conceptually between the ‘judicial’ and ‘administrative’ decisions of ministers. The report made a detailed appraisal of existing tribunals and inquiries, arguing that they should be marked by the qualities of openness, fairness and impartiality. The committee also concluded that judicial control, whether by appeal to the courts or by use of the prerogative orders, should be maintained and if necessary extended. This influential report led to the Tribunals and Inquiries Act 1958 which, in setting up the Council on Tribunals and in other ways, laid foundations for the evolution of tribunals and inquiries over the next 50 years.²⁸ The Franks report dealt solely with areas of government where recourse to a tribunal or a public inquiry was already available. But in many areas of governmental power neither safeguard existed, and the law provided no systematic redress for individuals suffering from maladministration. In 1967, following a recommendation by the Whyatt Report, *The Citizen and the Administration*, the office of Parliamentary Ombudsman was created, a constitutional reform that has stood the test of time.

The judicial review of government decisions was marked during the middle years of the 20th century by what has been called the ‘great depression’ or the ‘long sleep’²⁹ – when the judiciary appeared to acquiesce in an unjustified diminution of their role. When in the late 1960s the senior judges became willing to make greater use of their powers, attention concentrated on the archaic and highly technical processes by which judicial review had to be obtained. In

²⁴ R Errera [1986] CLP 157.

²⁵ *Dorset Yacht Co v Home Office* [1970] AC 1004; ch 26 A. And see Fairgrieve, Andenas and Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective*.

²⁶ Robson, *Justice and Administrative Law*, and Port, *Administrative Law*. And see G Drewry, in Supperstone, Goudie and Walker (eds), *Judicial Review*, ch 2. For a different approach, see Willis, *The parliamentary powers of English government departments*.

²⁷ Cmnd 218, 1957.

²⁸ Ch 23, and see J A G Griffith (1959) 22 MLR 125.

²⁹ See respectively Wade and Forsyth, *Administrative Law*, p 14; S Sedley in Andenas and Fairgrieve (eds), *Tom Bingham and the transformation of the law*, p 183.

1976, the English Law Commission recommended major procedural reforms;³⁰ these were implemented between 1977 and 1981, creating the procedure of application for judicial review.³¹ A similar but not identical procedure was introduced into Scots law in 1985.³²

In 2000, some changes made to the process of judicial review included the re-labelling of historic remedies and the naming of the Administrative Court.³³ At the same time, the Human Rights Act 1998 came into effect with far-reaching implications for administrative law, since it introduced new rules of statutory interpretation, required public authorities to act consistently with Convention rights and thereby created new grounds of judicial review.³⁴ While initially it could be claimed that the effect of the Human Rights Act was merely to reinforce existing rules of the common law, in reality the House of Lords (and since October 2009 the Supreme Court) has given much attention to claims that would have failed apart from the Act.³⁵

B. Law and the administrative process

The principle that government must be conducted according to law means that for every act performed in the course of government there must be legal authority.³⁶ That authority is usually derived expressly or by implication from statute or sometimes from the royal prerogative. Moreover, the Crown has at common law the same capacity as any other person to make contracts, own property etc.³⁷ A public body must be able to show that it is acting in accordance with legal authority when its action (for example, the levying of a tax) adversely affects the rights or interests of a private individual.

It is not possible to describe the administrative process in terms of law alone. There are many tasks (for example, budgeting and coordination) to which law is not of primary relevance. The creation of executive agencies, like many developments within the civil service, has not been authorised by legislation, being regarded as essentially a form of departmental management. Many politicians and administrators are likely to view law instrumentally as a means of achieving social or economic policies. In areas of government such as taxation, the detailed rules are found in statutes or in judicial decisions interpreting the statutes. Even so, those rules may not provide the complete picture since from time to time the revenue authorities exercise an extra-statutory discretion not to enforce payment of tax in a situation which neither Parliament nor the government can have foreseen. But the practice of granting extra-statutory concessions would defeat the whole purpose of imposing taxes by law if it became widespread; by the nature of a tax concession, it may escape challenge in a court of law.³⁸

³⁰ Cmnd 6407, 1976; cf Scottish Law Commission, *Remedies in Administrative Law*, 1971.

³¹ Ch 25.

³² See works cited in note 15. Also T Mullen, K Pick and T Prosser [1995] PL 52; and CMG Himsworth in Supperstone, Goudie and Walker (eds), *Judicial Review*, ch 22.

³³ See *Review of the Crown Office List* (Bowman report), 2000; Civil Procedure Rules, Part 54.

³⁴ See ch 14.

³⁵ S Shah and T Poole [2009] PL 347.

³⁶ The contrary view, expressed in *Malone v Metropolitan Police Commissioner* [1979] Ch 344, was disapproved in *R v Somerset CC, ex p Fewings* [1995] 3 All ER 20, and would conflict with the ECHR. See Harris, O'Boyle and Warbrick, *Law of the ECHR*, pp 344–8, 399–407.

³⁷ B V Harris (1992) 108 LQR 626, and (2007) 123 LQR 225. The Crown's power to make payments without statutory authority may not be used when this would contradict the clear intention of Parliament: *R (Wilkinson) v IRC* [2005] UKHL 30, [2006] 1 All ER 529.

³⁸ But not necessarily: *R (Davies) v HMRC* [2011] UKSC 47, [2011] 1 WLR 2625; and there may still be judicial criticism: *Vestey v IRC* [1980] AC 1148.

By contrast with taxation, in many areas of government the nature of the legal framework is deliberately skeletal, to allow for a flexible discretion on the part of the department concerned in promoting policies that are nowhere laid down in statutory rules. Thus the department responsible for promoting international development has a broad power to provide economic or humanitarian assistance to overseas countries,³⁹ that can be used to promote widely differing policies. Wide discretion is found in many areas of government, such as the control of immigration or the granting of permission for the development of land. In principle, the exercise of discretion is subject to control by the courts if it is exercised unlawfully. In practice, the use of discretion is often closely controlled through policy decisions taken by ministers or departmental rules which lay down how officials should exercise their powers.⁴⁰ At one time, such policies and rules were often protected from publication outside Whitehall, but today's more open approach to government requires disclosure of all policies and rules that are relevant to decision-making in individual cases.⁴¹

Many officials are therefore concerned with administering government policies rather than with administering the law as such. It is often difficult to separate administration of an existing policy from the making of a new policy. When a department is exercising discretionary powers and a case arises that raises new features, a decision on the facts will serve as a precedent for future decisions of a similar kind. Thus the process gives rise to the formulation of a more detailed policy than had previously existed.

Decision-making within a department is very different from the process by which a court settles a dispute. A civil case, for example, is decided by the judge after hearing evidence and legal arguments brought before the court by the parties in an adversary procedure. Oral proceedings take place in public before the judge, in the presence of the parties and their lawyers. A reasoned decision is announced in open court; when made it can be challenged only by appeal to a higher court. By contrast, departmental decisions are typically taken in private, without an adversary procedure. Often it is not known at what level in the department the decision has been taken. Political pressure may be brought to bear both before and after the decision. Except where a statute so requires, or where it would be unfair for reasons to be withheld, reasons for the decision are not in law required to be given. The decision-making may be subject to disclosure under the Freedom of Information Act 2000, but there are numerous exemptions which allow the information to be withheld in the public interest.

Although the two processes of administrative and judicial decision-making are different, we should not assume that one method is superior to the other or suppose that a department should always try to adopt the methods of a court. Much depends on the type and number of decisions to be made and on the results which it is desired to achieve from a particular scheme. Decisions made on the basis of general rules and after a procedure that enables the facts to be ascertained and competing considerations to be assessed are likely to be fairer than if made without such aids to decision-making. Thus many classes of decisions that are taken by civil servants at first instance (in such areas as taxation, social security and immigration) are subject to an appeal to independent tribunals, which apply a modified form of judicial procedure in making decisions.

³⁹ International Development Act 2002. And see *R v Foreign Secretary, ex p World Development Movement* [1995] 1 All ER 611.

⁴⁰ On departmental rules and 'quasi-legislation', see ch 22. For the relevance of policies in planning decisions, see *R (Alconbury Developments Ltd) v Environment Secretary* [2001] UKHL 23, [2003] 2 AC 295.

⁴¹ *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

Powers, duties and discretion

A recurring feature in administrative law is the interplay between powers, duties and discretion. If someone satisfies the legal rules that govern who may vote in parliamentary elections, then he or she has a right to be entered on the electoral register and a right to vote in the area where he or she is registered. The relevant officials are under a correlative duty to give effect to these rights. Many situations that arise in the course of public administration are less clearcut. Thus a minister may be under a duty to achieve certain broad policy objectives without in law being required to take action of any particular kind. Clearly, steps taken in the performance of such a duty involve the exercise of discretion. As Lord Diplock said:

The very concept of administrative discretion involves a right to choose more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred.⁴²

Where an Act confers authority to administer a branch of government, it may confer a broad duty on the minister and other public authorities to fulfil certain policy objectives. It may impose specific duties on the minister to act when certain conditions exist and it will probably confer powers on the authorities concerned. In administrative law, ‘power’ has two meanings, which are not always distinguished: (a) the capacity to act in a certain way (for example, power to provide a library service or to purchase land by agreement for a sports field); and (b) authority to restrict or take away the rights of others (for example, power to regulate the mini-cab trade in a city or to buy land compulsorily that is needed for a public purpose). Since it is inherent in the nature of a power that it may be exercised in various ways, use of a power invariably requires the exercise of discretion; and power and discretion are often used interchangeably. Often there is a duty to exercise a discretion. When an official decides to perform a duty or to exercise a power or discretion in a certain way, the decision may delight some persons and disappoint others. Within a democracy, important choices of this kind should be made by those who have political responsibility for them, not by judges.⁴³ Those whose rights or interests are adversely affected by an administrative decision may wish to challenge it, whether by taking any political action to get it changed that is still possible, by using any rights of appeal that exist, or by seeking judicial review.

Classification of powers

Under a written constitution founded on a formal separation of powers, it may be necessary for a court to decide whether legislative or executive action has improperly infringed the judicial power.⁴⁴ Although this is not the case in the United Kingdom, there are several purposes in administrative law for which it may be needed to classify the powers of government as being legislative, administrative or judicial in character. Under the Statutory Instruments Act 1946 in its application to earlier statutes, a distinction was drawn between instruments that were *legislative* and those that were *executive* in character.⁴⁵ The jurisdiction of the Parliamentary Ombudsman applies to ‘action taken in the exercise of *administrative* functions’ by a government department, which may mean that it does not extend to the functions of departments

⁴² *Secretary of State for Education v Tameside MBC* [1977] AC 1014, 1064. And see Davis, *Discretionary Justice*, and Galligan, *Discretionary Powers*.

⁴³ See the *Alconbury* case (above), esp paras [48] (Lord Slynn), [70] (Lord Hoffmann), [139]–[141] (Lord Clyde).

⁴⁴ *Liyana v R* [1967] 1 AC 259; *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett* [2005] UKPC 3, [2005] 2 AC 356. And ch 4 C.

⁴⁵ SI 1948/1, reg 2(1); ch 22.

which are legislative in character.⁴⁶ Under the Crown Proceedings Act 1947, s 2(5), the Crown is not liable for the acts of any person who is discharging responsibilities of a *judicial* nature.⁴⁷ This absolute rule of non-liability has now been altered by the Human Rights Act 1998, s 9, under which the Crown must in some circumstances compensate those who have lost their liberty by reason of a judicial act.⁴⁸

While many powers may be described without difficulty as legislative (in particular, a power to make regulations), administrative (for instance, power to decide where a government office should be located) or judicial (for example, power to decide the meaning of a disputed statute), other powers are so classifiable, if at all, only with difficulty. Laws are not always general in application: legislative form may be used to give effect to the government's decision of an individual case.⁴⁹ Government departments exercise both formal and informal powers of rulemaking: is the delegation of executive powers to be regarded as a legislative act?⁵⁰ How should we classify, for instance, the decision to build a motorway?⁵¹ Does a decision change its character from being judicial to administrative if it is transferred from a court to a government department?⁵²

Today, administrative functions are subject to judicial review without it being necessary for a court first to apply a classificatory label. Public authorities are under a general duty to act fairly, even though the precise content of 'fairness' varies according to the context.⁵³ Public authorities are required by the Human Rights Act to exercise their functions consistently with rights under the ECHR.

Public and private law

A different classification problem comes from the tendency that the courts adopted after 1980 of resolving questions about jurisdiction, liability and procedure by asking whether the matter was one of private or public law. This formal distinction is reflected in the structure of many European legal systems. Thus in France many public law disputes are decided by the administrative courts; private law is a matter for the civil courts. By contrast, in Britain the superior civil courts exercise an undivided jurisdiction over all justiciable disputes, whether they concern private citizens or public authorities.⁵⁴

Lord Woolf has described public law as 'the system which enforces the proper performance by public bodies of the duties which they owe to the public'; and private law as 'the system which protects the private rights of private individuals or the private rights of public bodies'.⁵⁵ On this basis, the emphasis in public law is on holding public authorities to account for their conduct, and in private law on safeguarding individual rights. This analysis may help to explain some essential differences between applying for judicial review (a matter of 'public law') and bringing an action in tort ('private law'). But the distinction is deceptively simple. For one thing, Lord Woolf's two systems overlap to a significant extent. In the common law tradition, the system which protects the private rights of individuals *is* to an important extent the system which enforces the performance by public bodies of the

⁴⁶ Parliamentary Commissioner Act 1967, s 5(1); ch 23 D.

⁴⁷ Ch 26. See *Quinland v Governor of Swaleside Prison* [2002] EWCA Civ 174, [2003] QB 306.

⁴⁸ The 'judicial act of a court' includes 'an act done on the instructions, or on behalf, of a judge' (Human Rights Act 1998, s 9(5)).

⁴⁹ *Hoffmann-La Roche & Co v Trade Secretary* [1975] AC 295.

⁵⁰ Cf *Blackpool Corp v Locker* [1948] 1 KB 349.

⁵¹ *Bushell v Environment Secretary* [1981] AC 75.

⁵² Cf *Local Government Board v Arlidge* [1915] AC 120.

⁵³ See ch 24.

⁵⁴ Cf J D B Mitchell [1965] PL 95, advocating the creation of a new public law jurisdiction.

⁵⁵ [1986] PL 220, 221. Also Lord Woolf [1995] PL 57, 60–5.

duties which they owe to the public, at least if the public is regarded as comprising all private individuals.⁵⁶ Personal liberty, for example, is protected both by the law of habeas corpus⁵⁷ and by the law of tort (action for false imprisonment): does habeas corpus come within public law (as the aim is to get the court to order the detainee's release if the detention is unlawful) and the tort remedy within private law (as it may lead to damages being paid to the wrongly detained person)? Similarly, a landowner may take action to protect his property against trespass, whether the trespasser is a government department or a neighbouring owner. Should the classification depend on the identity of the defendant? Comparable questions arise under the Human Rights Act, which protects the individual's Convention rights as well as imposing a duty on public authorities not to infringe those rights.⁵⁸ When someone seeks to protect her Convention right to privacy against a public authority, should the proceedings be classed as being a matter of public or private law? Could the answer depend on whether the individual is seeking the (private law) remedy of damages, or the (public law) remedy of quashing the authority's decision? In either event, the claimant may want to restrain further breaches of privacy by the authority, a remedy that is available both in 'public' and 'private' proceedings.

Very often when a private claimant (C) is in dispute with a public authority (P), P's position is founded on a power or duty that has been conferred on it by Parliament. This form of legal justification is not usually available to a private person. In this situation, to overcome P's reliance on statutory authority, C may seek to show that P has (for instance) acted outside the statute or has not followed the correct procedure.⁵⁹ This requires the court to review the validity of P's defence, but this is in essence the same task as when a judge must decide in a case against the police whether they had lawful authority for entering and searching private property or making an arrest. What the common law tradition stresses is that, even if there were always a clearcut demarcation between public bodies and private persons,⁶⁰ the acts of public officials are (apart from the effects of statute) in principle subject to the ordinary law that applies to private persons.⁶¹

The courts have two broad tasks in administrative law. The first (which we may call 'judicial review') arises when an individual challenges the legality of a decision taken by a public authority and the court must, in exercising a supervisory jurisdiction, decide whether to uphold or set aside the decision. This task has no exact equivalent in private law, although in areas such as trusts, company and trade union law, disputes may arise as to the validity of decisions by trustees, company directors and trade union committees, and supervisory principles may be applied in the process of review.⁶² The second broad task (which we may call 'governmental liability') arises when individuals seek compensation or damages for loss caused by a public authority's unlawful acts. This task has much in common with the general law of tort, contract and restitution, which applies to public and private entities alike.

The Human Rights Act 1998 makes it no easier for a clear distinction to be drawn between private and public law. The scheme of the Act (by s 6(1)) is to impose a duty to act compatibly with Convention rights in relation to *all* the functions of a 'core' public authority (such

⁵⁶ E.g. *Entick v Carrington* (1765) 19 St Tr 1030; *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180. Also Allison, *A Continental Distinction in the Common Law*.

⁵⁷ See ch 25 D.

⁵⁸ Human Rights Act 1998, s 6.

⁵⁹ This was the situation in the iconic *Cooper v Wandsworth Board of Works* (p 660 below).

⁶⁰ And see *YL v Birmingham Council* (below).

⁶¹ See ch 26. Sir William Wade's argument in (1985) 101 LQR 180, 195–7, that *CCSU v Minister for the Civil Service* [1985] AC 374 concerned private law issues has received no support.

⁶² See Oliver, *Common Values and the Public–Private Divide*; and Craig, in Taggart (ed.), *The Province of Administrative Law*, ch 10.

as a local council or a government department), whether the nature of a specific act is public or private. And by s 6(5) of the Act, bodies that are not public authorities for all purposes ('hybrid' bodies, with a mixture of public and private functions) have duties under the Act only in respect of acts that are public in their nature. The courts found it difficult to determine whether private companies that are paid by public authorities to provide services (such as care of the elderly) are themselves to be regarded as 'public authorities'; and the leading decision on this question has been reversed by Parliament.⁶³ The importance of identifying public authorities under the 1998 Act is to an extent offset by the rule that courts and tribunals are themselves public authorities for the purposes of the Act; they thus have a duty to act consistently with Convention rights in adjudicating on disputes that arise between private parties.⁶⁴

We have seen that the broad purposes served by judicial review are the same in both English law and the law of Scotland. However, the law in Scotland has escaped the difficulties discussed in this section almost entirely, since the supervisory jurisdiction of the Court of Session does not depend on the private law/public law distinction.⁶⁵

Local government – a note

The emphasis in this book is on the constitutional structures that underlie the democratic government of the United Kingdom. In the context of administrative law, we are concerned with how public bodies provide services, exercise regulatory powers and so on. At a national level, the government's tasks include oversight of the economy, control of the physical environment, provision or oversight of services such as health and education, management of the state's revenues, promotion of 'law and order' and maintenance of the judicial system. As the case of the police shows, it is neither necessary nor desirable that all public services should be provided directly from Whitehall. Moreover, given privatisation of the public utilities and the involvement of private companies in many sectors of government, not all public services are provided directly by public authorities.

In the history of public administration in the United Kingdom, local authorities have played an important role, second in importance only to central government, and they have featured prominently in the evolution of administrative law. Since the 19th century, local councils have been affected by such doctrines of public law as the *ultra vires* rule, whereby a council, with power to levy local taxes and impose charges for services, and receiving grants from central government, may incur expenditure only for purposes authorised by statute. More recently, local government has been subjected to a bewildering quantity of legislative changes (including reorganisation of areas, new forms of local taxation and novel methods of management within councils).⁶⁶ Following the Localism Act 2011, local authorities have power to do anything that individual s generally may do (s 1(1)). Elected councils continue

⁶³ See *YL v Birmingham Council* [2007] UKHL 27, [2008] AC 95 (J Landau [2007] PL 630 and A Williams [2008] EHRLR 524). Earlier cases included *Poplar Housing Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48 and *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936. See D Oliver [2000] PL 476 and [2004] PL 329, M Sunkin [2004] PL 643, H Quane [2006] PL 106. For the sequel to the *YL* case, see Health and Social Care Act 2008, s 145.

⁶⁴ Ch 14. And see e.g. *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457. Also H W R Wade (2000) 116 LQR 217; M Hunt [1998] PL 423.

⁶⁵ *West v Secretary of State for Scotland* 1992 SLT 636; and see CMG Himsworth in Goudie, Supperstone and Walker (eds), *Judicial Review*, ch 22.

⁶⁶ See Bailey (ed.), *Cross on Local Government Law* and Himsworth, *Local Government in Scotland*. See also Loughlin, *Local Government in the Modern State*; and (the same) *Legality and Locality: the Role of Law in Central–Local Government Relations*.

to promote local democracy, as well as providing or enabling social services and administering regulatory systems and licensing at a local level. But an outline of the structure and operation of local government is outside the scope of this book.

In view of the conflicting demands made on local authorities and their limited fund-raising powers, they are often involved in the contentious side of administrative law, whether seeking judicial review against central government⁶⁷ or other local authorities,⁶⁸ defending claims for judicial review brought by individuals,⁶⁹ regulatory agencies⁷⁰ or central government⁷¹ or resisting actions for damages in tort resulting from alleged failures of duty.⁷² Local councils have never had the privileges and immunities that government departments enjoy as agents of the Crown.⁷³ Local administrators are not civil servants and management methods are often very different from those in central government.⁷⁴ Councillors operate in a political context and the legality of party groups has been recognised,⁷⁵ but they are subject to mechanisms for securing public accountability and proper standards of conduct.

Finally, local councils are ‘public authorities’ for purposes of the Human Rights Act 1998. Every local authority must exercise its functions in a way that is compatible with the Convention rights, except where, as a result of primary legislation, it is unable to act differently or has acted to give effect to primary legislation that could not be read in a manner compatible with the Convention rights.⁷⁶

C. Conclusion

This chapter has been a summary of the form and development of administrative law: what administrative law is. It does not readily lend itself to further abbreviation. It is not always easy to understand why the study of how a branch of law developed is worth knowing, let alone necessary to know. Administrative law is different. As will be seen in subsequent chapters, many of the day-to-day practical problems of administrative law only make sense if it is understood how the law has arrived at the situation it has. The origins and development of the judicial control of administrative powers, of the various kinds, is an essential compass for navigating the doctrinal thickets of matters such as the, extremely thorny, difference between public and private law. If our starting point is to define administrative law as a branch of public law concerned with the composition, procedures, powers, duties, rights and liabilities of the various organs of government that are engaged in administering public policies, then the remainder of this final part of the book explores how administrative law goes about doing so.

⁶⁷ E.g. *R v Environment Secretary, ex p Hammersmith BC* [1991] 1 AC 521.

⁶⁸ E.g. *Bromley Council v GLC* [1983] 1 AC 768.

⁶⁹ E.g. *R v Gloucestershire CC, ex p Barry* [1997] AC 584; *Miss Behavin’ Ltd v Belfast Council* [2007] UKHL 19, [2007] 3 All ER 1007. On the use of judicial review against local authorities, see M Sunkin et al. [2007] PL 545.

⁷⁰ E.g. *R v Birmingham Council, ex p EOC* [1989] AC 1155.

⁷¹ E.g. *Lord Advocate v Dumbarton DC* [1990] 2 AC 580.

⁷² *X (Minors) v Bedfordshire CC* [1995] 2 AC 633; *Barrett v Enfield Council* [2001] 2 AC 550.

⁷³ E.g. *Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93.

⁷⁴ The principle in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (p 284 above) does not apply in local government.

⁷⁵ *R v Waltham Forest BC, ex p Baxter* [1988] QB 419; and see I Leigh [1988] PL 304.

⁷⁶ Human Rights Act 1998, s 6(1), (2)(a).

CHAPTER 22

Delegated legislation

We saw in chapter 21 that during the 20th century it came to be realised that the operation of government is carried on to a large extent not directly through laws made by Parliament, but by means of rules made by members of the executive under powers delegated to them by Parliament. This vast body of rules is known as delegated legislation, but it may also be described as secondary (or subordinate) legislation, by comparison with the primary legislation found in Acts of Parliament. In a few areas (especially in the conduct of foreign policy) government still relies not on statutory powers, but on the royal prerogative, that is, the common law powers that are exclusive to the Crown. Orders in Council made under the prerogative are, at least technically, a form of primary legislation. However, so far as the power to legislate is concerned, it was held long ago in the *Case of Proclamations*¹ that the Crown had no residual power to legislate so as to impose obligations or restrictions on the people. Over 300 years later it was held that this fundamental principle did not prevent the Crown having power under the prerogative to confer financial benefits on the victims of criminal violence.²

The term statute law covers both Acts of Parliament and delegated legislation. The main distinction between the two levels of statute law is that delegated legislation, unlike an Act of Parliament, is not the work of a supreme Parliament and is subject to judicial review. Nevertheless, the combined effect of the two levels is to set up public bodies to perform the tasks of government, and to equip them with the detailed powers needed for operating public services. It is very rare for an Act to contain all the provisions which are essential if a complex service is to be provided. An Act frequently does no more than outline the main features of the scheme, leaving many details to be filled in by subordinate legislation. In complex areas of government such as education, planning and immigration, there are often publications which bring together primary and subordinate legislation, along with codes of practice, ministerial circulars and sometimes a digest of the case law. The bulk of statutory instruments is formidable. From the Westminster Parliament alone in 2012, there were enacted 23 Public General Acts (the lowest total since 1957) and in the same year 3,328 statutory instruments were issued (the highest total on record).

A. The need for delegated legislation

Historical development

The formal process by which a Bill becomes an Act has never been the sole method of legislation. In the earliest years of Parliament, it was difficult to distinguish between enactment by the King in Parliament and legislation by the King in Council. Even when legislation by Parliament had become a distinct process, broad power to legislate by proclamation remained with the Crown. In 1539, by Henry VIII's Statute of Proclamations, royal power

¹ (1611) 12 Co Rep 74, p 46 above. The Crown retains prerogative power to legislate for certain overseas possessions, but subject to judicial review: *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61, [2009] 1 AC 453; and ch 10.

² *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864.

to issue proclamations ‘for the good order and governance’ of the country was recognised to exist and such proclamations were to be enforced as if made by Act of Parliament. One reason given for the Act was that sudden occasions might arise when speedy remedies were needed which could not wait for the meeting of Parliament; the Act contained saving words to protect the common law, life and property. The repeal of the statute in 1547 made little difference to the Tudor use of proclamations and Henry VIII’s name remains associated with the controversial practice of delegating power to the executive to amend Acts of Parliament.

After 1918, some lawyers and politicians became concerned at the wide legislative powers of government departments. The inquiry by the Committee on Ministers’ Powers (the Donoughmore Committee)³ concluded that unless Parliament was willing to delegate law-making powers, it would be unable to pass the kind or quantity of legislation which modern public opinion required. The committee drew attention to certain dangers in delegated legislation and proposed greater safeguards against abuse. In 1946, the Statutory Instruments Act replaced the Rules Publication Act 1893 and promoted a greater uniformity of procedure. Since 1944, a scrutinising committee has been regularly appointed by Parliament, first by the Commons and today by the Commons and Lords jointly. The practice of delegated legislation has been reviewed by many parliamentary committees,⁴ but the flood of subordinate legislation shows no sign of abating. Between 1981 and 1996 the number of instruments subject to parliamentary procedure increased by around 50 per cent, that is, from under 1,000 a year to around 1,500 a year; of these the number subject to the negative procedure in Parliament almost doubled, from some 700 in the early 1980s to around 1,300 in the period 1994–99.⁵ During this period, the contents of instruments may have changed. As one committee said in 1986, ‘Instead of simply implementing the “nuts and bolts” of Government policy, statutory instruments have increasingly been used to change policy, sometimes in ways that were not envisaged when the enabling primary legislation was passed.’⁶

In 1996, another committee concluded that ‘there is . . . too great a readiness in Parliament to delegate wide legislative powers to Ministers, and no lack of enthusiasm on their part to take such powers’.⁷ Such committees have criticised the way in which Parliament gives ‘second-rate’ consideration to secondary legislation.⁸

Why delegated legislation is important

Most constitutions today recognise the need for legislation to exist at several levels within the legal system. Sometimes the need arises from the desire to devolve powers from the centre to the regions or to elected councils within local government areas. Even if the Scottish Parliament and the Welsh Assembly make laws for Scotland and Wales respectively, the cities in those countries need some local laws that differ from those in rural areas.

A more general reason for delegated legislation is that the time available to Parliament for legislation is limited. If Parliament attempted to enact all new statutory rules itself, the legislative machine would clog up, unless the procedure for considering Bills was streamlined to a point at which detailed scrutiny by the legislators would be impossible. Even if the United Kingdom recognised a strict doctrine of separation of powers,⁹ this would not create

³ Cmd 4060, 1932 (‘MPC’). Ch 21.

⁴ HC 310 (1952–3); HL 184, HC 475 (1971–2); HL 204, HC 468 (1972–3); HC 588–1 (1977–8), ch 3; HC 152 (1995–6); and HC 48 (1999–2000).

⁵ HC 152 (1995–6), para 10 and HC 48 (1999–2000), para 25. For the negative procedure, see p 589 below.

⁶ HC 31–xxxvii (1985–6), p 2.

⁷ HC 152 (1995–6), para 14, endorsed in HC 48 (1999–2000), para 26.

⁸ P Tudor (2000) 21 *Statute Law Review* 149, 150. See too: Greenberg, *Laying Down the Law*.

⁹ See ch 4 C.

a bright line to distinguish between the laws that *should* be contained in primary legislation and the more detailed or technical rules that can properly be entrusted to the section of government that is administering a public service. Power to make detailed regulations on, for instance, road traffic or social security may be entrusted to the relevant government department, provided that there are procedures to ensure that some oversight is exercised by Parliament over the use made of the power.¹⁰

Another factor is that much delegated legislation deals with technical matters that are best regulated by a process in which the experience of relevant experts, professional bodies and commercial interests can be fully utilised. The greater the technicality involved in the content of such rules, the less suitable they are for consideration by the usual legislative process and the less likely they are to generate enough political interest to be included in the government's legislative programme.

An important justification for the existence of secondary legislation is that in many areas of government, especially when new services or schemes are established, it is not possible to foresee every difficulty that may arise in practice and detailed rules may be needed to accompany the parent Act.¹¹ Delegated legislation makes it possible to amend such rules as it is discovered how they are operating. There are also practical reasons why many new Acts should not come into effect as soon as the royal assent is given. It is common today for an Act to delegate power to a minister to make commencement orders, bringing into operation all or successive parts of the Act. There is no duty on the minister to exercise a commencement power, but the minister must not act so as to defeat Parliament's expectation that the Act will come into operation.¹²

Delegated legislation may also be needed in times of emergency when a government has to take action quickly and in excess of its normal powers. Many written constitutions include provision in emergency for suspending formal guarantees of individual liberty. In the United Kingdom, the Civil Contingencies Act 2004 (replacing the Emergency Powers Act 1920) makes permanent provision enabling the executive to legislate subject to parliamentary safeguards in certain emergencies.¹³ Under the little-known United Nations Act 1946, by Orders in Council the government may make such provision as appears necessary to give effect to decisions by the UN Security Council calling for sanctions (but not the use of armed force) to preserve international peace and security.¹⁴ Some powers to make delegated legislation without Parliamentary oversight are potentially extraordinary; for example, under section 40 of the British Nationality Act 1981 (as amended), the Secretary of State may, by order, deprive an individual of his British citizenship if convinced that to do so would be 'conducive to the public good'.

¹⁰ In 2010–12, the House of Commons spent 30 hours in all (just over 1 per cent of its time) debating statutory instruments subject to affirmative resolution, and none on those subject to negative procedure (*Sessional Returns* (HC 1, 2012–13)). These figures do not include the time spent on statutory instruments by committees of the Commons and Lords.

¹¹ When the community charge, or poll tax, was brought in by the Local Government Finance Act 1988, no fewer than 47 sets of regulations were made in the years 1989–91.

¹² *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513. It is customary for commencement orders not to be subject to any parliamentary process, in either the positive or negative forms. Cf *R (Haw) v Home Secretary* [2006] EWCA Civ 532, [2006] QB 780.

¹³ Ch 20 C.

¹⁴ In *Ahmed v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534 the Supreme Court quashed as ultra vires of the 1946 Act Orders in Council that froze the assets of persons suspected of being involved in international terrorism. The Orders were retrospectively validated by the Terrorist Asset-Freezing (Temporary Provisions) Act 2010.

The Cabinet Office has produced guidance to civil servants and Parliamentary draughtsmen on the type of factors which may suggest where matters of detail should be contained in the body of the Bill, and when they should be dealt with in secondary legislation.¹⁵ However, sponsoring departments may often make decisions for reasons of political expediency, or even tactics in relation to how best to steer a Bill through Parliament.¹⁶

B. Types of delegated legislation

While much delegated legislation is essential, governments are often tempted to obtain from Parliament greater powers than they should be given. Criticism centres on particular types of delegated legislation.

Matters of principle

There is a clear threat to parliamentary government if power is delegated to legislate on matters of general policy or if so wide a discretion is conferred that it is impossible to be sure what limit the legislature intended to impose. In practice Acts of Parliament frequently confer legislative powers in wide terms. One reason for this is that if powers are phrased more narrowly, this will make it more likely that the department will need to seek increased powers from Parliament in future. A proposal that Parliament should adopt a policy of passing framework legislation, with all details left to delegated legislation, was rightly rejected by the House of Commons Committee on Procedure in 1978, on the ground that this would further weaken parliamentary control.¹⁷ Nonetheless, governments sometimes propose Bills that have been described as ‘skeleton Bills’, Bills that are ‘little more than a licence to legislate’.¹⁸ Such Bills can operate only when extensive regulations are made and MPs may ask to see the proposed regulations before approving a Bill in this form. But there are few absolutes in this area and legislative practice is often a compromise between different attitudes to delegation.

Delegation of taxing power

We have seen how vital to the development of parliamentary government was the insistence that Parliament alone could authorise taxation.¹⁹ This insistence survives in an attenuated form, but modern pressures, particularly associated with the economy, require Parliament to delegate some powers in relation to taxation. In particular, the working of a system of customs duties combined with the development of the European Union has made necessary the delegation of power to give exemptions and reliefs from such duties.²⁰ The government also has power to vary certain classes of indirect taxation by order of the Treasury.²¹ These powers are subject to parliamentary control in that orders imposing import duties or varying indirect taxation cease to have effect unless they are confirmed by a resolution of the House

¹⁵ *Cabinet Office Guide to Legislative Procedures* (2004), para 8.18.

¹⁶ Greenberg, *Laying Down the Law*, ch 23.

¹⁷ HC 588-I (1977–8), ch 2.

¹⁸ See Tudor (note 8 above), p 152.

¹⁹ Ch 3 A.

²⁰ European Communities Act 1972, s 5; Customs and Excise Duties (General Reliefs) Act 1979.

²¹ Excise Duties (Surcharges or Rebates) Act 1979.

of Commons within a limited time. One surprising instance of taxation by delegated legislation was the Community Infrastructure Levy – a wholly new tax which was entirely set up by delegated legislation under Part 11 of the Planning Act 2008.

Sub-delegation

When a statute delegates legislative power to a minister, exercisable by statutory instrument, it may be assumed that Parliament intends the statutory instrument itself to contain the rules. Is it a proper use of such powers for the instrument to sub-delegate legislative power, by authorising rules to be made by another body or by another procedure? The legal maxim, *delegatus non potest delegare*, means that a delegate may not sub-delegate his or her power, but the parent Act may always override this by authorising sub-delegation, as did the Emergency Powers (Defence) Act 1939. Without express authority in the parent Act, it is doubtful whether sub-delegation of legislative powers is valid. However, emergency regulations under the Civil Contingencies Act 2004 may ‘make provision of any kind that could be made by Act of Parliament’ (s 22(3)), and the breadth of this power may authorise sub-delegation. Where sub-delegation occurs, control by Parliament becomes more difficult. In 1978, the Joint Committee on Statutory Instruments criticised the recurring tendency of departments to seek to bypass Parliament by omitting necessary detail from statutory instruments and vesting a wide discretion in ministers to vary the rules without making further statutory instruments.²² Under the European Communities Act 1972, sub-delegation is prohibited except for rules of procedure for courts or tribunals.²³

Retrospective operation

It follows from the supremacy of Parliament that Acts may have retrospective operation.²⁴ If on occasion retrospective legislation is considered necessary, this must either be done in express words by Parliament itself or, if done through delegated legislation, only on the express authority of a statute.²⁵ By reason of art 7, ECHR, applied by the Human Rights Act 1998, delegated legislation may not retrospectively create new offences or impose additional penalties.

Exclusion of the jurisdiction of the courts

The power of the courts in reviewing delegated legislation is confined to declaring it *ultra vires*, whether on grounds of substance or procedure,²⁶ a power that is now subject to the court’s duty where possible of protecting rights under the Human Rights Act. While control over the merits of delegated legislation is a matter for ministers and for Parliament, the possibility of control by the courts should not be excluded. It should never be for a minister to determine the limits of his or her own powers.²⁷

²² HL 51, HC 579 (1977–8), p 10; and see *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22 and Rely, note 85 below.

²³ European Communities Act 1972, s 2(2) and Sch 2.

²⁴ Ch 8 B.

²⁵ See e.g. *R (Stellato) v Home Secretary* [2007] UKHL 5, [2007] 2 AC 70. Cf the unsatisfactory decision in *R v Social Security Secretary, ex p Britnell* [1991] 2 All ER 726 (upholding ‘transitional provisions’ that had a retrospective effect).

²⁶ See pp 593–7 below.

²⁷ Yet under the Counter-Inflation Act 1973, Sch 3, para 1, an order made under part II of the Act could ‘define any expressions used in the provisions under which it is made’. And see *Jackson v Hall* [1980] AC 854.

Authority to modify an Act of Parliament

However undesirable this might appear in principle, Parliament has for long been known to delegate to ministers power to amend Acts of Parliament.²⁸ The term ‘Henry VIII clause’ is given to such provisions and numerous examples are found in the Scotland Act 1998 and the Government of Wales Act 2006.²⁹ When the power in a new Act is restricted to amending earlier Acts that are directly affected by the new reforms, the power is less objectionable than when it extends to amending the very Act that contains the power.³⁰ Yet some Acts dealing with schemes of social and industrial control empower a minister to broaden or narrow the scope of the schemes in the light of experience.³¹ Moreover, some statutes confer on ministers power to modify not merely existing but also future Acts.³²

Three instances of delegated power to modify Acts of Parliament may be given. The European Communities Act 1972, by s 2(2), authorises the making of Orders in Council and ministerial regulations to implement Community obligations of the United Kingdom, to enable rights under the European treaties to be exercised and ‘for the purpose of dealing with matters arising out of or related to any such obligations or rights’. Schedule 2 to the Act excludes certain matters from the general power, including the imposition of taxes, retroactive legislation and the sub-delegation of legislative power (other than power to make rules of procedure for any court or tribunal). Subject to these limitations, measures made under s 2(2) may make ‘any such provision (of any such extent) as might be made by Act of Parliament’ (s 2(4)). The intention in using such wide language must have been to exclude the possibility of judicial review on grounds of vires in the case of instruments made under s 2(2).³³

An unusual power to amend primary legislation was created by the Human Rights Act 1998, s 10.³⁴ This authorises ministers or the Queen in Council to make remedial orders when a superior court has declared primary legislation incompatible with a Convention right or the European Court of Human Rights has made a similar finding. The aim of a remedial order is to amend the offending legislation so as to remove the incompatibility. As with orders under the Legislative and Regulatory Reform Act (below), the making of an order is subject to an unusually full form of parliamentary supervision.³⁵

The third instance of power to amend primary legislation is found in the Legislative and Regulatory Reform Act 2006. Replacing an earlier Act of 2001, this enables ministers to amend or repeal existing Acts with the aim of removing or reducing any burden resulting from that legislation, in respect of such matters as financial cost, administrative inconvenience and obstacles to efficiency (s 1). This power is subject to many conditions and qualifications: thus the new provision must not impose, abolish or vary any tax (s 5(1)), may not create new offences punishable with imprisonment for more than two years (s 6(1)), must not authorise any forcible entry, search or seizure (s 7(1)), and may not amend the Human Rights Act 1998

²⁸ MPR, pp 36–8; Carr, *Concerning English Administrative Law*, pp 41–7.

²⁹ See in the Scotland Act 1998, ss 30(2), 79, 89, 104–8, 113(5), 114, 124 and Sch 7. These powers were considered necessary to enable ministers to implement devolution (see HL 101, 124, 146 (1997–8)). They are not to be confused with the power of the Scottish Parliament to make laws for Scotland, that necessarily includes power to amend Westminster Acts on devolved matters.

³⁰ See e.g. Freedom of Information Act 2000, s 75 (Secretary of State may by order repeal or amend any statutory provision which appears to him to be capable of preventing the disclosure of information).

³¹ Health and Safety at Work etc. Act 1974, ss 15 and 80; Sex Discrimination Act 1975, s 80, esp sub-s (3).

³² See N W Barber and A L Young [2003] PL 112. Also Delegated Powers and Regulatory Reform Committee, *Guidance for Departments* (2007), para 16.

³³ See HL Deb, 17 February 1976, cols 399–417, and HL 51, HC 169 (1977–8), pp 17–18. Cf *R v HM Treasury, ex p Smedley* [1985] QB 657. And see ch 6 E.

³⁴ See ch 14 C.

³⁵ See below page 592.

(s 8).³⁶ A power such as this provides an alternative to legislation by Bill, and new procedures within Parliament have become necessary for preventing their misuse.³⁷

Despite constitutional criticism, the Public Bodies Act 2011, giving effect to a Cabinet Office review of public bodies in 2010, is a further controversial example of this practice.³⁸ It conferred power on ministers to abolish bodies specified in schedule 1 to the Act and to transfer their powers to ‘eligible persons’ such as UK ministers, Scottish and Welsh ministers and ‘any other person exercising public functions’ (s 1). Schedule 1 to the Act included bodies such as the Administrative Justice and Tribunals Council, the Commission for Rural Communities, the Inland Waterways Advisory Council, the Library Advisory Council for England, and the National Consumer Council. The Act conferred power to merge bodies listed in Schedule 2 (including the Competition Commission and the Office of Fair Trading) and to change the constitutions of other public bodies. The Act includes several restrictions on use of the powers: s 7 seeks to protect functions such as judicial and enforcement powers that must be exercised independently of ministers, s 10 requires prior consultation, and s 11 enables use of the Act to be subject to an enhanced affirmative procedure that can be triggered by either House, similar to that in the Legislative and Regulatory Reform Act 2006.

Nomenclature

Despite the Statutory Instruments Act 1946, terminology is often confusing. The term ‘statutory instrument’ is a comprehensive expression to describe all forms of subordinate legislation subject to the 1946 Act.³⁹ Within the scope of the Act are many powers conferred on ministers by Acts dating back from before the 1946 Act. As regards Acts passed thereafter, there are two categories of statutory instrument: (a) legislative powers conferred on the Queen in Council and stated in the parent Act to be exercisable by Order in Council; (b) legislative powers conferred on a minister of the Crown and stated to be exercisable by statutory instrument. The first of these, the statutory Order in Council, must be distinguished from prerogative Orders in Council, which are not statutory instruments at all, though some of these are published in the annual volumes of statutory instruments. One reason why some powers are vested in the Queen in Council is that the more prestigious formality of an Order in Council may seem appropriate to some classes of legislation.⁴⁰ In the past powers were occasionally vested in a named minister, but today powers are generally vested in ‘the Secretary of State’; this means that the powers may in law be exercised by any holder of the office of Secretary of State. Many statutory instruments apply only in one locality, but the term does not include local by-laws or such matters as the confirmation of

³⁶ While the new measure must ‘make the law more accessible or more easily understood’ (s 3(4)), it is puzzling that it must not ‘remove any necessary protection’, nor must it be ‘of constitutional significance’ (s 3(2), (d) and (f)). What this latter category means is not explained.

³⁷ On earlier legislation preceding the 2006 Act, see [1995] PL 21 (M Freedland) and 34 (C M G Himsworth). On how the government’s Bill for the 2006 Act was cut down in Parliament, see P Davis, [2007] PL 677. It originally included a remarkably broad power that would have enabled the government to abolish long-established rules of the common law (Davis, at 685). The mammoth Company Law Reform Bill, 2005–06, included a super-affirmative clause (later abandoned), the avowed intention of which was to make it unnecessary for any future reforms of company law to be made by Parliament!

³⁸ For criticism of the original Bill, see 6th report, Select Committee on the Constitution (HL 51, 2010–12). See also 50th report, Merits of Statutory Instruments Committee (HL 250, 2010–12). And Cabinet Office, *Using the Public Bodies Act 2011*, March 2012.

³⁹ The official abbreviation for statutory instruments is SI followed by the year and number, e.g. SI 2004 No 252 (or SI 2004/252).

⁴⁰ No discussion of an Order takes place in the Privy Council when it is made: and ministers have the same responsibility to Parliament for Orders in Council as for other statutory instruments.

compulsory purchase orders. Confusingly, some kinds of rule made under statutory authority are not statutory instruments, for example immigration rules under the Immigration Act 1971 and regulations made by the Electoral Commission under the Political Parties, Elections and Referendums Act 2000.

Although statutory instrument is the generic term, various names are applied to the schemes of rules made by statutory instrument: orders, regulations, warrants, schemes, directions and so on. Several of these terms may be used in a single Act to distinguish different procedures for different purposes. In practice, the term ‘regulation’ is used mainly for matters of wide general importance. Where the legislation deals with procedure, rules are generally enacted, for example, the Civil Procedure Rules. With the term ‘order’ there is less uniformity; thus a commencement order may bring into effect all or part of an Act of Parliament and in town planning law a general development order contains detailed rules for the control of development.

To add to the scope for confusion, statutes may authorise the making of codes of practice, guidance and other forms of rules and provide sanctions of various kinds if they are not followed.⁴¹ These measures must be distinguished from informal administrative rules (guidelines, circulars, etc.), which are made without express statutory authority; they are considered later in this chapter.

The Human Rights Act 1998 draws a distinction between what it defines as ‘primary legislation’ and ‘subordinate legislation’.⁴² The reason for the distinction is to protect Acts of Parliament from being set aside or invalidated by the courts for inconsistency with Convention rights. But the demarcation line drawn is unsatisfactory in that the Act includes in ‘primary legislation’ various measures that are not Acts of Parliament. These include measures of the Church Assembly, instruments made under primary legislation that amend Acts of Parliament and Orders in Council made under the Crown’s prerogative.⁴³ There is no good reason why, if a minister uses a Henry VIII clause to amend a statute, and thereby creates inconsistency with a Convention right, the minister’s action should be treated as if it were an Act of Parliament.

If delegated legislation is a necessary phenomenon in the modern state, then it is essential (1) that the process by which it is made should include the consultation of interests; (2) that Parliament should retain the ability to oversee and supervise the use of delegated powers; (3) that delegated legislation should be published; and (4) that it is subject to challenge in the courts should reasons for this arise.

C. Control and supervision by Parliament

To what extent does Parliament control or supervise the making of delegated legislation? An answer to this difficult question must deal with the following matters: (a) the powers conferred; (b) procedures for making statutory instruments; (c) the role of the House of Lords; (d) technical scrutiny of statutory instruments; and (e) considering the merits of statutory instruments.

⁴¹ For an official definition of codes of practice, see p 597 below.

⁴² Human Rights Act 1998, ss 3(2), 4, 21 (1). And see ch 14 C. The Interpretation Act 1978 also draws a distinction between ‘primary’ and ‘subordinate legislation’, but does not define the distinction in the same way: s 21(1).

⁴³ See P Billings and B Pontin [2001] PL 21.

The conferment of powers

Since all delegated legislative powers stem from statute, there is always, at least in theory, an opportunity at the committee stage of a Bill to examine clauses that seek to delegate legislative powers. As long ago as 1932, the Ministers' Powers Committee recommended that Bills conferring such powers should be referred to a standing committee in each House to report whether there were any objections of principle to them.⁴⁴ It was only in 1992 that the House of Lords appointed a committee to consider clauses in Bills proposing to delegate legislative powers and to receive for each Bill a government memorandum justifying the proposals. By reporting promptly on such proposals, the committee (now named the Committee on Delegated Powers and Regulatory Reform) aims to discourage the granting of excessive powers and to ensure that an appropriate level of scrutiny is included in the parent legislation. Its reports receive no media attention, but it has often persuaded the government to accept its views on such questions as the choice of procedure for parliamentary scrutiny in relation to a specific Bill.⁴⁵

Procedures for making statutory instruments

In delegating legislative powers to government, Parliament typically provides for some parliamentary control or oversight to be built into the use of specific powers. However, two basic reasons for delegating legislative power are pressure on Parliament's time and the technical nature of the subject-matter; the very object of delegation would be frustrated if Parliament had to approve each instrument in detail. The procedure through which a statutory instrument must pass depends on the terms of the parent Act. The principal procedures are the following:

- (a) laying of draft instrument before Parliament, and requiring affirmative resolution before instrument can be 'made';
- (b) laying of instrument after it has been made, to come into effect only when approved by affirmative resolution;
- (c) laying of instrument that takes immediate effect, but requires approval by affirmative resolution within a stated period as a condition of continuance;
- (d) laying of instrument that takes immediate effect, subject to annulment by resolution of either House;
- (e) laying in draft, subject to resolution that no further proceedings be taken – in effect a direction to the minister not to 'make' the instrument;
- (f) laying before Parliament, with no further provision for control.⁴⁶

In a few instances a 'super-affirmative procedure has been created to deal with exceptional forms of delegated legislation;⁴⁷ at the other extreme, some statutory instruments are not required to be laid before Parliament at all (as will be the case if the parent Act is silent on laying before Parliament).

⁴⁴ MPR, pp 67–8. Cf HC 310 (1952–3).

⁴⁵ See C M G Himsworth [1995] PL 34, P Tudor (2000) 21 *Statute Law Review* 149, HL 112 (1998–9) and HL 110 (2004–5), ch 2. The Committee's *Guidance for Departments* (2009), outlines criteria for deciding whether proposals for delegation and proposed levels of parliamentary supervision are 'appropriate'.

⁴⁶ It is customary for commencement orders to be subject to no parliamentary control; and see *R (Stellato) v Home Secretary* [2007] UKHL 5, [2007] 2 AC 270. In such cases, there could be a motion to 'take note' of the instrument: see HC SO 118(4)(b).

⁴⁷ Page 392, below.

In cases (a)–(c) (*positive procedure*), an affirmative resolution of each House (or in the case of financial instruments, of the Commons alone) is needed if the instrument is to come into force or to remain in operation. In cases (d) and (e) (*negative procedure*), no action need be taken in either House unless there is some opposition to the instrument.

Of these procedures, by far the most common is case (d) (subject to annulment); the most common of the positive procedures is case (a). Under the positive procedure, the government must secure an affirmative resolution in each House and, if necessary, it must allot time in the Commons for such a resolution; current practice in the Commons is for the instrument to be debated, however briefly, in a ‘delegated legislation committee’.⁴⁸ Under the negative procedure, any member who so wishes may ‘pray’ that the instrument be annulled. It was formerly impossible for time to be found to debate all prayers for annulment which had been tabled.⁴⁹ The situation has been eased by the use of delegated legislation committees and by changes in the timetabling of Commons business,⁵⁰ but it would be a very rare event indeed for the House to adopt a motion to annul a statutory instrument.

A novel provision made by the European Communities Act 1972 was that a statutory instrument made under s 2(2) should be subject to annulment by a resolution of either House unless a draft of the instrument had been approved by each House before the instrument was made.⁵¹ Thus the government may choose whether the negative or positive procedure should be used. That choice is very often made with an eye on tactical decisions based around the ease with which the Bill may be passed. One increasingly common approach has been to require the affirmative resolution procedure for the first exercise of a power and the negative procedure thereafter. This has proved surprisingly attractive to the scrutiny committees, despite it not being obviously clear why subsequent uses should logically require any less oversight.⁵²

An Act that delegates legislative powers will specify the parliamentary procedures that are to apply. In addition, the Statutory Instruments Acts 1946 contains some general requirements. By s 4, where an instrument must be laid in Parliament after being made, it must in general be laid before it comes into operation; the heading of such an instrument must state three dates, showing (i) when it was made, (ii) when it was laid in Parliament and (iii) when it came into operation. What constitutes laying before Parliament is governed by the practice of each House⁵³ and an instrument may be laid when Parliament is not sitting. The rule that an instrument must be laid before it comes into operation is clear, subject to statutory provision for immediate operation in cases of urgency. Although there is no binding judicial authority on the matter, it is submitted that failure to lay an instrument prevents it from coming into operation.⁵⁴ While under the 1946 Act an interval of one day between laying and operation is in law sufficient, departments are urged to ensure that the interval is not less than 21 days.⁵⁵

By s 5 of the 1946 Act, where an instrument is subject to annulment, as in procedure (d) above, there is a uniform period of 40 days during which a prayer for annulment may be moved, exclusive of any time during which Parliament is adjourned for more than four days or is prorogued or dissolved. Where, as in procedure (e), an instrument is laid in draft but subject to the negative procedure, the same period of 40 days applies. In the case of instruments which need an affirmative resolution before they can come into operation (procedure (b)),

⁴⁸ See HC SO 118.

⁴⁹ A Beith (1981) 34 *Parliamentary Affairs* 165; Griffith and Ryle (eds), *Parliament*, pp 345–52.

⁵⁰ See HC SO 17 and 118.

⁵¹ European Communities Act 1972, Sch 2, para 2.

⁵² Greenberg, *Laying Down the Law*, ch 23.

⁵³ Laying of Documents before Parliament (Interpretation) Act 1948. See HL SO 71, HC SO 159. Also *R v Immigration Appeal Tribunal, ex p Joyles* [1972] 3 All ER 213.

⁵⁴ Cf A I L Campbell [1983] PL 43. The point was assumed but not decided in *R v Social Services Secretary, ex p Camden BC* [1987] 2 All ER 560 (A I L Campbell [1987] PL 328).

⁵⁵ HL 51, HC 169 (1977–8), pp 11–12; and *Statutory Instrument Practice* (Cabinet Office, 2006), 4.13.

no set period is provided as the government in each case must decide how urgently the instrument is needed. Under procedure (c) the period for obtaining the affirmative resolution is stated in the parent Act.

The role of the House of Lords

Although a parent Act may expressly confine control of statutory instruments to the Commons, the House of Lords is usually granted the same powers of control as the Commons. Moreover, the procedure under the Parliament Acts 1911 and 1949 for by-passing the Lords applies to Bills and not to statutory instruments. But it is extremely rare for the House of Lords to exercise its veto over subordinate legislation. When on 18 June 1968 the House rejected an order containing sanctions against the Rhodesian government made under the Southern Rhodesia Act 1965,⁵⁶ this caused the Labour government to propose (unsuccessfully) to abolish the power of the Lords to veto statutory instruments.⁵⁷ In 1994 the House declared that it had an ‘unfettered freedom to vote on any subordinate legislation submitted for its consideration’.⁵⁸ In 2000, the House exercised this freedom, rejecting the Greater London Election Rules because of a disagreement over granting candidates a free postal delivery.⁵⁹ The Lords thus have the power to veto all instruments, except financial instruments that are laid only in the Commons. They sometimes adopt a resolution disapproving of an instrument without rejecting it, to induce the government to think again. In 2006, after a full examination of this issue, a joint committee of both Houses found that while the upper House should not regularly reject statutory instruments, ‘in exceptional circumstances it may be appropriate for it to do so’. This conclusion was accepted by the government.⁶⁰

The technical scrutiny of statutory instruments

In the oversight of subordinate legislation, both Houses depend on the work of committees advised by qualified persons. All general statutory instruments laid before Parliament, as well as other statutory orders, come under scrutiny by the Joint Committee on Statutory Instruments, consisting of seven members appointed from each House. The members from the Commons meet separately to scrutinise those instruments which are laid only in the Commons. The joint committee is advised by the Speaker’s Counsel and by Counsel to the Lord Chairman of committees.

The committee must consider whether the attention of the Houses should be drawn to an instrument on various legal and procedural grounds. In summary, these are:

- (a) that an instrument imposes a charge on public revenues or requires payments to be made to any government department or public authority or sets the amount of such charge or payments;
- (b) that it has been made under an Act that excludes it from challenge in the courts;
- (c) that it appears to have retrospective effect without the express authorisation of the parent Act;
- (d) that there has been unjustifiable delay by the department (in publishing it, laying it in Parliament or in giving notice that it has come into operation before being laid);

⁵⁶ A month later, on 18 July 1968, an identical order was approved by the Lords.

⁵⁷ Cmnd 3799, 1969, pp 22–3; Parliament (No 2) Bill 1969, clauses 13–15.

⁵⁸ HL Deb, 20 October 1994, col 356.

⁵⁹ HL Deb, 22 February 2000, cols 136 and 182. Equivalent rules were later approved: HL Deb, 6 March 2000, col 849.

⁶⁰ See HL 265, HC 1212 (2005–06), ch 6; and the government response, Cm 6997, 2006, paras 36–47.

- (e) that there is doubt as to whether there is a power to make it or that it makes unusual or unexpected use of the delegated powers;
- (f) that for any reason its form or meaning need to be explained;
- (g) that its drafting appears to be defective; or
- (h) ‘on any other ground which does not go to its merits or the policy behind it’.⁶¹

Around 1,500 instruments are examined by the committee each year, but relatively few instruments are reported to the two Houses. Before such a report is made, the department concerned will have sent to the committee an explanation of the position. An adverse report does not in itself have any effect on the instrument; in particular, if the committee expresses doubts about the vires of an instrument, that is a question that only the courts may decide.

Considering the merits of statutory instruments⁶²

The Joint Committee on Statutory Instruments does not examine the merits or policy of an instrument. Occasionally, these matters may be discussed by the whole House of Commons on an affirmative resolution or on a prayer for annulment, but in general such debates are held in delegated legislation committees. Several such committees are regularly appointed, on the lines of the Public Bill committees used for the committee stage of Bills.⁶³ The committee debate enables important issues to be ventilated, but many such debates are no more than a formality.

Certain delegated measures that require the particularly close attention of Parliament form the new category of ‘super-affirmative’ instruments that has been created to legitimise the exercise of new ‘Henry VIII’ powers by ministers to amend primary legislation. Two instances of these instruments may be mentioned.

One, under the Human Rights Act 1998, s 10, is the ‘remedial order’ by which the government amends primary legislation to remove an inconsistency with a Convention right. The other, under the Legislative and Regulatory Reform Act 2006, amends primary legislation for such purposes as to ease the burden of a regulatory scheme.⁶⁴ The procedure laid down by these two Acts provides for greater scrutiny than is usual and requires each House to accept that the statutory conditions for making the order are satisfied; and the period for parliamentary action is 60 days rather than the usual 40. In the former case, the Joint Committee on Human Rights has the primary task of scrutinising remedial orders.⁶⁵ Under the 2006 Act, this is entrusted to the Regulatory Reform Committee (Commons)⁶⁶ and the Delegated Powers and Regulatory Reform Committee (Lords). Cabinet Office guidance states that use of the super-affirmative procedure should only be contemplated when the matter would previously have been legislated for by primary legislation.⁶⁷

In order that each House may inform itself about EC secondary legislation, committees of the two Houses exercise functions comparable with those of the committees which deal with statutory instruments.⁶⁸

⁶¹ HC SO 151; HL SO 74.

⁶² This account of secondary legislation is confined to the Westminster Parliament and does not deal with procedures in Edinburgh, Cardiff and Belfast for dealing with measures that are subordinate to the legislation adopted by the devolved Parliament or Assembly: see e.g. Scotland Act 1998, ss 52, 117, 118, and Sch 4, para 11; Standing Orders of the Scottish Parliament, ch 10.

⁶³ Ch 8 C.

⁶⁴ And see above page 586.

⁶⁵ For the procedure, see Human Rights Act 1998, sch 2; and also HC SO 152B.

⁶⁶ See HC SO 14.

⁶⁷ *Cabinet Office Guide to Legislative Procedures* (2004), para 8.25.

⁶⁸ Ch 6 C.

Publication of statutory instruments

Although it is desirable that all legislation should be publicised before it takes effect, there are some matters, for example changes in indirect taxation, where the object of the legislation might be defeated if it had to be made known to the public in advance. The Statutory Instruments Act allows that for essential reasons a statutory instrument may come into operation even before it is laid before Parliament, with the safeguard that the Lord Chancellor and the Speaker must be provided with an immediate explanation. More generally, it provides a uniform procedure for numbering, printing and publishing statutory instruments.⁶⁹ An instrument classified as local by reason of its subject matter and certain classes of general instrument may be exempted from the requirements of printing and sale. Each year is published a collected edition of all general instruments made during the year which are still operative. It is a defence in proceedings for breach of a statutory instrument to prove that it had not been issued by the Stationery Office at the date of the alleged breach, unless it is shown by the prosecutor that reasonable steps had been taken to bring the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.⁷⁰ Thus ignorance of a statutory instrument is no defence, but in certain circumstances failure to issue an instrument may be. Where regulations impose restrictions on Convention rights, there is a strong argument that they must be published before the restrictions can be said to be ‘prescribed by law’.⁷¹

D. Challenge in the courts

Although the Supreme Court has expressed the view that the classification of primary and secondary legislation is not determinative of its susceptibility to judicial review, the general rule is that primary legislation cannot be challenged but that delegated legislation may be.⁷²

If made in accordance with the prescribed procedure, and within the powers conferred by the parent Act, a statutory instrument is as much part of the law as the statute itself. The essential difference between statute and statutory instrument is that, unlike Parliament, a minister’s powers are limited. Consequently, if a department attempts to enforce a statutory instrument against an individual, the individual may as a defence question the validity of the instrument. The courts have power to decide this question even though the instrument has been approved by resolution of each House of Parliament.⁷³

The validity of a statutory instrument may be challenged on two main grounds: (a) that the content or substance of the instrument is ultra vires the parent Act; (b) that the correct

⁶⁹ Statutory Instruments Act 1946, s 2, amended by the Statutory Instruments (Production and Sale) Act 1996.

⁷⁰ Statutory Instruments Act 1946, s 3(2); *R v Sheer Metalcraft Ltd* [1954] 1 QB 586. For the argument that at common law delegated legislation must be published before it can come into force, see D J Lanham (1974) 37 MLR 510 and [1983] PL 395; cf A I L Campbell [1982] PL 569.

⁷¹ See e.g. *Silver v UK* (1983) 5 EHRR 347; and A W Bradley, in Supperstone, Goudie and Walker (eds), *Judicial Review*, pp 73–75.

⁷² *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 at [41]. That case concerned the susceptibility of an Act of the Scottish Parliament to judicial review, and the Supreme Court accepted that, on narrow grounds, review was possible. Orders in Council, although primary legislation, are also amenable to judicial review: *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61, [2009] 1 AC 453.

⁷³ *R v Home Secretary, ex p Javed* [2001] EWCA 789, [2002] QB 129; *Hoffmann-La Roche v Trade Secretary* [1975] AC 295.

procedure has not been followed in making the instrument. The chances of success in such a challenge depend essentially on the terms of the parent Act, as interpreted by the court.⁷⁴ The duty under the Human Rights Act 1998, s 3(1), to interpret legislation consistently with Convention rights where this is possible, significantly widens the scope for challenging the validity of delegated legislation. Except where the parent Act expressly or by necessary implication authorises regulations to be made that infringe Convention rights, a general power to make regulations on a given subject must be interpreted as *excluding* power to make regulations that infringe Convention rights.⁷⁵ The Human Rights Act thus requires the courts to strike down a secondary instrument where it is not possible to interpret it as being consistent with Convention rights, even though apart from the 1998 Act the regulation would have been valid. But the court may not strike down secondary legislation where primary legislation prevents the secondary legislation being made in any other terms.⁷⁶ In the latter case, the court may, under the 1998 Act, s 4, declare that the regulation is incompatible with a Convention right. Moreover, the interpretation and enforcement of delegated legislation may be subject to the requirements of EU law.⁷⁷ However, it is a well-established principle that delegated legislation should be construed in a way which falls within the conferring power where possible.⁷⁸

Quite apart from human rights and EU law, there is a long-established presumption of interpretation that Parliament does not intend delegated powers to be exercised for certain purposes unless by express words or by necessary implication it has clearly authorised them. The principles that no one should be deprived of access to the courts except by clear words of Parliament and that there is no power to levy a tax without clear authority have been repeatedly illustrated. The former principle was applied in 1997 when an order by the Lord Chancellor increasing the court fees payable for litigation and requiring them to be paid by someone on income support was held to deprive that person of the constitutional right of access to the courts.⁷⁹ That basic principles can cut down the width of such expressions as ‘power to make such regulations as seem to the minister to be necessary’ was illustrated in *Commissioners of Customs and Excise v Cure and Deeley Ltd*.

The Finance (No 2) Act 1940 empowered the Commissioners to make regulations providing for any matter for which provision appeared to them to be necessary for giving effect to the statutory provisions relating to purchase tax. Regulations were made under which, if proper tax returns were not submitted by manufacturers, the Commissioners might determine the amount of tax due, ‘which amount shall be deemed to be the proper tax due’, unless within seven days the taxpayer satisfied the Commissioners that some other sum was due. *Held* that the regulation was invalid in that it purported to prevent the taxpayer proving in a court the amount of tax actually due, and substituted for the tax authorised by Parliament some other sum arbitrarily determined by the Commissioners.⁸⁰

⁷⁴ See *R v Environment Secretary, ex p Spath Holme Ltd* [2001] 2 AC 349.

⁷⁵ See A W Bradley, R Allen and P Sales [2000] PL 358; D Squires [2000] EHRLR 116.

⁷⁶ Human Rights Act 1998, s 3(2). And ch 14 C.

⁷⁷ See e.g. *R (Barker) v Bromley Council* [2006] UKHL 52, [2007] 1 AC 470 (failure of planning regulations properly to implement a European directive).

⁷⁸ *R (Petsafe Ltd) v Welsh Ministers* [2010] EWHC 2908 (Admin), [2011] EuLR 270.

⁷⁹ *R v Lord Chancellor, ex p Witham* [1998] QB 575. Executive policies are subject to review on similar grounds: *R (Daly) v Home Secretary*, [2001] UKHL 26, [2001] 2 AC 532.

⁸⁰ [1962] 1 QB 340. See also *R v IRC, ex p Woolwich Building Society* [1991] 4 All ER 92.

By similar reasoning a court might declare invalid a statutory instrument which purported to have retrospective effect in the absence of clear authority from Parliament. In Scotland, the Court of Session quashed a regulation made by the Secretary of State which removed from qualified teachers the right to continue teaching without first registering with a statutory Teaching Council.⁸¹ The Home Secretary's power to make rules for the management of prisons did not permit him to make rules fettering a prisoner's right of access to the courts.⁸² Relevant considerations must be borne in mind by the relevant minister.⁸³ Social security regulations which deprived certain asylum seekers of benefits while their appeals for asylum were pending were unlawful because their effect was to prevent the right to appeal from being exercised.⁸⁴ Furthermore, delegated legislation must add something. Where regulations may be made to prescribe a description of a type of benefits scheme, those regulations must actually contain a description which goes beyond that in the primary legislation.⁸⁵

There have been a series of cases at the highest level arising out of the various legislative regimes for designating certain individuals or institutions because of alleged links to terrorism or rogue states. That designation will result in the freezing of assets and the prevention of trade with others; a potentially draconian outcome. In *Ahmed v HM Treasury*, the Supreme Court held ultra vires clauses in Orders in Council made under the United Nations Act 1946 that sought to implement resolutions of the UN Security Council requiring states to freeze the assets of persons who commit or attempt to commit terrorist acts.⁸⁶ One reason why the orders were ultra vires was that they went wider than the Security Council resolutions by being stated to apply where there were 'reasonable grounds for suspecting' that someone was or might be a terrorist; also, the effect of one order was to deprive an individual of the chance to seek judicial review of his listing as a terrorist. In *R v Forsyth*, concerning another Order in Council made under the 1946 Act, it was claimed that the order was invalid because it had been made ten years after the Security Council had asked governments to prevent funds being made available to Iraq.⁸⁷ The Supreme Court held that, while urgent measures would often be required by the Security Council, the lapse of time did not prevent the government from implementing this Security Council resolution. In a case arising from a Security Council Resolution concerning the supply of military equipment to Iraq, an Order in Council was held not to be effective, since an essential definition of the banned equipment could not be found in other delegated legislation; criticising government departments for not keeping proper records of their legislation, the Court of Appeal refused to supply its own definition to fill the gap in the prosecution's case.⁸⁸ Most recently, an Iranian bank suspected of being involved in financing Iran's nuclear programme challenged an Order made under the Counter-Terrorism Act 2008 that effectively excluded the bank from the UK financial market.⁸⁹ The majority of the Supreme Court held that it was irrational and arbitrary to designate the bank where the risk did not arise from the bank specifically, but the banking sector generally. It was also procedurally unfair that the bank had not had the opportunity to make representations on the decision to designate it. The Court held that the fact that the designation took the form of delegated legislation requiring Parliamentary approval did not affect the duty of fairness.

⁸¹ *Malloch v Aberdeen Corpn* 1974 SLT 253; and see Education (Scotland) Act 1973.

⁸² *Raymond v Honey* [1983] AC 1 and *R v Home Secretary, ex p Leech* [1994] QB 198.

⁸³ *Badger Trust v Welsh Ministers* [2010] EWCA Civ 807.

⁸⁴ *R v Social Security Secretary, ex p Joint Council for Welfare of Immigrants* [1996] 4 All ER 385.

⁸⁵ *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2013] 3 WLR 1276.

⁸⁶ [2010] UKSC 2, [2010] 2 AC 534.

⁸⁷ [2011] UKSC 9, [2011] 2 AC 69.

⁸⁸ *R v D* [2011] EWCA Crim 2082, [2012] 1 All ER 1108.

⁸⁹ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2013] 3 WLR 179.

The courts do not lightly review the substantive legality of a statutory instrument, but if necessary they apply a test of unreasonableness where a regulation is so unreasonable that Parliament cannot be taken as having authorised it to be made under the Act in question.⁹⁰ However, where an order by the Environment Secretary ‘capping’ local councils’ expenditure was subject to approval by resolution of the Commons, the House of Lords held that if the order came within the ‘four corners’ of the parent statute it was subject to review for unreasonableness only on the extreme grounds of bad faith, improper motive or manifest absurdity.⁹¹

A serious procedural error by the department concerned could lead to an instrument being set aside. Where there was a duty to consult interested organisations before regulations were made, it was held that the mere sending of a letter to an organisation did not amount to consultation;⁹² and no effective consultation occurred when a department failed to allow sufficient time for this.⁹³ But not every procedural error vitiates the statutory instrument, and if there has been substantial compliance with a prescribed procedure, minor irregularities may be overlooked.

Where because of its content or procedure an instrument is to an extent defective, this does not necessarily mean that the whole instrument is a nullity; it may still be operative to its lawful extent or bind persons not affected by the defect of procedure.⁹⁴ To decide when such ‘severance’ is permissible may involve a textual, or ‘blue pencil’ test (does deletion of the offending phrase or sentence leave a grammatical and coherent text?) and also a test of whether, after deletion of the unlawful part, the substance of the provision remains essentially unchanged in purpose and effect from what had been intended.⁹⁵

Where the parent Act provides that regulations when made should have effect ‘as if enacted in this Act’, the correct view has long been that this expression in the parent Act adds nothing to the binding effect of a properly made instrument.⁹⁶ Where a tribunal must adjudicate on the rights of an individual and the extent of those rights is directly affected by a regulation, the tribunal must if necessary decide whether the regulation is valid;⁹⁷ its decision on this issue will be subject to appeal. And if someone is prosecuted for breach of a regulation or by-law, it is always a good defence in law for the defendant to show that the instrument in question is invalid.⁹⁸

By-laws are a form of delegated legislation that generally applies only in a particular locality or certain public places (for example, airports). They are usually made by a local council or a statutory undertaking and are subject to ministerial confirmation before they take effect. The courts have traditionally shown less deference in respect of by-laws than over departmental regulations,⁹⁹ but there are suggestions that any law made by a democratically accountable body should be accorded respect by the court.¹⁰⁰

⁹⁰ *Maynard v Osmond* [1977] QB 240; *Cinnamond v British Airports Authority* [1980] 2 All ER 368; *R v Home Secretary, ex p Javed* [2001] EWCA 789, [2002] QB 129.

⁹¹ *R v Environment Secretary, ex p Hammersmith BC* [1991] 1 AC 521, applying *Nottinghamshire CC v Environment Secretary* [1986] AC 240 (C M G Himsworth [1986] PL 374, [1991] PL 76).

⁹² *Agricultural Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 WLR 190.

⁹³ *R v Social Services Secretary, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164. See also *Howker v Work and Pensions Secretary* [2002] EWCA Civ 1623, [2003] ICR 405.

⁹⁴ *Dunkley v Evans* [1981] 3 All ER 285; the *Aylesbury Mushrooms* case, note 92 above.

⁹⁵ *DPP v Hutchinson* [1990] 2 AC 783 (A W Bradley [1990] PL 293); and *R v IRC, ex p Woolwich Building Society* [1991] 4 All ER 92. Cf *R (Confederation of Passenger Transport) v Humber Bridge Board* [2003] EWCA 842, [2004] QB 310 (power of court to remedy evident mistake in statutory instrument).

⁹⁶ *Minister of Health v R* [1931] AC 494.

⁹⁷ *Chief Adjudication Officer v Foster* [1993] AC 754 (D Feldman (1992) 108 LQR 45; A W Bradley [1992] PL 185).

⁹⁸ E.g. *R v Reading Crown Court, ex p Hutchinson* [1988] QB 384; *Boddington v British Transport Police* [1999] 2 AC 143.

⁹⁹ See *Kruse v Johnson* [1898] 2 QB 91; *Cinnamond v British Airports Authority* [1980] 2 All ER 368.

¹⁰⁰ *R (Petsafe Ltd) v Welsh Ministers* [2010] EWHC 2908 (Admin), [2011] EuLR 270.

Consultation of interests

Unlike the process of primary legislation, which (at least in democratic theory) makes possible public debate of the purpose and contents of a Bill as it passes through both Houses, most delegated legislation comes into force as soon as it is made public, either at once or after a short interval stated in the document itself. Since there is no general requirement of prior publicity, an ordinary person has little chance of getting to know about proposed statutory instruments. But the department proposing to make a new instrument frequently embarks on consultation with interests affected by the proposal. Some Acts make this obligatory. Many social security regulations must be submitted in draft to the Social Security Advisory Committee, whose disagreements, if any, with the Secretary of State must be reported to Parliament along with the regulations.¹⁰¹ Several Acts do not specify the bodies to be consulted, leaving it to the minister to consult with such associations and bodies as appear to him or her to be affected.¹⁰² Where there is a duty to consult, either because of a statutory duty or a consistent practice of consultation,¹⁰³ the courts have laid down the criteria for proper consultation: it must be undertaken when the proposal is at a formative stage; sufficient reasons must be given for the proposal to enable an informed response to be given; adequate time must be allowed for the response to the proposals; and the product of consultation must be conscientiously taken into account when the ultimate decision is made.¹⁰⁴ Where there is a duty to consult, fairness may require disclosure to an interested person of the material on which the minister is proposing to rely.¹⁰⁵ Even where there is no duty to consult before delegated legislation is made, departments often consult interests likely to be affected, since this consultation may bring about access to specialised knowledge that exists outside government and help to promote consensus.

E. Administrative rule-making

Legislation by statutory instrument is more flexible than primary legislation, since the law can be changed without the need for a Bill to pass through Parliament. Nonetheless, statutory instrument procedures are complex and the instruments are expressed in formal language. In government today, many less formal methods of rule-making are used. Such methods are sometimes directly authorised by Act of Parliament, but rules so made may have an uncertain legal status, for example, immigration rules made under the Immigration Act 1971. In *Odelola v Home Secretary*,¹⁰⁶ Lord Hoffmann referred to the ‘rather unusual’ status of the immigration rules and the House of Lords held that they were not delegated legislation. In *Pankina v Home Secretary*¹⁰⁷ the Home Office had issued ‘policy guidance’ that added an increased financial requirement to what the Immigration Rules said must be shown by students of UK universities who had come to study in the UK and wished to remain to do skilled work after graduating. The Court of Appeal held this requirement to be unlawful, since (as Sedley LJ said), the immigration rules ‘have ceased to be policy and have acquired a status akin to

¹⁰¹ Social Security Administration Act 1992, ss 170, 172–4. See *Howker v Work and Pensions Secretary* [2002] EWCA Civ 1623, [2003] ICR 405 (regulations invalid where department misled advisory committee).

¹⁰² For the effect of failure to consult, see *Agricultural Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280; also *R v Social Services Secretary, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164.

¹⁰³ See *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755.

¹⁰⁴ *R v Brent LBC, ex p Gunning* (1985) 84 LGR 168. Cf the Cabinet Office’s *Consultation Principles* (2012).

¹⁰⁵ *R v Health Secretary, ex p US Tobacco International Inc* [1992] QB 353 (concerning scientific advice).

¹⁰⁶ [2009] UKHL 25, [2009] 1 WLR 1230.

¹⁰⁷ [2010] EWCA Civ 7191, [2011] QB 376.

law'. That additional requirement should have been laid before Parliament as an amendment to the Immigration Rules.

Not surprisingly, the implications of this decision were examined in a stream of other cases, culminating in two decisions by the Supreme Court. In *R (Munir) v Home Secretary* a Bangladeshi citizen and his wife and children were adversely affected by the withdrawal of a policy introduced in 1996 that enabled a family to remain in the UK where the children had had more than seven years' continuous residence.¹⁰⁸ The policy and its withdrawal had never been included in Immigration Rules. The Supreme Court rejected arguments for the Home Secretary that the power to make immigration rules was derived from the royal prerogative, finding that they were delegated legislation and that *Odelola* was obiter and wrong. The policy in question did not have the nature of a rule and that neither the policy nor its withdrawal had to be included in the Immigration Rules. In the linked case of *R (Alvi) v Home Secretary* the same court, grappling with the difficult borderline between what is and is not a rule that must be included in the Immigration Rules, held that 'the Immigration Rules should include all those provisions which set out criteria which are or may be determinative of an application for leave to enter or remain'.¹⁰⁹ Since some aspects of the 'points based system' for granting admission for certain occupations were determinative of whether Alvi, an assistant physiotherapist, would be admitted, they should have been included in the Immigration Rules and not merely included in ancillary codes of practice.¹¹⁰ Unhelpfully, Lord Hope appears to have approved the *Odelola* line that the Rules are not delegated legislation, despite the Court's clear judgment in *Munir*.¹¹¹

Two forms of rule-making that are often authorised by statute are codes of practice and administrative guidelines or notes of guidance.¹¹² In 2013, the Cabinet Office defined codes of practice in the following way.

A code of practice is an authoritative statement of practice to be followed in some field. It typically differs from legislation in that it offers guidance rather than imposing requirements: its prescriptions are not hard and fast rules but guidelines which may allow considerable latitude in their practical application and may be departed from in appropriate circumstances. The provisions of a code are not directly enforceable by legal proceedings, which is not to say that they may not have significant legal effects. A code of practice, unlike a legislative text, may also contain explanatory material and argument.¹¹³

Such codes of practice are often met in branches of law such as that on the use of police powers and employment disputes. Although codes of practice and guidance do not have the force of delegated legislation and generally do not have a mandatory effect,¹¹⁴ the issuing department may be expected either to observe them or take steps to change them.¹¹⁵ A local authority or a body such as an NHS trust must follow statutory guidance from central government except where it can state good reasons for not doing so.¹¹⁶

¹⁰⁸ [2012] UKSC 32, [2012] 1 WLR 2192.

¹⁰⁹ [2012] UKSC 33, [2012] 1 WLR 2208 at [97].

¹¹⁰ The Supreme Court promptly had to return to the effect of *Munir* and *Alvi* in *R (New London College Ltd) v Home Secretary* [2013] UKSC 51, [2013] 1 WLR 2858.

¹¹¹ [2012] UKSC 33, [2012] 1 WLR 2208 at [9].

¹¹² See e.g. Police and Criminal Evidence Act 1984, Part VI; Freedom of Information Act 2000, ss 45 and 46.

¹¹³ *Guide to Making Legislation* (Cabinet Office, 2013), App D.

¹¹⁴ See e.g. *Laker Airways v Department of Trade* [1977] QB 643.

¹¹⁵ *R v Home Secretary, ex p Khan* [1985] 1 All ER 40 (A R Mowbray [1985] PL 558).

¹¹⁶ *R v Islington Council, ex p Rixon* [1997] ELR 66; *R (Munjaz) v Ashworth Hospital Authority* [2005] UKHL 58, [2006] 2 AC 148 (hospital's policy on detention of mental patients upheld despite departing from code of practice). Also *R (Daniel Thwaites plc) v Wirral Magistrates* [2008] EWHC 838 (Admin), [2009] 1 All ER 239 (duty of licensing authority to 'have regard to' guidance from Secretary of State).

Depending on the parent Act, these rules may totally evade the procedures for parliamentary control described earlier. In fact, many administrative rules are issued without direct statutory authority. This phenomenon was once described as ‘administrative quasi-legislation’,¹¹⁷ when it was related to the practice of issuing the official interpretation of doubtful points in statutes and of stating concessions that would be made in individual cases. The practice has continued, for the revenue authorities often choose to waive the application of over-harsh laws rather than seek changes in the legislation. In 1979, the then Inland Revenue’s use of executive discretion rather than a statutory basis for assessing tax was described by the House of Lords as unconstitutional.¹¹⁸ As Walton J had said: ‘One should be taxed by law, and not be untaxed by concession.’¹¹⁹

In many areas of government, such as town planning, housing, education and health, ministerial statements of policy and circulars to local authorities have a practical effect which falls little short of declaring or modifying the law. On matters of general policy where controversial issues are involved, government by circular is not a satisfactory substitute for legislation. Nor can such circulars require the performance of unlawful acts.¹²⁰

F. Conclusion

Understanding of the legislative process, and the ways by which delegated legislation are made, is rarely high on the constitutional and administrative lawyer’s agenda. However, as this chapter has shown, understanding delegated legislation is essential for two principal reasons.

First, the making and passing of delegated legislation is a fundamental aspect of our constitutional arrangements. Delegated legislation, as we have discussed, is now a far greater proportion of the law that guides our everyday lives than it was even 20 years ago. Any constitutional lawyer must be able to understand when it can be made, how it is made, how (and the extent to which) it is scrutinised and how it is different from the primary legislation under which it is made.

Secondly, delegated legislation can be the subject of an administrative law challenge in the courts. It can be declared ultra vires and it can be struck down. Understanding how it has been made, and the particular considerations the courts will apply to the evaluation of delegated legislation, is essential for any challenge to be brought or a legal judgment evaluated.

¹¹⁷ R E Megarry (1944) 60 LQR 125; Ganz, *Quasi-Legislation*; R Baldwin and J Houghton [1986] PL 239. Informal administrative rules may be termed ‘tertiary rules’ (Baldwin, *Rules and Government*, ch 4) or, in the European context, ‘soft law’: K Wellens and G Borchardt (1989) 14 EL Rev 267. Also Craig, *Administrative Law*, pp 750–6.

¹¹⁸ *Vestey v IRC (No 2)* [1980] AC 1148.

¹¹⁹ *Vestey v IRC* [1979] Ch 177, 197. See *R (Wilkinson) v IRC* [2005] UKHL 30, [2006] 1 All ER 529 (extra-statutory concession could not be made to grant widowers a tax allowance that Parliament had granted only to widows) and *R (Davies) v HMRC* [2011] UKSC 47, [2011] 1 WLR 2625 (whether guidance on non-domicile rules having benevolent interpretation or are inconsistent with practice). See too the unsuccessful judicial review of the Revenue’s decisions to reach settlements with major corporations which had considerable tax liabilities: *UK Uncut Legal Action Ltd v HMRC* [2013] EHC 1283 (Admin).

¹²⁰ *Royal College of Nursing v DHSS* [1981] AC 800; *Gillick v West Norfolk Health Authority* [1986] AC 112.

Administrative justice

The title of this chapter may seem a contradiction in terms: there are such marked differences between the way in which decisions are made by civil servants and ministers on the one hand, and by the courts on the other, that the two systems, administration and justice, should be kept quite separate. However, as we will see in relation to judicial review, there is a strong tendency in administrative law for principles derived from the courts, such as the doctrine of natural justice,¹ to be applied to official decisions. The same tendency applies to developing institutions within government. In his seminal book, *Justice and Administrative Law*, first published in 1928, Robson described the extent to which ‘trial by Whitehall’ had developed in the British constitution. He argued that the judicial powers given to administrative bodies promoted the welfare of society and that administrative justice could become ‘as well-founded and broad-based as any other kind of justice now known to us and embodied in human institutions’.² Today, the influence of administrative justice is seen in decisions of the European Court of Human Rights interpreting art 6 of the European Convention.³

In this chapter, we examine various institutions and procedures that are located within a broad territory somewhere between the world of government departments on one hand and that of the law courts on the other. This territory is liable to be the site of diverse struggles for possession between competing interests from the administrative and legal worlds. In one sector of the territory that was formerly under strong departmental influence, namely administrative tribunals, the judicial model of decision-making now holds undoubted sway. Indeed, the British system of tribunals must no longer be referred to with the adjective ‘administrative’. The system will be outlined in section A of this chapter, but in truth specialist tribunals are now a vital element in the machinery of justice, with their own maze of case law and procedural rules.

In another sector, that of public inquiries (section B), government departments exercise the dominant influence over the decision-making, but key aspects of the procedures exist to pro-mote the fairness and openness of the process. Section C deals with inquiries appointed under the Inquiries Act 2005 (which replaced older legislation). This Act provides a formal process of impartial fact-finding for discovering what happened when things have gone seriously wrong in government or major scandals and disasters have occurred. Section D is concerned with Ombudsmen. The function of these officials is to investigate individual complaints about government or public authority action and to discover whether injustice has been caused by official error. Ombudsmen carry out this function by investigatory means which owe little to court procedures, and their powers fall short of requiring a remedy to be provided, although an acceptable remedy is usually the result when the Ombudsman decides that injustice has occurred.

¹ Ch 34 C.

² Robson, *Justice and Administrative Law*, p 515. The remit of the Administrative Justice and Tribunals Council (page 640 below) included a definition of ‘administrative justice’ (Tribunals, Courts and Enforcement Act 2007, sch 7, para 13 (4)). But in the scheme of the Act this appeared separately from the Council’s functions concerning tribunals and inquiries, which are an integral part of ‘administrative justice’ in a broader sense.

³ See e.g. C Harlow in Alston (ed.), *The EU and Human Rights*, ch 7; A W Bradley, in Supperstone, Goudie and Walker (eds), *Judicial Review*, pp 64–72. Also Harris and Partington (eds), *Administrative Justice in the 21st Century*, pt 5 and Adler (ed.), *Administrative Justice in Context*.

A. Tribunals⁴

Reasons for creation of tribunals

For many centuries Britain has had specialised courts in addition to the courts of general jurisdiction. Mediaeval merchants had their courts of pie poudre; the tin miners of Devon and Cornwall had their courts of Stannaries.⁵ From the early 19th century until they were abolished in 2009, the General Commissioners of Income Tax provided a local court for resolving disputes about the amount of tax that an individual should pay. The growth of the modern state led to the creation of many new procedures for settling the disputes that arose from the impact of public powers and duties on the rights and interests of private persons. The National Insurance Act 1911, in creating the first British social insurance scheme, provided for individual disputes that arose to be decided on appeal by an independent panel. Indeed, the history of social security appeals is central to the history of tribunals in the 20th century: after 1945, the structure of appeals became a notable feature of the welfare state.⁶

When Parliament creates new public services or regulatory schemes, questions and disputes will inevitably arise from operation of the legislation. There are three main means of enabling such questions and disputes to be settled: (a) by conferring new jurisdiction on the ordinary courts; (b) by creating new machinery in the form of a tribunal, sometimes with the right of appeal to a higher tribunal or to the courts; or (c) by leaving decisions to be made by the administrative bodies responsible for the scheme. Possible variants in solution (c) include (i) allowing an individual to seek review at a higher level within the same public body of a decision that he or she does not accept; (ii) providing for an appeal to another administrative body (for example, from a local council to central government), or (iii) requiring a hearing or public inquiry to be held before certain decisions are made. Whether or not any provision of these kinds is made, the procedure of judicial review is potentially available to supervise the legality of decisions. But judicial review, which should be an exceptional remedy, does not provide a right of appeal and is unable to ensure the quality of numerous decisions at first instance.

One achievement of the Franks committee on tribunals and inquiries, which reported in 1957,⁷ was to make clear that tribunals and inquiries differed in their constitutional status and functions. No tribunal ought to be seen as part of the structure of a government department, for tribunals exercised functions which were essentially judicial in character, although of a specialised nature. As the Franks committee stated in words of great significance:

We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned.⁸

On the other hand, the public inquiry, while it granted those affected by official proposals with some safeguards against ill-informed and hasty decisions, was essentially a step in a complex process leading to a departmental decision for which a minister was responsible to Parliament.

⁴ See report of the Franks committee, Cmnd 218, 1957, parts II and III; Richardson and Genn (eds), *Administrative Law and Government Action*, part II; Harlow and Rawlings, *Law and Administration*, ch 11; and Leggatt, *Tribunals for Users*; Jacobs, *Tribunal Practice and Procedure*.

⁵ See *R v East Pomder Justices, ex p Lampshire* [1979] QB 616.

⁶ On these tribunals, see Baldwin, Wikeley and Young, *Judging Social Security*; Adler and Bradley (eds), *Justice, Discretion and Poverty*; cf R Sainsbury, in Harris and Partington (eds), *Administrative Justice in the 21st Century*, ch 22.

⁷ See page 573 above.

⁸ Cmnd 218, 1957, p 9.

The constitutional logic of the view that tribunals are ‘machinery provided by Parliament for adjudication’ reached its culmination fifty years after the Franks report, in the Tribunals, Courts and Enforcement Act 2007. We shall see that this Act deals with tribunals as a vital part of the machinery of justice, operating alongside the ordinary civil courts.

Court and tribunals – some comparisons

Although there is today no doubt about the judicial role of tribunals, the existence of tribunals was sometimes in the past thought to weaken the judiciary and the authority of the ordinary courts.⁹ In fact, the machinery of the courts is not suited for settling all disputes arising out of the work of government. One reason for this is the need for specialised knowledge (in areas such as taxation, social security or immigration) if disputes are to be settled expeditiously and consistently. Another reason is the large volume of appeals that arise from first-instance decisions in such areas. Further, while policy decisions and oversight of a department’s work are entrusted to ministers, the efficient administration of many areas of government depends on there being a body of rules which officials can apply without constant recourse to a minister.¹⁰ The right of appeal against an official’s decision at first instance is a better remedy for the aggrieved individual than the principle of ministerial responsibility, since it provides a means of discovering whether the rules have been correctly applied or whether a decision has been made that is contrary to the department’s professed policies.

Factors favouring the use of tribunals have included the need for procedure which avoids the formality of the courts; the need, if a new social policy is introduced, for the speedy, cheap and decentralised decision of many cases; and the need for expert knowledge in the tribunal, whose members may include both lawyers and also other professionals or lay persons. Another factor has been that the legal profession has no monopoly of the right to represent parties to tribunal proceedings: there is a value in enabling the individual affected to be heard in person by the tribunal.¹¹ In 1957, when the status of tribunals had not been clearly established, the Franks committee reflected a traditional preference for courts rather than tribunals in expressing the view that ‘a decision should be entrusted to a court rather than to a tribunal in the absence of special considerations which make a tribunal more suitable’.¹² There have been so many changes since then in the procedures of both tribunals and courts that this now seems a very dated viewpoint. Certainly, most tribunals are concerned with disputes between a private individual and a public authority (these may be termed, disputes between *citizen and the state*). This does not apply to employment tribunals, which deal with disputes between the parties to the employment relationship. However, even with this exception there is a striking overlap in the decisions made by courts and tribunals.¹³ For instance, in hearing claims for unlawful discrimination brought against employers, employment tribunals make decisions that other legal systems entrust to a labour court; and cases alleging unlawful discrimination against bodies other than employers are brought in the county court.

The essentials of good adjudication apply to both tribunals and courts. The right under art 6(1) ECHR to a fair hearing before an independent and impartial court or tribunal does not depend on the label applied to the decision-maker. It is fundamental that neither judges

⁹ See e.g. Lord Scarman, *English Law – the New Dimension*, part III. For a historical critique, see Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in the 19th Century*.

¹⁰ This fact underlies the present use in Whitehall of executive agencies: see ch 11 D.

¹¹ See G Richardson and H Genn [2007] PL 116, re-assessing the right to an oral hearing.

¹² Cmnd 218, 1957, p 9.

¹³ A very different distinction is drawn in Australia between ‘administrative tribunals’ and the courts: see P Cane [2009] PL 479 and (same author) *Administrative Tribunals and Adjudication*.

nor tribunal members should be subject to dismissal when a government department is dissatisfied with their decisions. Procedure in a tribunal is often said to be informal. But informality is difficult to reconcile with the need for legal precision¹⁴ and tribunal procedures are not always less formal than procedures in a comparable court. When a county court is dealing with a small claim through arbitration, its procedure is very informal.

Although some tribunals do exercise jurisdiction at first instance (this is true of employment tribunals), the right to go to a tribunal usually arises only where a public body or official has first made a decision that the individual disputes. The need for individuals to appeal will depend to a large extent on whether the public body in question has taken reasonable steps to ensure that they ‘get decisions right first time’.¹⁵

A safeguard common to all tribunals is that it should be possible to challenge their decisions on points of law, whether by appeal to a higher court or tribunal or by judicial review. In 1957, the Franks committee considered that the ideal appeal structure took the form of a general appeal from the tribunal of first instance to an appellate tribunal, and that all tribunal decisions should be subject to review by the on points of law. That ideal structure has often been absent. Until the reform of the tribunal system made in 2007, the confusing lack of system in relation to tribunals extended to the piecemeal provision made for appeals.¹⁶ Where no right of appeal is provided in the legislation, the decisions and procedures of a tribunal are subject to judicial review.¹⁷

The Leggatt review of tribunals

In 2001, for the first time since the Franks report of 1957, a review of all tribunals was conducted. It was undertaken for the Lord Chancellor by a retired Court of Appeal judge, Sir Andrew Leggatt, assisted by an expert panel.¹⁸ He found that, leaving regulatory bodies to one side, there were some 70 different tribunals in England and Wales, between them disposing of nearly a million cases each year. But of the 70 tribunals, only 20 heard more than 500 cases a year: many of the tribunals were defunct and some had never had any cases to decide. Leggatt criticised the lack of system in tribunals, commenting that tribunals had grown up in a haphazard way, created piecemeal by legislation and separately administered by government departments with wide variations of approach, in a way that (in his view) took more account of departmental needs than the convenience of tribunal users. He proposed the creation of what would indeed be a system of administrative justice, ‘a single, overarching structure’ that would give the individual improved access to all tribunals. Although this would involve reorganising the structure and servicing of tribunals, many tribunals, particularly those with large caseloads, would continue to function with little practical change in their decision-making being necessary.

There was certainly no need for as many as 70 separate tribunals. The Leggatt review proposed that there should be a single tribunal system, administered by an integrated tribunal service, and operating in divisions according to subject matter. The divisions proposed by Leggatt would have brought together existing tribunals under nine headings: (a) education; (b) employment; (c) finance and revenue; (d) health and care; (e) immigration and asylum; (f) property, land and valuation; (g) social security, pensions and criminal injury compensation; (h) transport; and (i) aspects of trade, competition, patents and copyright. Leggatt also

¹⁴ H Genn, in Richardson and Genn (eds), ch 11 (note 4 above).

¹⁵ *Transforming Public Services*, Cmd 6243, 2004, para 3.9.

¹⁶ See Lord Woolf (1988) 7 CJK 44; Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (HC 669, 1993–4), part XII.

¹⁷ See chs 24, 25.

¹⁸ See Leggatt, *Tribunals for Users*, and comment by A W Bradley [2002] PL 200.

proposed the creation of a general tribunal to hear appeals from the first tier of tribunal decisions, since the ‘tribunal maze’ extended to a bewildering variety in the rights of appeal.

Tribunals, Courts and Enforcement Act 2007

A main aim of the Act was to carry through the complex reform of tribunals initiated by the Leggatt review.¹⁹ Part 1 of the Act set up two new general tribunals, with the function of replacing the great majority of the former first-instance and appellate tribunals: the First-tier Tribunal to make first-instance decisions, and the Upper Tribunal to hear appeals from the First-tier Tribunal (s 3). The Act created the office of Senior President of Tribunals, appointed by the Queen on the advice of the Lord Chancellor (s 2). The first Senior President was Carnwath LJ. The Act envisages that his successors would also be drawn from the Court of Appeal or from the appellate courts in Scotland and Northern Ireland,²⁰ and upon his appointment to the Supreme Court in 2012, Sullivan LJ was appointed the Senior President. In a statement of principle that reinforces the assimilation of tribunals to the courts, the guarantee of judicial independence given in the Constitutional Reform Act 2005²¹ for judges in the civil and criminal courts was extended to those holding judicial office in the new tribunals (s 1).

The Senior President must take account of the need for tribunals to be accessible, for their proceedings to be fair, quick and efficient, for tribunals to have available suitable expertise to deal with specialised areas of law, and for the development of new informal methods of resolving disputes (s 2). The Senior President reports each year to the Lord Chancellor on matters relevant to cases coming before the First-tier and Upper Tribunals (s 43), has authority to make representations to Parliament, and is required to represent the views of all tribunal members (sch 1, paras 13, 14). The two tribunals comprise persons who are legally qualified and are known as judges, as well as non-legal members who may have professional qualifications (for instance, in medicine or valuation) or be lay persons with relevant experience.

The First-tier Tribunal is organised in a system of chambers, each headed by a judge as president. The Lord Chancellor has power by order to transfer the functions of many tribunals to the appropriate chamber, whereupon the former tribunals are abolished. In September 2013, the First-tier Tribunal comprised six divisions: (a) the General Regulatory Chamber (whose multifarious functions include consumer credit and estate agent appeals, charity appeals, information disputes, and driving standards agency appeals); (b) the Social Entitlement Chamber (dealing with social security, child support, asylum support and criminal injuries compensation); (c) the Health, Education and Social Care Chamber (mental health review, special educational needs and disability, and care standards); (d) the War Pensions and Armed Forces Compensation Chamber; (e) the Tax Chamber (income tax, VAT and duties); (f) the Immigration and Asylum Chamber; and (g) the Property Chamber (residential property, rent functions, leasehold valuation and agricultural lands).²² Members of the First-tier Tribunal may sit in more than one chamber. Employment tribunals, and some other smaller jurisdictions, are outside this structure, but like the First-tier Tribunal chambers they are administered by the general Courts and Tribunals Service.

The Upper Tribunal is organised in a smaller number of chambers: (1) the Administrative Appeals Chamber; (2) the Tax and Chancery Chamber; (3) the Lands Chamber; and (4) the

¹⁹ See R Carnwath [2009] PL 48.

²⁰ If it is not possible to appoint a judge at appellate level, the Judicial Appointments Commission will operate a selection process: sch 1, parts 1 and 2.

²¹ See ch 13 B.

²² The functions of the former Asylum and Immigration Tribunal have been divided between this chamber of the First-tier Tribunal and the related chamber in the Upper Tribunal.

Immigration and Asylum Chamber. The president of each chamber is a High Court judge. In outline, each chamber hears appeals from one or more chambers of the First-tier Tribunal, although certain limited types of case may be heard directly by the Upper Tribunal. However, the First-tier Tribunal has power to review its own decisions (exercisable once only in any case) and it may then take a fresh decision, may refer the case to the Upper Tribunal or may decide that no action is needed.²³ The purpose of this review is to deal rapidly with decisions that are considered to be clearly wrong, so avoiding the need for an appeal. The parties to a decision by the First-tier Tribunal have a right of appeal to the Upper Tribunal, but only on a point of law and only with the leave of either Tribunal. A novel feature of the scheme is that the Upper Tribunal may in specified classes of case exercise a so-called ‘judicial review’ jurisdiction, closely modelled on judicial review proceedings in the Administrative Court; and certain proceedings may be transferred from the Administrative Court to the Upper Tribunal, and vice versa (ss 15–21). From the Upper Tribunal, there is a right of appeal with leave to the Court of Appeal (in Scotland, to the Inner House of the Court of Session) (ss 13–14).²⁴

In two Supreme Court cases heard together in 2011, *R (Cart) v Upper Tribunal*²⁵ and *Eba v Advocate General for Scotland*,²⁶ the question arose of whether, if leave to appeal is refused by both First-tier and Upper Tribunals, that refusal is subject to judicial review. A refusal of permission to appeal is an excluded decision within the meaning of the Act and cannot be appealed (ss 11(4) and 13(8)). The Supreme Court in *Cart* held that (a) the Upper Tribunal’s decisions were subject to judicial review, but (b) in light of the tribunal structure under the 2007 Act, it was reasonable to restrict judicial review by applying criteria that now apply to limit the making of a ‘second-tier appeal’ to the Court of Appeal, and also to appeals from the Upper Tribunal to the Court of Appeal. These criteria are (a) that the appeal raises an important point of principle or practice or (b) that there is some other compelling reason for the appeal to be heard. In reaching this decision, the Supreme Court emphasised both the importance of entrusting the courts with authority to uphold the law, and the need for courts to remember that even in the administration of justice, resources are limited. As a result of this decision, and in response to suggestions from members of the Court, the Civil Procedure Rules were amended to provide for the test set out in *Cart*.²⁷ In addition, the judicial review time limit has been reduced to 16 days after the date on which the Upper Tribunal’s decision was sent to the applicant (r 54.7A(3)) and unlike with normal judicial review claims, there is no right to request an oral reconsideration if permission is refused on the papers (r 54.7A(8)). In *Eba v Advocate General for Scotland*, a similar conclusion was reached for Scotland; and the Supreme Court ruled that, contrary to what was held in *Watt v Lord Advocate*,²⁸ the Scottish courts may correct an error of law made by a statutory tribunal even if the error might be said to be ‘within jurisdiction’. Lord Hope observed that, while the position of tribunals in Scotland has not been identical with their position in English law, the 2007 Act did apply to Scotland and there were common factors (such as the need to respect the expertise of specialist tribunals) that indicated that Scots law and English law should now be aligned.

One valuable result of the two-tier structure is to rationalise the diverging procedures that separate tribunals had used. This task has been carried out by the Tribunal Procedure

²³ 2007 Act, s 9. The Upper Tribunal has a similar power (s 10).

²⁴ On the meaning attached to errors of law at this level, and the desirability of interpreting the concept flexibly, see Carnwath (note 19 above) at 61–64 and *R (Jones) v First-tier Tribunal* [2013] UKSC 19, [2013] 2 AC 48, [43]–[47].

²⁵ [2011] UKSC 28, [2012] 1 AC 663.

²⁶ [2011] UKSC 29, 2011 SLT 768.

²⁷ Civil Procedure (Amendment No.2) Rules 2012 (S.I. No 2012/2208).

²⁸ 1979 SC 120.

Committee, chaired by a Court of Appeal judge. The aims of the procedure rules include that of ensuring that in tribunal proceedings ‘justice is done’; that the tribunal system is ‘accessible and fair’; that proceedings are ‘handled quickly and efficiently’; and that the rules are ‘both simple and clearly expressed’.²⁹

All appointments to the First-tier and Upper Tribunals are made by the Judicial Appointments Commission. The 2007 Act contains rules of eligibility for appointment to the Tribunals that may encourage greater diversity in their membership.³⁰ The flexible and wide-ranging jurisdiction of the two Tribunals should mean that no other tribunals need be created in future: if as a result of legislation new decisions are to be made that require a right of appeal, power to decide the appeals can be conferred on the First-tier Tribunal, and then assigned to an appropriate chamber.

Some tribunals continue to exist outside the two-tier scheme created by the Act of 2007. They include the Investigatory Powers Tribunal, created by the Regulation of Investigatory Powers Act 2000, the Proscribed Organisations Appeal Commission, created under the Terrorism Act 2000, and the Competition Appeal Tribunal, created by the Enterprise Act 2002. Tribunals that are now outside the two-tier tribunal structure may be brought within the scheme, provided that they exist under statutory authority. This means that private and domestic tribunals must remain outside the scheme, but bodies that hear appeals from decisions made by local councils may in future be added to it.

Administrative support for the 2007 Act tribunals, including staffing and premises, is provided by Her Majesty’s Courts and Tribunals Service (HMCTS), an executive agency within the Ministry of Justice.³¹

Administrative Justice and Tribunals Council

Following the Leggatt Report, the Act created the Administrative Justice and Tribunals Council.³² The council, which had Scottish and Welsh committees, consisted of between 10 and 15 members appointed by an interlocking variety of processes to which the Lord Chancellor, the Scottish ministers and the Welsh ministers all contributed to a varying extent. The council reported annually to the Lord Chancellor and the Scottish and Welsh ministers. The council’s principal functions were (a) to keep the administrative justice system under review, (b) to keep under review the constitution and working of specified tribunals, and (c) to keep under review the working of statutory inquiries. The fact that the remit of the council, compared with the former Council on Tribunals, had been broadened by the inclusion of ‘administrative justice’ was welcomed. ‘The administrative justice system’ is defined for this purpose as

the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including

- (a) the procedures for making such decisions,
- (b) the law under which such decisions are made, and
- (c) the systems for resolving disputes and airing grievances in relation to such decisions.³³

²⁹ 2007 Act, s 22(4). The rules take account of the specialist needs of each chamber. All the procedure rules are listed on the justice.gov.uk website.

³⁰ 2007 Act, schs 2, 3; Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008 (SI No 2692/2008), as amended.

³¹ The HMCTS was created in 2011 by merging the Tribunals Service with Her Majesty’s Court Service. This is further evidence of how deeply embedded within the legal structure the new tribunal structure has already become.

³² 2007 Act, ss 44–45 and sch 7. And see the council’s report for 2008–9.

³³ 2007 Act, sch 7, para 13(4).

However, the structure of the council's remit does not make clear that tribunals and inquiries are themselves important features in the landscape of administrative justice.³⁴ And the mention of an 'overall system' refers to what is desirable, not to what now exists. The council's functions concerning administrative justice included considering ways in which the system may be made 'accessible, fair and efficient', and the council could advise ministers on developing the system and could make proposals for research.³⁵

However, the government proposed, in 2011, to remove the council. The abolition of the council, along with its Scottish and Welsh committees, was to be achieved by means of subordinate legislation, subject to parliamentary procedure, under the Public Bodies Act 2011.³⁶ The proposal was strongly criticised at Westminster, including in reports from the House of Lords Secondary Legislation Scrutiny Committee, but the council was abolished on 19 August 2013.³⁷

Conclusion

The constitutional position of tribunals has been transformed by the reforms initiated by the Leggatt review and given effect by Parliament in 2007.³⁸ Most issues over tribunals that arose between 1957 and 2007 are now of historical interest alone. The legislative changes have had to be matched by an extensive re-deployment of administrative and judicial resources. The full benefits of having a system of tribunals that is assimilated to the system of courts are yet to be felt, but the allocation of decision-making to the First-tier and Upper Tribunals should make possible a flexible and effective interface between these tribunals, and the Administrative Court and Court of Appeal. The First-tier and Upper Tribunals comply fully with the standards of judicial decision-making required by art 6(1) ECHR, although not necessarily every underlying area of law the tribunals engages civil rights and obligations within the meaning of art 6(1).³⁹ It is unlikely (unless Parliament were to go back on the Act of 2007) that tribunals could come under covert political influence or control. To take one example, the creation of the Immigration and Asylum chambers within the two-tier structure should prove to last longer than other attempts to structure decision-making in this controversial area. The commitment of the 2007 Act to the wider landscape of administrative justice, including the principle of proportionate dispute resolution, should ensure that tribunal procedures are not raised to a level of formality that prevents decisions being made in a manner that is accessible, effective and understood by the public. It is to be hoped that even the abolition of the council will not undermine that commitment pervading the tribunal system but it is a matter of concern that it will be the Ministry of Justice that will be the body responsible for an independent oversight of administrative justice.

B. Public inquiries

As we have seen in section A, the status of tribunals in the United Kingdom is now largely assimilated to that of the courts: the legally qualified members of the First-tier and Upper

³⁴ And see note 2 above.

³⁵ 2007 Act sch 7, para 13(1).

³⁶ See the Public Bodies (Abolition of the Administrative Justice and Tribunals Council) Order 2013.

³⁷ See e.g. 21st report of Public Administration Select Committee (2010–12, HC 1621); 8th report of Justice Select Committee (2012–13, HC 965); 2nd report of the Secondary Legislation Scrutiny Committee (2013–14, HL 8); and 7th report of the Secondary Legislation Scrutiny Committee (2013–14, HL 36).

³⁸ As was convincingly argued by Carnwath LJ in his first annual report as Senior President of Tribunals: *Tribunals Transfers*, 2010.

³⁹ See e.g. *Browning v Information Commissioner* [2013] UKUT 236 (AAC) in relation to appeals under the Freedom of Information Act 2000.

Tribunals are termed judges, and the Tribunals have a close relationship with the Administrative Court and Court of Appeal. The nature of public inquiries is different. The public inquiry is an administrative process that became widespread during the 20th century as government departments acquired power to intervene in matters of local government such as housing, public health, compulsory purchase and town planning. The issues that caused central government to become involved often arose out of a conflict between a local authority's policies and the rights and interests of individuals. Public inquiries of this kind (conducted locally by an official of central government, most commonly designated an 'inspector')⁴⁰ should not be confused with inquiries investigating matters of national concern, that may be held under the Inquiries Act 2005; these are considered in section C below.

Two views on the nature of inquiries have often been expressed. As seen by the Franks committee in 1957, the 'administrative' view was to regard the inquiry as a step leading to a ministerial decision in the exercise of discretion, for which the minister was responsible only to Parliament. By contrast, on the 'judicial' view, the inquiry appeared 'to take on something of the nature of a trial and the inspector to assume the guise of a judge', so that the ensuing decision must be based directly on the evidence presented at the inquiry.⁴¹

The Franks committee rejected these two extreme interpretations. In the committee's view, the objects of the inquiry procedure were (a) to protect the interests of the citizens most directly affected by a governmental proposal by granting them a right to be heard in support of their objections; and (b) to ensure that thereby the minister would be better informed of the whole facts of the case before the final decision was made.⁴² To ensure a balance between the conflicting interests, Franks recommended (1) that individuals should know in good time before the inquiry the case they would have to meet; (2) that any relevant lines of policy laid down by the government should be disclosed at the inquiry; (3) that the inspectors who conduct inquiries should be under the control of the Lord Chancellor, not of the minister directly concerned with the subject matter of their work; (4) that the inspector's report should be published together with the letter from the minister announcing the final decision; (5) that the decision letter should contain full reasons for the decision, including reasons to explain why the minister had not accepted recommendations of the inspector; (6) that it should be possible to challenge a decision made after a public inquiry in the High Court, on the grounds of jurisdiction and procedure.⁴³

With one exception, the Franks recommendations were accepted and their effect can still be seen in the procedure of public inquiries today. The exception was the recommendation that inspectors be transferred to the Lord Chancellor's department. This was not adopted, but the status of inspectors has changed since 1957, when they worked in the department responsible for planning. The inspectors decide appeals on such matters as the refusal of planning permission and enforcement action taken by local councils; they may also conduct inquiries before major planning decisions are made by ministers, and into local development plan documents.⁴⁴

From its creation in 1958 and until 2007, the Council on Tribunals had power to consider and report on matters arising out of the conduct of statutory inquiries. This power was passed to the Administrative Justice and Tribunals Council.⁴⁵ In this context, 'statutory

⁴⁰ In Scotland, the commonly used term is that of 'reporter'.

⁴¹ Cmnd 218, 1957, p 58.

⁴² 'The purpose of an inquiry is two-fold: it is both to reach a rational planning decision and to allow the various parties to have their concerns heard': HC 364 (1999–2000), para 34 (Committee on Environment, Transport and Regional Affairs).

⁴³ Cmnd 218, 1957, part IV.

⁴⁴ For an assessment of the Inspectorate, see HC 364 (1999–2000) and, in response, Cm 4891, 2000.

⁴⁵ Page 640 above.

inquiry' includes both an inquiry or hearing held by or on behalf of a minister in pursuance of a duty imposed by any statutory provision, and also what is known as a discretionary inquiry, that is, an inquiry initiated by a minister in exercise of a statutory discretion, where such an inquiry is designated for this purpose by statutory instrument.⁴⁶

The inquiries examined by the Franks committee mostly concerned such matters as the compulsory purchase of land for public purposes (such as a new town, a power station or a motorway), and disputes under planning law about the use and development of land. Inquiries and similar procedures serve many other purposes, for example to inquire into electoral boundaries⁴⁷ or to investigate the failure by a local authority to maintain proper standards of care in relation to children.⁴⁸

Rules of procedure for public inquiries

Under the Tribunals and Inquiries Act 1992, s 9, as amended, the Lord Chancellor may make rules regulating the procedure at statutory inquiries. Rules have been made in respect of inquiries held for many purposes, including inquiries into compulsory purchase orders, appeals against the refusal of planning permission; and inquiries into development plans and major infrastructure projects.⁴⁹ Subject to the rules, procedure at the inquiry is determined by the inspector. The degree of formality depends on the circumstances of the inquiry, particularly the extent of legal representation. The inspector's report must include his or her conclusions and recommendations, if any; it will be sent to the parties when the minister's decision is notified to them.

One important rule deals with the situation where the minister, after considering the inspector's report, either differs from the inspector on a finding of fact or, after the close of the inquiry, 'takes into consideration any new evidence or new matter of fact (not being a matter of government policy)'. In such a case, if the minister proposes not to follow the inspector's recommendation because of this new material, the public authority and objectors must be informed and they have the right to require the inquiry to be reopened. The background to this lies in what was known as the chalk-pit affair:⁵⁰ after an inquiry into a controversial application to extract chalk in the Essex countryside, the department that conducted the inquiry consulted privately with the Ministry of Agriculture about the harm that the chalk working would cause to neighbouring property. This secret consultation was defended at the time, but today it would breach the inquiry rules.

The aim of the procedure rules is to protect the fairness and openness of the inquiry process: the rules are enforceable in the courts, and the requirement to observe them exists alongside duties at common law derived from the principle of natural justice.⁵¹ If a particular inquiry is not governed by statutory rules of procedure, there is in any event a duty to observe common law rules of natural justice or fairness.⁵² Although the procedure rules

⁴⁶ Tribunals and Inquiries Act 1992, s 16(2). And see Tribunals and Inquiries (Discretionary Inquiries) Order 1975, SI No 1975/1379 (as frequently amended).

⁴⁷ Ch 7 B.

⁴⁸ See Justice/All Souls report, *Administrative Justice*, pp 312–27; S Sedley (1989) 52 MLR 469; L Blom-Cooper [1993] CLP 204 and e.g. the (Laming) report of inquiry into the death of Victoria Climbié, Cm 5730, 2003. Also SOLACE, *Getting it Right: guidance on the conduct of effective and fair ad hoc inquiries* (2002). And section C below.

⁴⁹ See, for example, Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI No 2000/1625) (as amended).

⁵⁰ See J A G Griffith (1961) 39 *Public Administration* 369; and *Buxton v Minister of Housing* [1961] 1 QB 278. Ch 24 C.

⁵² *Fairmount Investments Ltd v Environment Secretary* [1976] 2 All ER 865; *Bushell v Environment Secretary* [1981] AC 95.

define those who are entitled to notice of an inquiry and to take part, they give the inspector a discretion to allow other persons to appear at the inquiry. In practice, community associations and other interest groups are permitted to take part and thereby they acquire a right to come to the Administrative Court if it is alleged that the procedure rules have not been observed.⁵³

In its earliest years, the former Council on Tribunals took an active part in shaping the inquiry rules and in seeking to secure the award of costs to those taking part in inquiries, at least for owners who successfully object to the compulsory purchase of their land. More recently, the conduct of public inquiries has raised fewer questions. If there has been a departure from proper procedure, the Administrative Court may give an effective remedy to those aggrieved by setting aside the inquiry. Alternatively, where someone is adversely affected by the improper conduct of an inquiry, or by acts of the department related to the inquiry, he or she may take the complaint to the Parliamentary Ombudsman, who can make a full investigation into the matter and may recommend the department to provide a remedy.⁵⁴

The changing use of public inquiries

The public inquiry continues to be a part of the process by which certain decisions are made, especially those concerning use of land for developments of environmental significance, but its role has diminished. One consequence of the Franks report was the greater legalisation of inquiries. Increased involvement of the legal profession in inquiries put pressure on the planning process, and led to delays and over-centralisation of decision-making on many local issues. Many steps have been taken to restrict the use of the public inquiry and to encourage the use of speedier procedures. For instance, the Planning and Compulsory Purchase Act 2004, ss 100–1, authorised the use in connection with compulsory purchase of a *written representations* procedure that has long been available for planning appeals,⁵⁵ but only if the objectors consent to this; if consent is not given, then either a public inquiry must be held or they must be given a *hearing*, in each case before a member of the Planning Inspectorate.⁵⁶

As regards the control of development, delay has been reduced by transferring the power to decide planning appeals from the Secretary of State to the inspectorate. All appeals regarding applications for planning permission and all appeals against enforcement notices may be decided by an inspector;⁵⁷ however, the Secretary of State retains power to decide certain appeals and may ‘call in’ applications for decision.⁵⁸ An inspector’s decision is subject to review in the courts, but the Secretary of State is not responsible to Parliament for it. In their decision-making, inspectors must take account of published planning policies, at the national, regional or local level, as well as all other material considerations and views of the parties.

The leading judicial examination of a planning inquiry is that made in *Bushell v Environment Secretary*.⁵⁹

⁵³ *Turner v Environment Secretary* (1973) 72 LGR 380.

⁵⁴ Section D below.

⁵⁵ Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 (SI No. 2009/452).

⁵⁶ See: The Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI No. 2000/1626) (as amended).

⁵⁷ Town and Country Planning Act 1990, Sch 6 and Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997 (SI No. 1997/420) (as amended).

⁵⁸ 1990 Act, ss 77–79. And see the *Alconbury* case (note 61 below).

⁵⁹ [1981] AC 75. And see *R v Transport Secretary, ex p Gwent CC* [1988] QB 429.

During a lengthy inquiry held concerning the M40 extension near Birmingham, the inspector allowed objectors to bring evidence challenging estimates of future traffic growth, but refused to allow civil servants to be cross-examined on these. After the inquiry and before the minister made a decision, the department revised its traffic estimates, but the minister did not allow the inquiry to be reopened to examine the new estimates. The objectors claimed that natural justice entitled them (a) to cross-examine officials on the traffic predictions and (b) to a re-opening of the inquiry. The House of Lords upheld the motorway orders, holding that natural justice had not been infringed. The judges stressed that an inquiry was quite unlike civil litigation. An inspector had wide discretion to disallow cross-examination if it would serve no relevant purpose. The methods of predicting future traffic growth were an essential element in national policy for motorways, and were not suitable for investigation at local inquiries. Lord Edmund-Davies, dissenting, held that the objectors had been denied 'a fair crack of the whip'.⁶⁰

This decision was a reminder that a public inquiry into a controversial proposal put forward by a government department is only part of a political process in which the minister cannot be expected to assume a cloak of judicial impartiality. A similar reminder was given in *R (Alconbury Developments Ltd) v Environment Secretary*.⁶¹

A Human Rights Act challenge was made to the minister's power to determine planning appeals which, instead of being decided by an inspector, had been 'called in' for the minister to decide. Similar challenges were made to the minister's power to approve a compulsory purchase order under the Highways Act 1980 and a new rail link under the Transport and Works Act 1992. The claimants argued that (1) the decisions affected their civil rights; (2) by art 6(1) ECHR, such questions must be determined by an independent and impartial tribunal, failing which a decision must be subject to review by a court with full jurisdiction to consider its legality; (3) the Secretary of State was not such a tribunal; and (4) there was insufficient judicial control of the decisions to satisfy art 6(1) ECHR, since the statutory appeals available did not provide for a rehearing on the merits. The House of Lords broadly approved points (1)–(3), but rejected point (4), holding that art 6(1) ECHR did not require a court to rehear the merits of the decisions; the statutory appeals to the High Court provided sufficient review of their legality. Lord Clyde said: 'We are concerned with an administrative process and an administrative decision. Planning is a matter for the formation and application of policy. The policy is not a matter for the courts but for the executive' (para 139).

Earlier, in *Bryan v United Kingdom*,⁶² the Strasbourg Court had held that no breach of art 6(1) ECHR occurred where an inspector's decision on a planning appeal was subject to an appeal to the High Court that extended to all grounds of judicial review; such control by the national court overcame the fact that the position of the inspector was not an independent court or tribunal for the purposes of art 6(1). Because of *Bryan v United Kingdom*, the challenge in *Alconbury* focused on the fact that the decisions were made by the minister, not by an inspector.

⁶⁰ [1981] AC 75, 118.

⁶¹ [2001] UKHL 23, [2003] 2 AC 295. See D Elvin and J Maurici [2001] *Jl of Planning Law* 883.

⁶² (1995) 21 EHRR 342, applying *Albert and Le Compte v Belgium* (1983) 5 EHRR 533.

Difficulties have continued to be experienced in relation to the handling of major infrastructure projects dealing with such matters as energy, water and transport.⁶³ The Planning and Compulsory Purchase Act 2004, s 44, gave power to the Secretary of State to deal with infrastructure projects of national or regional importance. The minister could appoint an inspector as ‘lead inspector’, to conduct a public inquiry into aspects of the project, with power to set a time-table for the inquiry and to appoint additional inspectors to conduct concurrent sessions of the inquiry into specific matters.

Following reviews of the planning system and of the handling of major transport proposals,⁶⁴ further changes were made by the Planning Act 2008. This introduced a new system for major infrastructure projects, to exclude altogether any future public inquiry. Instead, national policy statements that affect the projects may be adopted by the Secretary of State, subject to prior consultation and publicity; the statements must be laid before Parliament and are subject to approval from the House of Commons (s 9). Where such statements have been adopted, the Secretary of State decides whether to approve the project, but must do so in accordance with the policy statement.⁶⁵

The public examination of such a project is in principle to be dealt with by written representations (s 90). But a hearing may be held on specific issues (s 91), and a hearing must be held if the proposal involves compulsory acquisition and an owner asks to be heard (s 92). The Act does not authorise a public inquiry at any stage, but an ‘open-floor hearing’ may be held at which any interested persons may make representations (s 93). All hearings must be in public, but time limits may be imposed, and cross-examination of witnesses is strictly limited. Nevertheless, the inspector may allow oral questioning if necessary to ensure that representations are adequately tested, or that an individual has a ‘fair chance’ to put his or her case (s 94 (7)). Significantly, ‘representations relating to the merits of a policy set out in a national policy statement’ are excluded (s 98(4)). An order to permit the development may be challenged by judicial review but, in keeping with the desire to reduce delay, the period for challenge is restricted to six weeks from publication of the order or (if later) from publication of the reasons for the order (s 118).⁶⁶

One problem under this process is that campaigners against particular projects will find it difficult to accept that the issues can be fairly examined by the Secretary of State, especially if the national policy statement is site-specific as to a new reservoir, wind farm or power station. For this and other reasons, objectors are likely to seek judicial review of proceedings under the 2008 Act,⁶⁷ even if the disputed issues are essentially policy questions which (the framers of the Act would argue) should be decided by Parliament.

⁶³ On the government proposal in 2001 that parliamentary approval for certain major projects should be obtained in advance of a public inquiry, see HC Deb, 20 July 2001, col 521W; J Popham and M Purdue [2002] *Jl of Planning Law* 137.

⁶⁴ See K Barker, *Review of Land Use Planning*, 2006 and R Eddington, *Transport Study*, 2006, which were followed by the white paper, *Planning for a Sustainable Future*, Cm 7120, 2007.

⁶⁵ The Planning Act 2008 had created an Infrastructure Planning Commission, but this was abolished, and its functions reallocated to the Secretary of State, by the Localism Act 2011, s 128 and Sch 13.

⁶⁶ In general, judicial review must be sought within three months of the decision challenged. However, in 2013, the Civil Procedure Rules were amended to reduce the period of challenge to decisions taken under the planning acts (principally the Town and Country Planning Act 1990) to six weeks: r 54.5. This aligns the position with statutory review of planning and similar decisions, which has long been subject to a six-week limitation period. See p 679 below.

⁶⁷ J Maurici [2009] *Jl of Planning Law* 446. For an example of a challenge to a high-profile major infrastructure planning project (the High Speed 2 rail line) which failed on all the substantive policy challenges and succeeded only on one consultation issue, see: *R (Buckingham CC) v Secretary of State for Transport* [2013] EWHC 481 (Admin); and on appeal: [2014] UKSC 2, [2014] 1 WLR 324.

This account of the changing use of public inquiries may suggest that we need to differentiate between two broad categories (while recognising that an intermediate ‘grey’ category exists between them): (a) decisions (such as the approval of major wind farms, high-speed rail links or power stations) that have a high content of national policy, are controversial, environmentally sensitive and cannot be decided by adjudication, but only by a governmental decision for which there must be political accountability; and (b) more routine matters, such as small-scale planning applications, which are decided in accordance with national, regional and local policies, initially by local authorities but with a right of appeal to the Planning Inspectorate. In this second category, discretion must still be exercised by the decision-makers, although sometimes the outcome depends on application of rules. When a planning inspector deals with this second category of questions, then this function is arguably comparable with that of the tribunals that we considered in section A – which cannot be said of the duties of ministers in deciding whether, for instance, nuclear power is in the national interest.

C. The Inquiries Act 2005

Both tribunals and inquiries form part of the regular structure of administrative justice and numerous decisions are made each year by these procedures. This section deals with something different – the legal provision for enabling a national disaster or major scandal to be the subject of investigation, with a view to finding out the reasons for the event, whether individuals or public authorities were responsible for it, and the lessons to be learnt. When such inquiries are held, it is essential that they are conducted impartially and with full regard to the evidence given to them. For this reason, serving judges have in the past been appointed to conduct such inquiries, but today retired judges are preferred.⁶⁸ The government nearly always has a direct interest in these inquiries, since the ministers and civil servants concerned may thereby come under close public scrutiny. MPs have a strong interest in inquiries as a means of allaying concern and establishing accountability; and the inquiries are paid for by the taxpayer. Some inquiries are concerned with questions of human rights, especially where deaths have occurred.⁶⁹ Many inquiries are held without statutory authority; others are conducted under legislation specific to the subject matter (whether, for instance, it concerns policing, rail accidents, or failures in the NHS). We deal first with the inquiries which, until its repeal in 2005, were held under the Tribunals of Inquiry (Evidence) Act 1921.

The Tribunals of Inquiry (Evidence) Act 1921

In the 19th century, parliamentary committees were occasionally appointed to inquire into matters of concern, such as alleged corruption in government. Use of these committees was discredited in 1913 when a Commons committee investigated the conduct of members of the Liberal government in the Marconi affair and the committee produced three conflicting reports.⁷⁰ The 1921 Act provided a more reliable way of securing an impartial investigation into major events. When the government had decided that a formal inquiry was necessary

⁶⁸ Although whether this is always appropriate is a matter for debate: J Beatson (2005) 121 LQR 221.

⁶⁹ Under art 2, ECHR, the state must investigate unnatural deaths, including deaths in which the state may be implicated. See *Jordan v UK* (2003) 37 EHRR 2; also HL 26, HC 224 (2004–5), ch 2. This duty has increased the significance of inquests and (in Scotland) fatal accident inquiries. See also *R (Hurst) v North London Coroner* [2007] UKHL 13, [2007] 2 AC 189; *R (JL) v Justice Secretary* [2008] UKHL 68, [2009] 2 All ER 521. And M Requa and G Anthony [2008] PL 443.

⁷⁰ See Donaldson, *The Marconi Scandal*.

with powers of obtaining evidence, the two Houses would resolve that a ‘tribunal of inquiry’ be appointed to inquire into a matter of ‘urgent public importance’; this enabled the tribunal to be appointed by the government. The tribunal would be granted all the powers of the High Court (in Scotland, of the Court of Session) to examine witnesses and require production of documents. When a person summoned as a witness failed to attend or refused to answer questions which the tribunal had power to ask, the chairman of the tribunal could report the matter to the High Court or Court of Session for inquiry and punishment as a contempt of court.⁷¹

In more than 80 years, only 24 tribunals of inquiry were appointed. Serious allegations of corrupt or improper conduct in the public service that were inquired into included a leakage of Budget secrets (1936), alleged bribery of ministers and civil servants (1948), premature disclosure of information relating to the raising of the bank rate (1957) and the disastrous financial operations of the Crown Agents (1978).⁷² Other matters of public anxiety were the tragic Aberfan disaster (1966), the Dunblane shootings (1996), abuse of children in care in North Wales (1999), and the ‘Bloody Sunday’ shootings in Londonderry (1972 and 2010).⁷³

Such tribunals of inquiry usually consisted of a senior judge, assisted by one or two additional members or expert assessors. The tribunal would hear witnesses in public, called to the inquiry by counsel instructed by the Treasury Solicitor. Witnesses were entitled to be legally represented and their costs could be met from public funds. They would be cross-examined by lawyers appearing at the tribunal and questioned by the tribunal. Because of the inquisitorial proceedings, steps might be needed to protect witnesses from being inculpated in giving evidence on charges which had not been formulated in advance and which they had no chance of contesting.⁷⁴ The Attorney General could assure witnesses that no criminal charges would be brought against them in respect of their evidence.

Other forms of inquiry

The public procedures of a tribunal of inquiry were not considered suitable for a review of events leading to the Falklands Islands hostilities that involved access to secret diplomatic and intelligence documents; instead, Lord Franks was appointed to chair a committee of privy counsellors. A similar method was adopted for the Butler review of intelligence on weapons of mass destruction in Iraq.⁷⁵ In 2009, Sir John Chilcot and other privy counsellors were appointed by the Prime Minister, after consulting opposition parties, to examine British involvement in Iraq from 2001 until July 2009. Chilcot’s broad terms of reference were to establish as accurately as possible the way government decisions were made before and during the conflict, and to identify the lessons to be learnt. The committee decided to hear as much evidence as possible in public; witnesses were questioned by the committee, and lawyers were absent from the public proceedings.

Other inquiries have been held under subject-specific legislation, for example into the conduct of the police or health authorities, or rail accidents.⁷⁶ Other inquiries have been

⁷¹ See *A-G v Mulholland and Foster* [1963] 2 QB 477 (imprisonment of journalists for refusing to disclose their sources).

⁷² See Cmd 5184, 1936; Cmd 7616, 1948; Cmnd 350, 1957; HC 364 (1981–2). See Keeton, *Trial by Tribunal*; and Z Segal [1984] PL 206.

⁷³ HC 553 (1966–7); Cm 3386, 1996; HC 201 (1999–2000); HC 220 (1971–2) and HC 29-I (2009–10).

⁷⁴ This criticism was made of the tribunal which investigated the collapse of the Vehicle and General Insurance Company: HC 133 (1971–2).

⁷⁵ See the Butler report, HC 898 (2003–4).

⁷⁶ See respectively the (Macpherson) inquiry into the killing of Stephen Lawrence, Cm 4262, 1998; the (Kennedy) inquiry into the Bristol Royal Infirmary, Cm 5207, 2001; and the (Cullen) inquiry into the Paddington rail disaster (*The Ladbroke Grove Rail Inquiry, Parts 1 & 2*, Health and Safety Executive, 2001).

conducted less formally and without statutory powers (including Lord Denning's dramatic inquiry into the Profumo affair in 1963).⁷⁷ As well as the Franks, Butler and Chilcot inquiries already mentioned, other non-statutory inquiries have included Sir Richard Scott's inquiry (1992–96) into the export of arms to Iraq,⁷⁸ and Lord Hutton's inquiry into the death of Dr David Kelly.⁷⁹ Such inquiries are 'judicial' in that they are conducted by a judge, although similar inquiries are conducted by other persons (for instance, the Bichard inquiry into the background to the Soham murders).⁸⁰ Their procedure is investigative and they have no power to compel witnesses to attend. Since they are not protected by the law of contempt of court, the subject matter can be discussed freely in the media. In the arms for Iraq inquiry, Sir Richard Scott was told that if he needed them, powers under the 1921 Act would be granted; he was eventually satisfied that he had full access to all official witnesses and papers.⁸¹ In that inquiry, the inquisitorial procedure for taking evidence in public was criticised for its effect on witnesses, who were permitted legal assistance but not representation.⁸²

The Inquiries Act 2005

Against this background, the Inquiries Act 2005 provides a new legal framework for inquiries, but it does not affect the power of a government to appoint non-statutory inquiries. The Act repealed the 1921 Act and the legislation for subject-specific inquiries of the kind already mentioned.⁸³

In outline, the Act empowers any minister in the UK government⁸⁴ to appoint an inquiry when 'particular events' have caused or may cause public concern, or 'there is public concern that particular events may have occurred' (s 1(1)). Such an inquiry may not determine a person's civil or criminal liability, but may find facts from which it is likely that liability may be inferred (s 2). The minister appoints the chairman of the inquiry, either to act alone, or with other members appointed by the minister after consulting the chairman (ss 3, 4). In making appointments, the minister must take into account the expertise of the panel, the need for balance and the services of assessors (ss 8, 11). The inquiry's terms of reference are settled and may be amended by the minister, after consulting the chairman or proposed chairman (s 5(3), (4)). Parliament must be informed of the inquiry, but is not required to approve the minister's decision (s 6). No member of the inquiry panel may have a direct interest in the subject matter or a close association with an interested party, except where this could not reasonably be regarded as affecting the impartiality of the panel (s 9). If the minister proposes to appoint a judge to serve on an inquiry, he or she must consult the president of the court concerned; for judges in England and Wales, this will be the Lord Chief Justice; in Scotland, the Lord President of the Court of Session; and for the Supreme Court, the president of the court (s 10, as amended). But the Act does not prevent the minister from appointing a judge who is willing to be appointed, even if the president does not consent to the appointment. In some circumstances, the minister may suspend an inquiry, but only after consulting the chairman, and notice of the suspension with

⁷⁷ Cmnd 2152, 1963; and Cmnd 3121, 1966, pp 19–21.

⁷⁸ See HC 115 (1995–6). Also I Leigh and L Lustgarten (1996) 59 MLR 695; and A W Bradley, in Manson and Mullan (eds), *Commissions of Inquiry*, ch 2.

⁷⁹ HC 247 (2003–4). For his reply to media criticism of the report, see Lord Hutton [2006] PL 807.

⁸⁰ The Bichard inquiry report, HC 653 (2003–4).

⁸¹ Scott report, section A, ch 1.

⁸² See Lord Howe [1996] PL 445; and Scott report, app A, part D. Also B K Winetrobe [1997] PL 18; L Blom-Cooper [1993] CLP 204 and [1994] PL 1; C Clothier [1996] PL 384; M C Harris [1996] PL 508; Leigh and Lustgarten (note 78 above), pp 694–701; and H Grant [2001] PL 377.

⁸³ For the repealed statutes, see Sched 3.

⁸⁴ The Act confers similar powers on the devolved authorities in Scotland, Wales and Northern Ireland.

reasons must be laid before Parliament (s 13); the minister may even bring the inquiry to an end before it has reported, subject to consulting the chairman and notifying Parliament (s 14).

The procedure and conduct of an inquiry are to be as directed by the chairman, subject to fairness and the need to avoid unnecessary costs (s 17). The chairman must take reasonable steps to ensure public access to the inquiry and the evidence, but restrictions on access may be imposed by the minister or the chairman, for instance for the purpose of reducing ‘harm or damage’ that would otherwise be caused (ss 18, 19). The ‘harm or damage’ includes damage to national security or international relations, damage to economic interests of the United Kingdom and damage caused by disclosure of commercially sensitive information (s 19(5)).⁸⁵ The chairman may require witnesses to attend the inquiry and produce relevant documents (s 21), subject to the exclusion of privileged information (s 22).⁸⁶ It is for the minister, or in some circumstances the chairman, to arrange for publication of the full report, subject to the omission of material that might cause ‘harm or damage’ of the kind mentioned (s 25). Reports when published are laid before Parliament (s 26).

The Act makes it an offence (s 35) to fail to comply with notices from the chairman under s 21, and such notices may be enforced in the High Court (in Scotland, the Court of Session) as if they had been issued in civil proceedings (s 36). Anyone who wishes to challenge decisions of the minister in relation to the inquiry or decisions by the panel has only 14 days from becoming aware of a decision in which to seek judicial review (although the court may extend the period) (s 38). The costs of the inquiry are to be borne by the minister, but the minister may notify the panel if it is going outside the terms of reference and the minister need not bear future costs if the panel ignores this warning (s 39). Rules of procedure and evidence may be made by the Lord Chancellor (s 41). A non-statutory inquiry can be converted into a 2005 Act inquiry.⁸⁷

While there was certainly a good case to be made for further general legislation on inquiries, aspects of the Act are controversial.⁸⁸ By eliminating altogether the need for Parliament to approve proposed inquiries, as required by the 1921 Act, the Act is open to the criticism that while inquiries often involve the acts and decisions of government departments, it is ministers who decide to hold an inquiry, appoint the chairman and panel members, settle and enforce the terms of reference, restrict public access to the inquiry and impose restrictions on publication. However, the Northern Ireland Court of Appeal held that the ability of a minister to stop an inquiry did not have a direct impact on its independence.⁸⁹ It will be important for parliamentary and public opinion to uphold the highest standards of integrity in the recourse made by governments to the Inquiries Act. The use of public resources for inquiries cannot be justified unless the findings made by inquiries are likely to allay public concern.⁹⁰ Since the enactment of the 2005 Act a number of public inquiries have been held under it, most prominently the Mid Staffordshire NHS Foundation Trust Inquiry, chaired by Robert Francis QC, and the Leveson Inquiry into the Culture, Practice and Ethics of the Press, chaired by Leveson LJ.⁹¹ Both of those inquiries – probably the most high-profile under the new system – can be said to have met the test of allaying public concern, both leading to significant public debate about legal and political reforms of the NHS and press regulation respectively.

⁸⁵ See also s 23 (risk of damage to the economy).

⁸⁶ The law of public interest immunity in civil proceedings (see ch 26 D) applies to inquiries: s 22(2).

⁸⁷ See *R (D) v SSHD* [2006] EWCA Civ 143, [2006] 3 All ER 946, [43]–[46].

⁸⁸ See the report of the Joint Committee on Human Rights cited in note 69 above.

⁸⁹ *Re Application by David Wright for Judicial Review* [2007] NICA 24.

⁹⁰ This is a factor that the Act rightly refers to in two places: ss 19(4)(a) and 25(5)(a).

⁹¹ HC 375-I (2013–14); and HC 780-I (2012–13).

D. Ombudsmen

Although the idea derived from the Ombudsman in Scandinavian countries and New Zealand,⁹² the British model was designed to fit alongside other means of remedying citizens' grievances, such as challenge in the courts (in the 1960s judicial review was a little used remedy), appeal to tribunals, the right to be heard at a public inquiry, and parliamentary means, such as an MP's letter or question to the minister concerned. Although each remedy may be effective in the appropriate situation, each has its particular limitations.⁹³ By comparison with those remedies, the value of the ombudsman model is that it provides an accessible, cheap (from the viewpoint of someone with a complaint against officialdom), non-legalistic and general-purpose remedy which may take a variety of forms, by which an individual can get his or her grievance examined by an independent and impartial person, experienced in the ways of government and able to distinguish good from bad administration. The ombudsmen acting in the public sector are also much more generally willing to engage with the substance of a complaint, rather than the traditional procedural focus and the high-level scrutiny of policy decisions found in the courts on judicial review.⁹⁴

The focus in this section will be on the Parliamentary Ombudsman. After more than forty years of that office, we can see that its success, admittedly within a structure that now seems overly rigid, led to similar initiatives in Britain in local government, the NHS and other areas of the public sector. The use of ombudsman-type procedures has also taken root in the private sector. Commitment to the ombudsman concept within a large organisation (whether governmental or commercial) is to accept the principle that individuals need effective redress against the mistakes, inefficiencies and other failings that occur in corporate conduct.

The Parliamentary Ombudsman

When the office of 'Parliamentary Commissioner for Administration' was created in 1967, it was indicative of the caution with which this was done that the word 'ombudsman' was not allowed to appear in the legislation. The statutory title just stated has always been cumbersome and in 1994 the government agreed that 'at the first opportunity' of legislation it would be changed to 'Parliamentary Ombudsman'.⁹⁵ No such opportunity has apparently arisen since. In fact, the present holder of the office, Dame Julie Mellor, describes herself as the 'Parliamentary Ombudsman'.⁹⁶ While the Parliamentary Ombudsman has close links with the executive, the office was designed as an extension of Parliament; and it has virtually no links with the judicial system. As Sir Cecil Clothier, then the Ombudsman, said in 1984:

The office . . . stands curiously poised between the legislative and the executive, while discharging an almost judicial function in the citizen's dispute with his government; and yet it forms no part of the judiciary.⁹⁷

It may not matter that it is difficult to locate the Ombudsman within a formal separation of powers, but it is important that the Ombudsman should be recognised as having a constitutional role that can help to maintain the electorate's faith in democracy and strengthen the principle of accountable government: yet this dimension is often absent from discussion

⁹² On comparative aspects, the earlier literature includes Rowat (ed.), *The Ombudsman*; Gellhorn, *Ombudsmen and Others*; Hill, *The Model Ombudsman*; Stacey, *Ombudsmen Compared*.

⁹³ Cf *The Citizen and the Administration* (the Whyatt report), 1961 and Cmnd 2767, 1965.

⁹⁴ Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct*, ch 10.

⁹⁵ See HC 619 (1993–4).

⁹⁶ Or, as in her annual reports, 'Parliamentary and Health Service Ombudsman'.

⁹⁷ Report for 1983 (HC 322 (1983–4)), p 1.

of constitutional reform.⁹⁸ On one view, the essence of the ombudsman idea for the ordinary person is accessibility, flexibility, informality and humanity. On another view, the Ombudsman provides an authoritative means of ‘judging’ the conduct of faceless officials and bureaucracies, thus helping to develop administrative practices that are both humane and effective. In the British version of the Ombudsman, both aspects of the role are seen at work.

Status and jurisdiction⁹⁹

The Parliamentary Ombudsman is appointed by the Crown and in future will hold office for not more than seven years, without the possibility of reappointment; she may be removed by the Crown for misbehaviour, following addresses by both Houses (s 1, as amended).¹⁰⁰ Originally, the appointment was solely a matter for the government, but the chairman of the Commons committee on the Ombudsman (currently the Public Administration Committee) is now consulted before an appointment is made.¹⁰¹ The Ombudsman’s salary is charged on the Consolidated Fund (s 2). She appoints the staff of the office, subject to Treasury consent as to numbers and conditions of service (s 3). Of the seven Ombudsmen who served between 1967 and 2002, five came to the post after civil service careers and two were Queen’s Counsel; the present Ombudsman (Dame Julie Mellor, appointed in 2012) came from a different background, having been an accountant in private practice and chair of the Equal Opportunities Commission. Her predecessor (Ms Ann Abraham) had worked in public sector housing.

The formal task of the Ombudsman is to investigate complaints by private persons that they have suffered injustice in consequence of maladministration by government departments and many non-departmental public bodies, in the exercise of their administrative functions (s 5). The area of jurisdiction is defined by the 1967 Act, Sch 2 of which lists the departments and other bodies subject to investigation. This list may be amended by Order in Council (s 4), and this is done whenever bodies are abolished or created. Section 4 restricts the bodies which may be entered in Sch 2 to (a) government departments; (b) bodies exercising functions on behalf of the Crown; (c) bodies established under the prerogative, an Act of Parliament or Order in Council, or by a minister, that fulfil certain criteria as to the source of their income and the power of appointment to them.¹⁰²

The Ombudsman has no jurisdiction over the devolved authorities in Scotland or Wales, nor over bodies which are outside central government, for example, local authorities, the police and universities, although she may investigate complaints about the way in which central departments have discharged their functions in these fields. Many matters are excluded from investigation for which ministers are or may be responsible to Parliament (s 5(3) and Sch 3). Thus the Ombudsman may not investigate:

⁹⁸ See the valuable series of articles by Ann Abraham in (2008) 61 *Parliamentary Affairs* at 206, 370, 535, 681 and in [2008] PL 1. Also R Kirkham, B Thompson and T Buck, (2009) 62 *Parliamentary Affairs* 600.

⁹⁹ References in the text are to the Parliamentary Commissioner Act 1967, as amended. The literature includes Gregory and Hutchesson, *The Parliamentary Ombudsman*; Seneviratne, *Ombudsmen: Public Services and Administrative Justice*; Harlow and Rawlings, *Law and Administration*, ch 12; A W Bradley [1980] CLJ 304; C Clothier [1986] PL 204; G Drewry and C Harlow (1990) 53 MLR 745; N O’Brien [2009] PL 466.

¹⁰⁰ 1967 Act.

¹⁰¹ Cmnd 6764, 1977. See HC 619 (1993–4) for the government’s agreement to amend the law to provide for appointment following an address by the Commons moved after consultation with the Opposition: the law has not been amended.

¹⁰² The numerous bodies within jurisdiction include the Arts Council, Charity Commission, English Nature, National Gallery, Sport England, OFSTED and utility regulators such as OFCOM.

- (a) action taken in matters certified by a Secretary of State to affect relations between the UK government and other governments, or international organisations;
- (b) action taken outside the UK by any officer representing or acting under the authority of the Crown;¹⁰³
- (c) administration of dependent territories outside the UK;
- (d) action taken by a Secretary of State under the Extradition Acts;
- (e) action taken by or with the authority of a Secretary of State for investigating crime or protecting the security of the state, including action so taken with respect to passports;
- (f) (1) the commencement or conduct of civil or criminal proceedings before any UK court, court martial or international court; (2) action taken by persons appointed by the Lord Chancellor as administrative staff of courts or tribunals, being action taken on the authority of persons acting in a judicial capacity;¹⁰⁴
- (g) an exercise of the prerogative of mercy;
- (h) action taken on behalf of central government by authorities in the NHS;
- (i) matters relating to contractual or other commercial transactions on the part of central government;¹⁰⁵
- (j) appointments, discipline and other personnel matters in relation to the civil service and the armed forces, and decisions of ministers and departments in respect of other branches of the public service;
- (k) the grant of honours, awards or privileges within the gift of the Crown.

It was these restrictions that led to criticism that the 1967 Act sought to carve up areas of possible grievances in an arbitrary way.¹⁰⁶ The exclusion of the NHS was later put right by the creation of an Ombudsman for the Health Service, a post that for England has always been held by the Parliamentary Ombudsman. The restrictions which have been most criticised are in (i) and (j) above. The government may by Order in Council revoke any of these restrictions (s 5(4)), but despite frequent recommendations from the Commons committee mentioned above, successive governments have refused to revoke the restriction on personnel matters in (j).¹⁰⁷

A limitation of a different kind is that the Ombudsman may not normally investigate any action in respect of which the complainant has or had a right of recourse to a tribunal or a remedy in a court of law, although she may do so if in a particular case the citizen could not reasonably be expected to exercise the right (s 5(2)).¹⁰⁸ Thus, if an individual wishes to challenge a decision about tax or social security, he or she should appeal to the relevant tribunal. But the Ombudsman often accepts that a complainant cannot be reasonably expected to embark on the hazardous course of litigation.¹⁰⁹

¹⁰³ The acts of British consuls abroad, other than honorary consuls, are within jurisdiction, if the complainant is resident or has a right of abode in the United Kingdom: 1967 Act, s 6(5).

¹⁰⁴ And see note 114 below.

¹⁰⁵ This is subject to an exception for transactions relating to land bought compulsorily or under threat of compulsory powers. But for this exception, a latter-day Crichel Down affair (ch 5 C) would be outside the Ombudsman's jurisdiction.

¹⁰⁶ HC Deb, 18 October 1966, col 67 (Quintin Hogg MP). Cf report by Justice, *Our Fettered Ombudsman*, 1977.

¹⁰⁷ See e.g. HC 615 (1977–8); and Cmnd 7449, 1979.

¹⁰⁸ However, the Ombudsman may legitimately refuse to investigate a complaint which has already been the subject of judicial review, and so it may be important for an individual to pursue his case with the Ombudsman first: *R (Scholarstica Umo) v Commissioner for Local Administration in England* [2003] EWHC 3202 (Admin), [2004] ELR 265.

¹⁰⁹ Cf *R v Commissioner for Local Administration, ex p Croydon BC* [1989] 1 All ER 1033, 1044–5. See HC 735 (2005–6), paras 18–20 on use of this discretion.

The complainant need not be a British citizen, but in general must be resident in the United Kingdom or have been present in the United Kingdom when the offending action occurred, or the action concerned must relate to rights or obligations arising in the United Kingdom (s 6(4)).

There is a time bar: the Ombudsman may investigate a complaint only if it is made to an MP within 12 months from the date when the citizen first had notice of the matter complained of, except where circumstances justify the Ombudsman in accepting a complaint made later than this (s 6(3)).

It is for the Ombudsman to determine whether a complaint is duly made under the Act; in practice, many complaints identify the injustice that has been suffered more closely than the maladministration that caused it.¹¹⁰ The Ombudsman has an express discretion to decide whether to investigate a complaint.¹¹¹ Her decisions are in principle subject to judicial review on the usual grounds, if those grounds for the Administrative Court to intervene can be shown. Thus, if she were to investigate a complaint that is outside her jurisdiction, the decision could be quashed,¹¹² and no one could be liable for refusing to supply information to her (s 9). However, it would be unsatisfactory if the acts of someone charged to promote the resolution of grievances were to generate a mass of satellite litigation. Recognising this, the courts have accepted that it will be rare for a judge to find the Ombudsman to have acted perversely, and that it is not for the courts to usurp the role of the Ombudsman.¹¹³ The extent of the Ombudsman's powers may involve difficult legal issues.¹¹⁴ Where the Ombudsman has to exercise a discretion under the 1967 Act, the court will not intervene except where it is satisfied that the discretion has been exercised unlawfully.¹¹⁵

Procedure

One important feature of the ombudsman idea is that the Ombudsman should be accessible to the individual. But in Britain the citizen has no right to present a complaint to the Parliamentary Ombudsman. A complaint must first be addressed to an MP by the person who claims to have suffered injustice (s 5(1)). It is for the MP to decide whether to refer the complaint to the Ombudsman.¹¹⁶ Usually complainants will take their complaint to their constituency MP, but the Act does not require this. Very many inquiries and complaints are received directly by the Ombudsman, whose staff advise the individual what action may be open, including the advice that a complaint within the Ombudsman's remit cannot be considered unless it is forwarded by an MP.¹¹⁷ In 1993 retention of the 'MP filter' was supported by a Commons committee, but many MPs (including the present successor to that committee) now wish the filter to be abolished.¹¹⁸

¹¹⁰ Cf *R v Local Commissioner for Administration, ex p Bradford Council* [1979] QB 287, 313.

¹¹¹ 1967 Act, s 5(5). And see *Re Fletcher's Application* [1970] 2 All ER 527.

¹¹² See *R (Cavanagh) v Health Service Commissioner* [2005] EWCA Civ 1578, [2006] 3 All ER 543 (Health Service Ombudsman 'has no power of investigation at large').

¹¹³ *R (Doy) v Commissioner for Local Administration* [2001] EWHC (Admin) 361, [2002] Env LR 11.

¹¹⁴ See Courts and Legal Services Act 1990, s 110 (extending jurisdiction to certain staff of courts and tribunals, but not if acting on judicial authority), and the Parliamentary Commissioner Act 1994.

¹¹⁵ *R v Parliamentary Commissioner for Administration, ex p Dyer* [1994] 1 All ER 375. In *R v PCA, ex p Balchin* [1998] 1 PLR 1 (Sedley J), (*the same*) No 2 [2000] 2 LGR 87 (Dyson J) and (*the same*) [2002] EWHC 1876 (Admin) (Harrison J), decisions by successive Ombudsmen rejecting a complaint against the Department of Transport were quashed; see P Giddings [2000] PL 201. See also *R (Attwood) v Health Service Commissioner* [2008] EWHC 2315 (Admin), [2009] 1 All ER 415.

¹¹⁶ This decision is not amenable to judicial review: *R (Murray) v Parliamentary Commissioner for Administration* [2002] EWCA Civ 1472.

¹¹⁷ Cf Report of PCA for 1978 (HC 205 (1978–9)), p 4.

¹¹⁸ See HC 33–I (1993–4), pp xv–xx; M Elliott [2006] PL 84, 90–2; and HC 107 (2009–10).

The 1967 Act lays down a formal procedure by which the Ombudsman first decides whether a complaint received via an MP falls within jurisdiction. If it does, she must decide whether a full investigation would be justified, and there may be practical factors that make this unnecessary (if for instance it is unlikely that an investigation will lead to a worthwhile outcome, or if it is likely that an informal intervention with the relevant department will resolve the complaint).¹¹⁹ If she decides to make a full investigation, the department and persons named in the complaint must have an opportunity to comment (s 7(1)). The investigation, carried out in private, will generally involve examining departmental records. The Ombudsman may compel witnesses to give evidence and produce documents (s 8). Investigations are not restricted by public interest immunity (s 8(3)),¹²⁰ but she may not see documents which are certified by the Secretary of the Cabinet, with the Prime Minister's approval, as relating to proceedings of the Cabinet or a Cabinet committee (s 8(4)). When a formal investigation is completed, the Ombudsman sends the MP concerned a report on the investigation (s 10(1)). If it appears that injustice was caused through maladministration and has not been remedied, she may lay a special report before Parliament (s 10(3)). Reports relating to an investigation are absolutely privileged in the law of defamation (s 10(5)). A minister may not veto an investigation, but may require the Ombudsman to omit from a report information that would prejudice the safety of the state or be against the public interest (s 11(3)).

These powers of investigation give the Ombudsman a formidable instrument for scrutinising departmental action should it be necessary, but there is little value in a prolonged scrutiny of cases in which it is rapidly apparent (and accepted by the department) that mistakes were made in handling the individual's affairs. Recent Ombudsmen have developed the use of flexible procedures that are more focused on the needs of the complainant than in the past.¹²¹ The aim is to find the most effective way of resolving the complaint, if possible by informal means; the staff maintain a dialogue with the complainant, and encourage departments to provide an appropriate outcome without delay when this is justified.

Despite her power to investigate and report on complaints, the Ombudsman has no power to enforce provision of a remedy. Thus she cannot alter a departmental decision or award compensation to a citizen, although she may suggest an outcome that she would regard as acceptable. In the very great majority of cases, departments agree to such an outcome, but in exceptional cases a department may refuse and may argue that the Ombudsman's conclusions are mistaken.

In *R (Bradley) v Work and Pensions Secretary*,¹²² the Department of Work and Pensions refused to accept certain findings by the Ombudsman of maladministration regarding information given to members of certain final salary pension schemes that later collapsed. When several affected persons sought judicial review of the refusal, the court examined the Ombudsman's findings in great detail. The Court of Appeal held that the minister was not bound to accept the Ombudsman's findings of maladministration and might come to his own conclusion about what had occurred. However, the minister's decision could be set aside if it was irrational, in the sense that it was not supported by 'cogent reasons' for rejecting the Ombudsman's conclusions. In a later case, the Divisional Court held that the government's reasons for rejecting several findings by the Ombudsman concerning the Equitable Life affair lacked cogency and reasoning.¹²³

¹¹⁹ See the Ombudsman's report for 2008–9 (HC 786, 2008–9), pp8–9.

¹²⁰ See ch 26 D.

¹²¹ See the report for 2004–5, HC 348 (2005–6), pp 36–41; and for 2008–9 (above), pp 9–10.

¹²² [2008] EWCA Civ 36, [2009] QB 114. And see R Kirkham, B Thompson and T Buck [2008] PL 510; JNE Varuhas (2009) 72 MLR 102. After the Court of Appeal's decision, the Secretary of State proposed a modified form of compensation that the Ombudsman considered acceptable.

¹²³ *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin).

A minister is usually under a strong obligation to accept the Ombudsman's findings, but a report may have such political implications that a minister could come under pressure not to do so;¹²⁴ and if there has been a systemic failure affecting hundreds or thousands of persons, the costs of providing a remedy may be large. To support the Ombudsman in this situation, and to oversee the office, the Public Administration Committee in the Commons examines her reports and takes evidence from departments that she has criticised. The committee has made valuable studies of such matters as the powers and remit of the Ombudsman, the meaning of maladministration, remedies and the need for reform of the various public sector ombudsmen.¹²⁵

The Ombudsman's casework

What is meant by the phrase, 'injustice to the person aggrieved in consequence of maladministration' (s 10(3))? No definition and no illustrations of maladministration and injustice are given in the Act. It is for the Ombudsman to interpret what the concept includes.¹²⁶ Maladministration includes such defects as 'neglect, inattention, delay, incompetence, ineptitude, perversity, and arbitrariness'.¹²⁷ Many examples of maladministration are found in the Ombudsman's reports. They include failure to give effect to assurances given to a citizen;¹²⁸ incorrect advice and delay in dealing with a benefit claim;¹²⁹ failure to treat someone with respect;¹³⁰ failure to give proper effect to a department's policy guidance;¹³¹ dilatory enforcement of regulations against asbestosis;¹³² failure to make departmental policy known in the press;¹³³ and even the making of misleading statements by a minister in Parliament.¹³⁴ Maladministration is not, however, a synonym for unlawful conduct: it is wider.¹³⁵

Even if maladministration has occurred, this does not mean that injustice has thereby been caused to the individual. Conversely, injustice or hardship may exist, caused not by maladministration but by legislation or a judicial decision. Injustice for this purpose means not merely injury of a kind that a court may remedy, but includes 'the sense of outrage aroused by unfair or incompetent administration, even where the complainant has suffered no actual loss'.¹³⁶ It is not restricted to a concept such as damage within the meaning of tort law.¹³⁷

¹²⁴ In 1975, the government was supported by the Commons in rejecting the Ombudsman's finding that the government had some responsibility for holidaymakers' losses arising from collapse of the Court Line group: HC Deb, 6 August 1975, col 532.

¹²⁵ See HC 33-I (1993-4); HC 619 (1993-4); HC 112 and 316 (1994-5); HC 612 (1999-2000); HC 448 (2002-3); HC 107 (2009-10).

¹²⁶ *R v Local Commissioner for Administration, ex p Bradford Council* [1979] 1 QB 287, 311; *R (Doy) v Commissioner for Local Administration* [2001] EWHC (Admin) 361, [2002] Env LR 11.

¹²⁷ HC Deb, 18 October 1966, col 51 (R H S Crossman MP). For a similar list see Lord Denning MR's judgment in *R v Local Commissioner for Administration, ex p Bradford Council* [1979] 1 QB 287, 311.

¹²⁸ See A W Bradley [1981] CLP 1, 8-11.

¹²⁹ See e.g. HC 348 (2005-6), pp 26-7.

¹³⁰ *Ibid*, p 25.

¹³¹ A R Mowbray [1987] PL 570. See also A R Mowbray [1990] PL 68 and P Brown, in Richardson and Genn (note 4 above), ch 13 (remedies for misinformation).

¹³² HC 259 (1975-6), p 189. On the Ombudsman's response to official delay, see S N McMurtrie [1997] PL 159.

¹³³ HC 680 (1974-5).

¹³⁴ HC 498 (1974-5).

¹³⁵ *R v Local Commissioner for Administration, ex p Liverpool City Council* [2000] EWCA Civ 54, [2001] 1 All ER 462.

¹³⁶ Both judgments in *R v PCA, ex p Balchin*, note 115 above, approved this quotation from Mr Crossman's speech to Parliament in 1966.

¹³⁷ *R v Commissioner for Local Administration, ex p S* (1999) 1 LGR 633.

One cause of difficulty has been the relation between maladministration and discretionary decisions. The Ombudsman may not question the merits of a discretionary decision taken without maladministration (s 12(3)). Where errors have been made in the procedures leading to a discretionary decision, she can report accordingly. But what if a discretionary decision has caused manifest hardship to the individual, but no identifiable defect has occurred in the procedures leading up to it? In such a case, the Ombudsman may infer an element of maladministration from the very decision itself or may inquire into harsh decisions based on the over-rigorous application of departmental policies.¹³⁸ An account of maladministration prepared in 1993 by Sir William Reid, then Ombudsman, included ‘unwillingness to treat the complainant as a person with rights’ and ‘failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment’.¹³⁹

Three leading examples of the Ombudsman’s investigations may be given. The Sachsenhausen case was the first occasion on which a department was found to be seriously at fault.¹⁴⁰

Under the Anglo-German Agreement of 1964, the German government provided £1 million for compensating UK citizens who suffered from Nazi persecution during World War Two. Distribution of this money was left to the discretion of the UK government. In 1964, the Foreign Secretary (Mr Butler) approved rules for distributing it. Later the Foreign Office withheld compensation from 12 persons who claimed under the rules because they had been detained within the Sachsenhausen concentration camp. Pressure from many MPs failed to get this decision reversed and a complaint was referred to the Ombudsman. By this time the whole of the £1 million had been distributed to other claimants. After an extensive investigation, the Ombudsman reported that there were defects in the procedure by which the Foreign Office reached its decisions and subsequently defended them, and that this maladministration had damaged the reputation of the claimants. When this report was debated in the Commons, the Foreign Secretary (Mr George Brown) assumed personal responsibility for the decisions, which he maintained were correct. He nonetheless made available an additional £25,000 in order that the claimants might receive the same rate of compensation as successful claimants on the fund.¹⁴¹

At that time, the prevailing view was that the ‘Butler rules’ were not enforceable in law since they conferred no rights on the claimants, but on similar facts today the claimants could seek judicial review of the Foreign Office decisions, based on the legitimate expectations created by the rules.¹⁴²

The most extensive investigation that by 1989 had been undertaken by the Ombudsman was into the Barlow Clowes affair, referred to him by no fewer than 159 MPs.¹⁴³

¹³⁸ HC 9 (1968–9); HC 350 (1967–8), and see G Marshall [1973] PL 32.

¹³⁹ Report of PCA for 1993, HC 290 (1993–4), p 4.

¹⁴⁰ HC 54 (1967–8); HC 258 (1967–8); G K Fry [1970] PL 336; Gregory and Hutchesson (note 99), ch 11.

¹⁴¹ HC Deb, 5 February 1968, cols 105–17.

¹⁴² Ch 24 B.

¹⁴³ See PCA, HC 76 (1989–90); HC 671 (1987–8) (the Le Quesne report); HC 99 (1989–90); and R Gregory and G Drewry [1991] PL 192, 408.

In 1988, the Barlow Clowes investment business collapsed, leaving millions of pounds owing to investors, many of whom were older persons of modest means. The Department of Trade and Industry had licensed the business under the Prevention of Fraud (Investments) Act 1958 (later replaced by the more rigorous Financial Services Act 1986), though there were indications that the business was not properly conducted. The Ombudsman found that there had been maladministration by civil servants in five respects. As a result, the losses to investors exceeded what they would have been had the department exercised its regulatory powers with a 'sufficiently rigorous and enquiring approach'.¹⁴⁴

The government took the unusual course of rejecting the findings of maladministration, but nonetheless undertook *ex gratia* to provide £150 million to compensate investors for up to 90 per cent of their loss. Had the investors attempted to sue the DTI in negligence, they would almost certainly have failed to establish in law that the department owed them a duty of care.¹⁴⁵

The third example has striking resemblances to the Sachsenhausen case above.

In 2000, the Ministry of Defence announced an *ex gratia* scheme for compensating British military and civilian persons interned by the Japanese during World War Two. Professor Hayward, a British citizen who had been interned as a boy, was refused payment because neither he, his parents nor grandparents had been born in the United Kingdom. The Ombudsman (Ann Abraham) found that the MoD embarked on the scheme before it had worked out the rules of eligibility; it had developed new criteria after payments had begun without checking that they were compatible with those already used; and it could not show that the scheme had been administered correctly. She recommended that the government should apologise to those affected, review operation of the scheme and reconsider the claims of Hayward and others so placed. The MoD agreed to apologise, but refused to review the scheme or to reconsider. It was only when the Commons Committee on Public Administration called the Minister for Veterans from the MoD to give evidence that the MoD began a review – having just 'discovered' that inconsistent criteria had been used.¹⁴⁶ Three months later, the MoD widened the scheme to include British citizens with 20 years' residence in the United Kingdom.

At one time, the services of the Ombudsman had little publicity and were under-used. During the 1990s, the number of complaints made rose from 801 in 1991 to a record figure of 1,933 in 1996 before falling back slightly. In 2000–1, 1,721 new complaints were received and the Ombudsman disposed of 1,787 cases.¹⁴⁷ Since then, the level of complaints has risen, although recent statistics are difficult to compare with earlier years. In 2011–12, the Parliamentary Ombudsman received over 23,800 inquiries, relating to nearly 6,500 complaints against government departments and other public bodies. The great majority of these complaints were rejected as resulting in no case to answer, and others were concluded by means

¹⁴⁴ HC 76 (1989–90), para 8.12.

¹⁴⁵ *Yuen-Kun Yeu v A-G of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 2 All ER 536; ch 26 A.

¹⁴⁶ See *A Debt of Honour*, HC 324 (2005–6); and HC 735 (2005–6). See also *R (Association of British Civilian Internees in the Far East) v Defence Secretary* [2003] EWCA Civ 473, [2003] QB 1397; R Kirkham (2006) 69 MLR 792.

¹⁴⁷ Report of PCA for 2000–1 (HC 5 (2001–2)).

of an informal intervention with the department. Only 421 were accepted for investigation, of which 80% of complaints were fully or partially upheld. The remedies included 531 compensation payments, 204 corrective actions, 591 apologies and 404 wider remedies.¹⁴⁸

Other Ombudsmen in the public sector¹⁴⁹

The ombudsman model has been applied in other areas of government. Although complaints about the NHS were excluded from the remit of the Parliamentary Ombudsman, a scheme of Health Service Ombudsmen for England, Wales and Scotland was later introduced.¹⁵⁰ Complaints about health authorities, NHS trusts and other bodies may be referred directly to the Ombudsman by a member of the public. There is no ‘MP filter’, but complaints must be first raised with the appropriate NHS body. In 1996, the scope of NHS complaints was enlarged to include complaints in respect of primary health functions such as general medical and dental services, and by the removal of a statutory bar which had prevented the Ombudsman from investigating complaints about clinical judgement.¹⁵¹ From 2004 to 2009, complainants who were not satisfied with the initial answer that they received had to notify them for review to the Healthcare Commission. In April 2009, this body was abolished and complaints by way of review now come to the Health Service Ombudsman. The Parliamentary Ombudsman was formerly appointed Health Service Ombudsman in Scotland and Wales as well as in England. Today, as the health service is devolved in Scotland and Wales, NHS complaints in those countries are handled by the Scottish and Welsh Ombudsmen respectively. Although the legislation remains separate, the present Ombudsman organises her resources as a single office, producing a composite annual report. As Health Service Ombudsman, she has published special reports dealing with the problems of NHS funding for long-term care of elderly and disabled people.¹⁵²

As far as local government is concerned, there is a Commission for Local Administration in England (of which the Parliamentary Ombudsman is an *ex officio* member).¹⁵³ The scheme resembles the Parliamentary Ombudsman model, but with differences. Individuals may complain to one of the two Local Government Ombudsmen regarding maladministration by local authorities, joint boards, police authorities and other bodies, and (since 2008) concerning failures in service and failures to provide a service. Since 1988, it has been possible to complain either directly to an Ombudsman or by referring the matter to a member of the body in question; but before the Ombudsman may investigate, the complaint must have been brought to the notice of the authority in question. The complainant must specify the conduct which he or she considers to be maladministration, or at least identify the matter giving rise to complaint.¹⁵⁴ Certain matters are excluded from investigation, for instance complaints about action which affects all or most of the inhabitants in the local area. As with the Parliamentary Ombudsman, the local Ombudsman has no means of compelling the provision of a remedy, but a council has power to pay compensation where the Ombudsman reports in favour of a complaint.¹⁵⁵ If no satisfactory response is made by the council to the Ombudsman’s first report, he or she may issue a second report that recommends the action

¹⁴⁸ Figures derived from the report of the Parliamentary and Health Service Ombudsman for 2011–12. Health service figures have been omitted.

¹⁴⁹ See Seneviratne, *Ombudsmen: Public Services and Administrative Justice*.

¹⁵⁰ See the consolidating Health Service Commissioners Act 1993.

¹⁵¹ Health Service Commissioners (Amendment) Act 1996.

¹⁵² See HC 399 (2002–3) and HC 144 (2004–5).

¹⁵³ Local Government Act 1973, Part III, as amended. On the many changes made by the Local Government and Public Involvement in Health Act 2007, see M Seneviratne [2008] PL 627.

¹⁵⁴ *R v Local Commissioner, ex p Bradford Council* [1979] QB 287.

¹⁵⁵ Local Government Act 1974, s 31(3), as amended.

to be taken, including measures to remedy a matter and to prevent its recurrence in the future, and (where relevant) to provide a remedy for injustice caused; the report may require local publicity to be given to the affair.¹⁵⁶ A strong case may be made for imposing a legal obligation on a council to provide a remedy in such circumstances.¹⁵⁷ The courts have interpreted the legislative framework as intending local authorities to loyally accept Ombudsman reports and that they should carry out their statutory duties in relation to them unless they have judicially reviewed the report as legally flawed.¹⁵⁸ The Court of Appeal has described the situation as involving a ‘convention that local authorities will be bound by the findings’ of the Ombudsman.¹⁵⁹ However, there is no legal obligation to implement a report, but any reasoned decision for a refusal is subject to judicial review.¹⁶⁰

Devolution to Scotland and Wales has made possible the creation of an integrated office of Ombudsman in each country.¹⁶¹ The Scottish Public Services Ombudsman provides a ‘one stop shop’ to receive complaints regarding the Scottish executive, the NHS, higher and further education institutions, local government and many other public bodies.¹⁶² For Wales, the Westminster Parliament created the office of Public Services Ombudsman for Wales, with jurisdiction broadly corresponding to that of the Scottish Ombudsman, but subject to the many differences in the two schemes of devolution.¹⁶³ In both Wales and Scotland, the Parliamentary Ombudsman retains powers in relation to areas of government (such as immigration, taxation and social security) that are not devolved.

In April 2000, a Cabinet Office review of public sector ombudsmen in England¹⁶⁴ concluded that the legislation needed a radical overhaul: integrated arrangements for complaints of maladministration should be made for central and local government, the NHS and other bodies. Individuals should have a common right of access to the new-style Ombudsmen. The review was welcomed by the select committee on public administration,¹⁶⁵ but a consultation paper was issued only in August 2005.¹⁶⁶ Instead of primary legislation, for which no time could be found, the outcome was an order under the Regulatory Reform Act 2001.¹⁶⁷ This enabled the various ombudsmen to collaborate fully in investigations, to delegate functions to each other’s staff, to issue advice and guidance on good administrative practice, and to resolve complaints informally.¹⁶⁸ In 2010, the Law Commission published its final report on administrative justice to reforms in the system of public sector ombudsmen.¹⁶⁹ The Commission’s recommendations included provisions for facilitating access to ombudsmen (by enabling complaints to be made other than in writing, and by repealing the ‘MP filter’

¹⁵⁶ Ibid, s 31(1)–(2H), as amended by the Local Government and Housing Act 1989.

¹⁵⁷ Cf Commissioner for Complaints Act 1969 (Northern Ireland), s 7 (power of county court to award damages). See also HC 448 (1985–6), C M G Himsworth [1986] PL 546 and Justice/All Souls Committee report, *Administrative Justice – Some Necessary Reforms*, ch 5.

¹⁵⁸ *R v Local Commissioner for Administration, ex p Eastleigh Borough Council* [1988] QB 855; M Jones [1988] PL 608.

¹⁵⁹ *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114, [139].

¹⁶⁰ *R (Gallagher) v Basildon District Council* [2010] EWHC 2824 (Admin), [2011] PTSR 731; *R (Westwood Homes) v South Hallam DC* [2014] EWHC 863 (Admin).

¹⁶¹ See M Elliott [2006] PL 84.

¹⁶² The office was created by the Scottish Public Services Ombudsman Act 2002 (Scotland). Complaints about cross-border public authorities that relate to devolved matters may be investigated.

¹⁶³ M Seneviratne [2006] PL 6; Public Services Ombudsman (Wales) Act 2005.

¹⁶⁴ Cabinet Office, *Review of Public Sector Ombudsmen in England* (2000) (the Collcutt review).

¹⁶⁵ See HC 612 (1999–2000).

¹⁶⁶ Cabinet Office, *Reform of Public Sector Ombudsmen Services in England* (2005). See M Elliott [2006] PL 84.

¹⁶⁷ The Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007 (SI 2007 No 1889).

¹⁶⁸ See e.g. the valuable report, *Six lives: the provision of public services to people with learning disabilities* (HC 203, 2008–9) by the Parliamentary and Local Government Ombudsmen.

¹⁶⁹ *Administrative Redress: Public Bodies and the Citizen* (2010, Law Com 322), HC 1136 (2010–12). See T Buck, R Kirkham and B Thompson [2011] PL 20.

for complaints to the Parliamentary Ombudsman), for widening the discretion of ombudsmen to deal with complaints which might also give rise to a remedy in the courts, and empowering the Administrative Court to issue a stay on judicial review proceedings to enable the appropriate ombudsman, if she chose, to investigate the complaint. Other changes proposed were to enable an ombudsman to refer a question of law to the Administrative Court and to publish more information about her investigations and findings, but without identifying individuals concerned except with their consent.

The desire for joined-up Ombudsmen is not easy to satisfy in a simple way, given the increasing complexity of levels of government and forms of public administration. In response to the Citizen's Charter initiative in 1991,¹⁷⁰ some departments appointed so-called 'lay adjudicators' to deal promptly with grievances that had not been dealt with satisfactorily by the officials concerned. Thus the Inland Revenue appointed a Revenue Adjudicator;¹⁷¹ and the Home Office appointed a Prisons Ombudsman for England and Wales,¹⁷² whose onerous tasks include dealing with the complaints of prisoners and immigration detainees, and investigating the deaths of persons in detention. There is also a Housing Ombudsman, whose functions were amended under the Localism Act 2011 (Part 7, Chapter 6). Further, the European Parliament appoints an Ombudsman to hear complaints from EU citizens of maladministration on the part of European institutions, except for the Court of Justice and the General Court acting in their judicial role.¹⁷³

Although the ombudsman concept originated as a safeguard against abuses in government, it has spread in a variety of forms to the private sector, with banks, building societies, insurance companies and many others appointing ombudsmen to deal with complaints from dissatisfied customers; their position is generally founded upon contract, but in the case of the legal profession, the Legal Services Ombudsman was created by statute.¹⁷⁴ These processes are outside the scope of this book, but their success will have an impact on the ombudsman model in the public sector, encouraging further progress being made towards prompt, accessible and cost-effective remedies, including ensuring that public authorities respect the human rights of the individuals whose lives they are affecting.¹⁷⁵

E. Conclusion

We have seen in this chapter an array of different mechanisms by which administrative justice may be secured. The tribunal system unified under the Tribunals, Courts and Enforcement Act 2007 has brought together an eclectic mix of different jurisdictions and reveals just how wide the range of subject matters covered by the tribunals have become. Tribunals are increasingly court-like in their approach to adjudication and the procedural rules adopted to govern their functioning. It is a matter for debate the extent to which the

¹⁷⁰ See Cm 1599, 1991; HC 158 (1991–2). Also A W Bradley [1992] PL 353; A Barron and C Scott (1992) 55 MLR 526.

¹⁷¹ See P Morris [1996] PL 309.

¹⁷² The title is inappropriate, because of potential confusion with the Parliamentary Ombudsman: see HC 33–I (1993–4), p x. See also *R (D) v Home Secretary* [2006] EWCA Civ 143, [2006] 3 All ER 946 and note 87 above.

¹⁷³ For the work of the EU Ombudsman, see HL 117 (2005–6). See also EU Charter of Fundamental Rights (2000), art 43 and TFEU, art 228.

¹⁷⁴ Courts and Legal Services Act 1990, ss 21–6. And cf the Judicial Appointments and Conduct Ombudsman, created by the Constitutional Reform Act 2005, s 62.

¹⁷⁵ See N O'Brien [2009] PL 466 for a perceptive discussion of this question.

judicialisation of tribunals helps the citizen for whom they are intended, or moves too far away from the original intent of tribunals as a quick and cheap administrative remedy.

Although the term ‘inquiries’ is used in both Sections B and C of this chapter, it can have a very different meaning. An administrative inquiry into, say, a planning matter is an entirely different creature from an inquiry set up under the Inquiries Act 2005. Again, the difference which can be readily identified is between a formal procedure which is very close to a court-like experience (under the Act), and a more informal process whereby an administrator takes a policy-driven decision.

The final part of this chapter considered the increasing number of Ombudsmen. They remain the overlooked remedial tool of administrative law, perhaps because Ombudsmen have so far managed to continue to go about their work without the judicial formality of tribunals and inquiries. Although lawyers invariably focus on courts as the remedy for all administrative ills, it is in many cases the Ombudsmen who can provide an affordable route of complaint which may even result in monetary compensation.

CHAPTER 24

Judicial review I: the grounds of review

Judicial review of administrative action is an essential process in a constitutional democracy founded upon the rule of law. Whatever statutory provision is made for appealing against official decisions, it is salutary that all decision makers exercising public power should know that the courts exercise jurisdiction over the *legality* of their decisions, on such matters as the extent of their powers and the proper observance of procedure. Certainly, judicial review is no substitute for administrative or political control of the *merits, expediency or efficiency* of decisions; and matters such as the level of expenditure that should be permitted to local councils are not inherently suitable for decision by a court.¹ But the courts can ensure that decisions made by public authorities conform to the law and that standards of fair procedure are observed.

In exercising this jurisdiction, the courts take account of both the legislation that applies to the subject of the dispute and the principles of administrative law that have developed from judicial decisions. The role of the judiciary is first to determine the legal rules that apply and then to decide on the facts whether the rules have been breached. While the background of common law rules does not change overnight, ‘Parliament, understandably and indeed inevitably, tends to lay down different rules for different situations’; the judges ‘are continually being faced with the need to study, interpret and apply new versions of the rules’.²

The legislation that applies to public authorities is made up of innumerable different Acts, varying widely in the powers conferred, the agencies in whom powers are vested and the extent of protection for private interests. Because of this, judicial review always has a tendency to fragment into disparate branches of law, such as education, housing and immigration law. Yet general principles have emerged from numerous judicial decisions affecting public authorities, and awareness of those principles is essential when specific statutes are before the court.

Judicial review of administrative action involves the judges in developing legal principles against a complex and often changing legislative background. Lord Diplock warned in 1981 that ‘judicial statements on matters of public law if made before 1950’ were likely to be a misleading guide to the current law;³ since 1981 changes in the law have continued to occur, as the coverage of government by judicial review has spread and the depth of review has intensified. It was formerly said that judicial review of administrative action ‘is inevitably sporadic and peripheral’ when set against the entire administrative process.⁴ But the general principles which emerge from the judicial process should not be haphazard, incoherent or contradictory.⁵

The legal solution to many administrative disputes inevitably involves the reviewing court in choosing between the merits of the opposing arguments,⁶ and the outcome is often unpredictable. Even if the relevant principles are clear, their application to particular facts is

¹ *R v Environment Secretary, ex p Hammersmith Council* [1991] 1 AC 521, 662.

² *Ibid.*, at 561 (Lord Donaldson MR).

³ *R v IRC, ex p National Federation of Self-Employed* [1982] AC 617, 640.

⁴ Woolf, Jowell and Le Sueur, *De Smith’s Judicial Review*, p 8.

⁵ For a perceptive critique of the underlying theories, see D J Galligan (1982) 2 OJLS 257.

⁶ See e.g. the acute difference of judicial opinion in the controversial decision of the Law Lords by 3–2 in *R (Bancoult) v Foreign Secretary (No 2)*, [2008] UKHL 61, [2009] 1 AC 453 and *M Elliott and A Perreault-Saussine* [2009] PL 697.

seldom clearcut, which is why the bare statement that courts in judicial review proceedings are not fact-finders can be misleading. Since the court's decision may have a political impact when it concerns the cherished policy of a minister or local authority, this may lead to criticism of the judges for political bias.⁷ A prominent instance of this occurred in 1981, when the cheap fares policy for London of the (Labour) Greater London Council (GLC) was challenged in the courts by the (Conservative) Bromley Council. Some extravagant language was used by two judges in the Court of Appeal (Lord Denning MR and Watkins LJ) in condemning the actions of the GLC, but that court's decision was upheld in more restrained terms by a unanimous House of Lords.⁸ Many cases of judicial review (for instance, in relation to immigration policy or anti-terrorist measures) give rise to political controversy, but it is fundamental that the judges should decide such cases on legal grounds, not for reasons relating to their own political views. Unjustified and lazy charges that the judges have their own covert agenda for obstructing government policies have sometimes been made by ministers whose decisions have been set aside. The landmark decision in *M v Home Office*⁹ that the Home Secretary (Kenneth Baker) was in contempt of court over the removal from Britain of a Zairean asylum seeker may indeed have had an impact on Mr Baker's political standing: but the decision owed nothing to party politics and everything to what the judges considered should be the proper relationship between the executive, the courts and the individual.

This chapter outlines the grounds on which courts exercise the function of judicial review.¹⁰ Some are of long standing in the common law, such as the rule against bias and the right to a fair hearing; others, such as proportionality and legitimate expectations, are still developing. Before we consider these grounds, three preliminary matters must be mentioned.

First, the foundations of judicial review have been the subject of vigorous scholarly debate.¹¹ In the background to the debate is the historical growth of public law in an unwritten constitution. The theoretical base for the system of judicial review is difficult to find, given the questions raised by the interface between the supremacy of Parliament and the rule of law.¹² One approach (styled the 'ultra vires' theory) emphasises that the ultra vires doctrine is fundamental to the principles of judicial review; since these principles have developed through statutory interpretation, they depend for their legitimacy on the intention of Parliament. Since Parliament has not prohibited the evolution of judicial review, its intention must have been to authorise it. Ultra vires has traditionally been the language of public law.

By contrast, the 'common law' theory stresses the common law foundations of judicial review. It does not dispute the authority of legislation by Parliament, but argues that the grounds of review are judge-made, have never been the subject of comprehensive legislation, and include principles of fair and just administration far beyond anything that Parliament has expressly authorised. Many successful judicial review claims do not involve a public authority acting outside the scope of its express statutory powers. Further, judicial review extends to non-statutory powers. It is not founded on a fiction of parliamentary intent but is an aspect of the rule of law, a principle that is of coordinate authority with the supremacy of Parliament. In response to this 'common law' theory, a 'modified ultra vires theory' has been advanced.¹³ Instead of relying on the direct and specific intent of Parliament, this view attributes to

⁷ E.g. Griffith, *The Politics of the Judiciary*, chs 3–7.

⁸ *Bromley Council v Greater London Council* [1983] AC 768; and see the sequel *R v London Transport Executive, ex p GLC* [1983] QB 484. Also J Dignan (1983) 99 LQR 605; H Sales [1991] PL 499.

⁹ *M v Home Office* [1994] 1 AC 377.

¹⁰ For the procedure of judicial review, see ch 25.

¹¹ See the valuable collection of articles in Forsyth (ed.), *Judicial Review and the Constitution*.

¹² Chs 3 and 4.

¹³ See Elliott, *The Constitutional Foundations of Judicial Review*, P Craig and N Bamforth [2001] PL 763, T R S Allan [2002] CLJ 87, C F Forsyth and M Elliott [2003] PL 286.

Parliament a generalised and indirect intent that the rule of law should be upheld; thus judicial review may be said to accord with the intent of Parliament.

Underlying this debate are concerns about the supremacy of Parliament, and about the authority of the judiciary should a political crisis develop regarding judicial review. All sides accept that Parliament has authority to legislate on the scope of judicial review, whether to enlarge it or to restrict it in specific ways;¹⁴ but some ‘common law’ theorists are less willing than the ‘ultra vires’ adherents to accept that Parliament has absolute authority to exclude judicial review.

More recent judicial expressions of the justification for judicial review have referred to the enforcement of the rule of law as the ‘ultimate controlling factor on which our constitution is based’. Whether this provides any more practical guidance than the ultra vires doctrine is open to question, but it avoids some of the artificiality inherent in focusing on an unexpressed and implied intention of Parliament.¹⁵

The second matter relates to classification of the grounds of judicial review. In the GCHQ case in 1984, Lord Diplock classified the grounds on which administrative action is subject to judicial control under three heads, namely illegality, irrationality and procedural impropriety; he accepted that further grounds (for example, proportionality) might be added as the law developed.¹⁶ In 1986, the President of the New Zealand Court of Appeal commented that ‘the substantive principles of judicial review are simply that the decision-maker must act in accordance with law, fairly and reasonably’.¹⁷ This is an admirable summary of the policy behind the law, but a great deal needs to be known about the meaning attached to each of its three strands if it is to serve as a guide to decision-making.

The third matter is the remarkable impact of the Human Rights Act 1998 upon judicial review.¹⁸ In brief, by s 3, the Act requires every court, where it is possible to do so, to apply and interpret legislation compatibly with Convention rights. By s 6(1), it is unlawful for public authorities (except where they are required to do so by primary legislation) to act in a way which is incompatible with Convention rights. And by ss 6–7, judicial review is the residual procedure for protecting Convention rights if there are no other proceedings in which the issue of human rights may be raised. Accordingly, the 1998 Act extended the existing grounds of judicial review by a requirement of great breadth and complexity, namely that all public authorities must act consistently with Convention rights.

A. Judicial review on substantive grounds

This section is concerned with grounds of review relating to the substance or content of the official decision or action that is under review; grounds relating to the procedure by which a decision was made are considered later in the chapter. Although the emphasis is on English law, the principles of judicial review in the law of Scotland are very similar.¹⁹ Substantive

¹⁴ See pp 679–83 below.

¹⁵ *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 at [107] (Lord Hope); and *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 at [51] (Lord Hope) and [142]–[143] (Lord Reed). See also: Constitutional Reform Act 2005, s 1 and Lord Steyn [2002] EHRLR 723.

¹⁶ *CCSU v Minister for Civil Service* [1985] AC 374, 410; cf 414 (Lord Roskill).

¹⁷ Sir Robin Cooke, in Taggart (ed.), *Judicial Review of Administrative Action in the 1980s*, p 5.

¹⁸ See pages 645–50 below. Also ch 14 C and A W Bradley, in Supperstone, Goudie and Walker (eds), *Judicial Review*, ch 4.

¹⁹ See *Stair Memorial Encyclopedia of the Laws of Scotland*, vol 1, Administrative Law (reissue, 2000); Clyde and Edwards, *Judicial Review*; C Himsworth in Supperstone, Goudie and Walker (eds), *Judicial Review*, ch 22; and see *Eba v Advocate General for Scotland* [2011] UKSC 29, [2012] 1 AC 710.

judicial review has always proved to be the area of most concern to both courts and government; it has the potential to raise constitutional questions about the appropriate role of the courts in regulating executive action which is subject to democratic oversight. Judicial review of policy – as opposed to process (below in section C) – throws into sharp relief the nature of judicial review as a legal and a political tool to attack unfavourable policy decisions. As a result, the courts have been traditionally slow to intervene.

The ultra vires rule (excess of powers)

When a public authority is intending to exercise a power vested in it by legislation, it must do so in accordance with the legislation, both as regards the limits of the power and as regards any detailed conditions that must be observed when the power is used. If a public authority acts beyond the limits of the power, its acts are to that extent invalid as being ultra vires. The ultra vires doctrine cannot be used to question the validity of an Act of Parliament; but provides the foundation enabling the court to intervene when a public authority has departed from the legislation. (The ultra vires doctrine also applies to the rare cases in which a government department may be seeking to exercise a power stemming from the royal prerogative at common law.)²⁰ The simplest instance of the rule is where a local council, whose capacity to act and to regulate private activities is derived from statute, acts outside the scope of that authority. Two examples may be given.

In *R v Richmond Council, ex p McCarthy and Stone Ltd*, a local planning authority began charging a fee of £25 for informal consultations between its planning officers and developers intending to seek planning permission for new development. The council was required by law to determine all applications for planning permission that were made, whether or not such informal consultations had been held. *Held*, by the House of Lords, while it was conducive or incidental to the council's planning functions that its officers should have informal consultations with intending developers, the fee of £25 was not lawful, since making such a charge was not incidental to those functions. The House applied the principle that no charge on the public can be levied by a public body without clear statutory authority.²¹

In *Hazell v Hammersmith Council*, the local authority (as other councils had done) in 1983 established a fund for conducting transactions in the capital money market, by which the council could benefit from future movements in interest rates. These transactions included interest rate swaps, options to make such swaps, forward rate agreements and so on. If interest rates fell, the council would benefit; in fact, rates went up and large capital losses were made by the council. In a second stage of the policy, the council made further swaps, but solely to limit the extent of its losses while extricating itself from the market. The district auditor applied for a declaration that all the transactions were unlawful. *Held*, the council had no power to enter into interest swap transactions, which by their nature involved speculation in future interest rates, since they were inconsistent with the statutory borrowing powers of the council and were not 'conducive or incidental to' those powers.²²

²⁰ See *R (Bancoult) v Foreign Secretary (No 2)*, note 6 above. And see ch 10 E.

²¹ [1992] 2 AC 48.

²² [1992] 2 AC 1; and see M Loughlin [1990] PL 372, [1991] PL 568.

As these cases illustrate, the powers of an authority include not only those expressly conferred by statute but also those which are reasonably incidental to those expressly conferred.²³ The courts are often required to decide whether a general power to do X includes by implication or interpretation a specific power to do Y.²⁴ A local council's implied powers do not include what on other grounds is objectionable.

In *Crédit Suisse v Allerdale Council*, the council set up a company to provide a leisure pool complex (which was plainly within the council's powers) together with time-share accommodation (which eventually was held not to be); since the council was restricted from itself borrowing the necessary capital, it guaranteed repayment of a loan of £6 million made by the plaintiff bank to the company. The company did not earn enough from selling time-shares to repay the loan. Held, the guarantee was void and unenforceable, as the legislation had provided a comprehensive code of borrowing powers. The project was 'an ingenious scheme designed to circumvent the no doubt irksome controls imposed by central government'.²⁵

The rule requiring statutes to be observed applies to all public authorities, but its application in any case necessarily depends on the powers vested in the public body. Government departments benefit from the rule that the Crown as a legal person is not created by statute and has capacity at common law to own property, enter into contracts, employ staff etc.²⁶ However, a department that is exercising statutory powers of regulation may not use them so as to conflict with other statutes or exceed its powers in other ways.

In *R v Social Security Secretary, ex p Joint Council for the Welfare of Immigrants*²⁷ the minister had power under the Social Security Contributions and Benefits Act 1992 to make regulations regarding eligibility for income support. To discourage asylum seekers from coming to the United Kingdom, the minister made regulations that barred certain asylum seekers from receiving income support, although they were entitled to remain in the country while their appeals under the Asylum and Immigration Appeals Act 1993 were determined. The Court of Appeal held, by 2-1, that the regulations would, for some asylum seekers, render nugatory their appeal rights; as they conflicted with the 1993 Act, the regulations were ultra vires.

Nor may a department incur expenditure which does not meet the relevant conditions imposed by Parliament.²⁸ When a public body's conduct is challenged as ultra vires or contrary to statute, the court's attention focuses on the Act which is claimed to be the source of its authority. But the process of judicial review is far from being a narrow exercise in

²³ As regards local authorities, see Local Government Act 1972, s 111 (as amended) and now the general power of competence in the Localism Act 2011, s 1.

²⁴ See e.g. *R (W) v Metropolitan Police Commissioner* [2006] EWCA Civ 458, [2007] QB 399 (whether statutory power at night to 'remove' a person under 16 from a dispersal area to his home included power to use coercion).

²⁵ [1997] QB 306 (Neill LJ); and see *Crédit Suisse v Waltham Forest Council* [1997] QB 362.

²⁶ See *B v Harris* (1992) 108 LQR 626 and (2007) 123 LQR 225; *A Lester and M Wait* [2003] PL 415. Also *R v Health Secretary, ex p C* [2000] 1 FCR 471 and *R (Shrewsbury Council) v Communities and Local Government Secretary* [2008] EWCA Civ 148, [2008] 3 All ER 548.

²⁷ [1996] 4 All ER 385. And see *R (BAPIO) v Home Secretary* [2008] UKHL 27, [2008] AC 1003: NHS guidance restricting employment of foreign doctors held unlawful (by Lords Bingham and Carswell) as aim could be achieved only by amending Immigration Rules.

²⁸ *R v Foreign Secretary, ex p World Development Movement* [1995] 1 All ER 611.

statutory interpretation. One reason for this is that acts taken under the prerogative or from another non-statutory source may themselves be subject to judicial review.²⁹ A second reason is that many statutes confer broad discretion on public authorities; judicial control of such discretion, goes well beyond statutory interpretation.³⁰

The concept of jurisdiction³¹

In many cases use is made of the language of jurisdiction, rather than of vires. Often it makes no difference which terminology is used, except that the language of jurisdiction is more appropriate when used in relation to an inferior court or tribunal. Supervision by the higher courts did not provide a fresh decision on the merits, but sought to ensure that the body in question had observed the rules upon which its power to make decisions depended. According to a famous dictum in *R v Nat Bell Liquors*:

That supervision goes to two points: one is the area of the inferior judgment and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.³²

This approach distinguished between the rules that limited the powers of the lower court or tribunal, and the rules that it had to observe in deciding a matter within its powers. Thus a tribunal could be dealing with a matter that was ‘within its jurisdiction’ but while doing so could make an error of law. For procedural reasons, many older cases were concerned with the elusive distinction between (a) an error made by a tribunal on a point of jurisdiction and (b) an error of law made by a tribunal ‘within jurisdiction’.

Today, the law has fortunately developed to a point at which we need no longer struggle with the concept of an ‘error of law within jurisdiction’, for the reason that all errors of law made by a tribunal now give rise to judicial review. The recent pages of this history begin with a House of Lords decision that illustrates the difficulties of distinguishing between jurisdictional and non-jurisdictional matters, *Anisminic Ltd v Foreign Compensation Commission*.³³

The Foreign Compensation Commission was a tribunal created by the Foreign Compensation Act 1950. It had rejected a claim made by a British company (Anisminic) under a scheme for compensating British subjects who had lost property in Egypt during the Suez affair in 1956. The reason for rejection was that, on the commission’s interpretation of the relevant Order in Council, it was fatal to the claim that Anisminic’s assets in Egypt had after 1956 been acquired by an Egyptian company, since the order required that any ‘successor in title’ to the British claimant had to be of British nationality. In the absence of any right to appeal, Anisminic had to establish not only that the commission’s interpretation of the order was erroneous, but also that the commission’s decision rejecting the claim was a nullity, since the 1950 Act excluded the power of the High Court to review errors of law made within the jurisdiction of the commission. *Held*, by a majority in the House of Lords, the commission’s interpretation of the Order in Council was wrong (since the Egyptian company was not

²⁹ See *CCSU v Minister for the Civil Service* [1985] AC 374; *R v Panel on Take-overs, ex p Datafin plc* [1987] QB 815. And note 6 above.

³⁰ J Jowell and A Lester [1987] PL 368.

³¹ Wade and Forsyth, *Administrative Law*, ch 8; and Craig, *Administrative Law*, ch 16.

³² [1922] 2 AC 128, 156.

³³ [1969] 2 AC 147; and see H W R Wade (1969) 85 LQR 198, B C Gould [1970] PL 358, L H Leigh [1980] PL 34, J Beatson (1984) 4 OJLS 22.

Anisimic's 'successor in title'); this error had caused the commission to take into account a factor (nationality of the Egyptian company) which was irrelevant to Anisimic's claim. Thus the commission had exceeded the limits of its jurisdiction and the decision rejecting the claim was a nullity.

The main issue for present purposes is whether *Anisimic* established the rule that *all* errors of law made by a tribunal cause the tribunal to exceed its jurisdiction. On a reading of the speeches in *Anisimic*, this does not seem to have been intended, but in *Pearlman v Keepers and Governors of Harrow School*, Lord Denning MR said that the distinction between an error which entails absence of jurisdiction and an error made within the jurisdiction should be abandoned, and that the new rule should be that 'no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends'.³⁴

This position was confirmed when, in *R v Hull University Visitor, ex p Page*, the House of Lords held unanimously that *Anisimic* had established that all errors of law made by a tribunal were subject to judicial review 'by extending the doctrine of ultra vires'. Parliament must be taken to have conferred power on a tribunal subject to it being exercised 'on the correct legal basis'; a misdirection in law in making the decision rendered the decision ultra vires.³⁵

An important proposition that is not affected by the *Anisimic* and *Hull University* cases is that no tribunal or other decision-maker has power conclusively to determine the limits of its own jurisdiction.³⁶ Lord Mustill has said that the question of jurisdiction is 'a hard-edged question. There is no room for legitimate disagreement'.³⁷

What has been called the doctrine of jurisdictional fact arises when a decision-maker's jurisdiction depends on a 'precedent fact' which must if necessary be established by the court and not by the decision-maker.³⁸ To take the example of the Home Secretary's power to deport an alien when this would be conducive to the public good: if X is detained under this power with a view to deportation and claims that she is not subject to deportation as she is a British citizen, the court must examine the relevant evidence and must decide the matter for itself; on this issue the court is not confined to a supervisory role.

This fundamental principle was re-established by the House of Lords in *R v Home Secretary, ex p Khawaja*.³⁹ The case concerned the power of the Home Secretary to remove from the United Kingdom those who were 'illegal entrants' under the Immigration Act 1971. The House applied the principle that (in Lord Scarman's words) 'where the exercise of an executive power depends upon the precedent establishment of an objective fact, it is for the

³⁴ [1979] QB 56, 70. This was supported by Lord Diplock in *Re Racal Communications Ltd* [1981] AC 374, 383; P Daly (2011) 74 MLR 694.

³⁵ [1993] AC 682, 701.

³⁶ The word to be emphasised here is 'conclusively'. When a new claim comes to a tribunal, the tribunal may at the outset have a duty to decide whether it is within its jurisdiction: such a decision may, depending on the legislation, be challenged by exercising a right of appeal (if there is one) and/or by judicial review. The Supreme Court firmly rejected the reintroduction of errors of law within jurisdiction in respect of the First-tier and Upper Tribunal structure in *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, instead imposing a more stringent second appeals criteria taken from the Civil Procedure Rules: namely that the proposed appeal would raise some important point of principle or practice; or there is some other compelling reason for the relevant appellate court to hear the appeal.

³⁷ *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 All ER 289, 293. Lord Mustill accepted that a criterion on which a body's jurisdiction depends may be 'broad enough to call for the exercise of judgment', which will be assessed by reference to irrationality: *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929.

³⁸ See R Williams [2007] PL 793 for a re-assessment of jurisdictional review of errors of law and fact.

³⁹ [1984] AC 74, reversing *R v Home Secretary, ex p Zamir* [1980] AC 930.

court, if there be a challenge by way of judicial review, to decide whether the precedent requirement has been satisfied'.⁴⁰ On this test, it was not sufficient that the immigration officers reasonably believed Khawaja to be an illegal entrant; his status as an illegal entrant had to be established by evidence before the power to remove him could be exercised. Similarly, it is a precedent fact to which there is a right or wrong answer whether or not an individual is a child to whom duties are owed under the Children Act 1989.⁴¹

Unlawful use of discretionary powers⁴²

We have already seen that the concept of a discretion involves the possibility of choosing between several decisions or courses of action, each of which may be lawful.⁴³ However, in exercising a discretion, an official or public body may (intentionally or inadvertently) make a decision or embark on action which the court considers to be unlawful. For centuries, the courts have supervised such decisions.⁴⁴ While the court will not substitute its own decision for the decision made by the official or body to whom the law entrusts the discretion, it may intervene where a discretion appears not to have been lawfully exercised. Even if the language of a statute seems to confer an absolute discretion, the courts will be very reluctant to hold that their power to review the action taken is excluded. As was said in a leading Canadian case on the improper cancellation of a liquor licence, 'In public regulation of this sort there is no such thing as absolute or untrammelled "discretion" [by which] . . . action can be taken on any ground or for any reason that be suggested to the mind of the administrator'.⁴⁵ The attitude of the courts to claims that a minister has unlimited discretion is shown in *Padfield v Minister of Agriculture*.

Under the Agricultural Marketing Act 1958, the milk marketing scheme included a complaints procedure by which a committee of investigation examined any complaint made about the operation of the scheme 'if the Minister in any case so directs'. Padfield, a farmer in south-east England, complained about the prices paid to farmers in that region by the Milk Marketing Board. The minister refused to direct that the complaint be referred to the committee of investigation, and claimed that he had an unfettered discretion in deciding whether or not to refer such complaints. *Held*, the minister would be directed to deal with the complaint according to law. The reasons given by the minister for his refusal were not good reasons in law and showed that he had not exercised his discretion in a manner which promoted the intention and objects of the Act. Lord Reid said: 'the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court.'⁴⁶

This decision was also significant in that the judges, after examining the reasons given by the minister to see whether they conformed to the Act, were prepared to assume that he had

⁴⁰ [1984] AC 74, 108.

⁴¹ *R (A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557.

⁴² See Auburn, Moffett and Sharland, *Judicial Review: Principles and Procedure*, chs 11–14, 16–18; Wade and Forsyth, *Administrative Law*, chs 10, 11; Craig, *Administrative Law*, chs 16–19. And see Galligan, *Discretionary Powers*.

⁴³ See ch 21, text at notes 42–3.

⁴⁴ See e.g. *Rooke's case* (1598) 5 Co Rep 99b: "Discretion" means . . . that something is to be done according to the rules of reason and justice, not according to private opinion.'

⁴⁵ Rand J in *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689, 705.

⁴⁶ [1968] AC 997, 1030 (Lord Reid). In *R v Environment Secretary, ex p Spath Holme Ltd* [2001] 2 AC 349, 396, Lord Nicholls said: 'The discretion given by Parliament is never absolute or unfettered.'

no better reasons for his decision. The willingness of the judges to impose limits upon the minister's discretion in *Padfield* matches the way in which they have frequently cut down the width of local authority discretions. Thus a local planning authority may grant planning permission 'subject to such conditions as they think fit', but the courts have severely limited the apparent width of this power.⁴⁷

The distrust of excessive discretion explains why the power to refuse naturalisation to an alien without giving reasons was held subject to a procedural requirement of fairness,⁴⁸ and why a power to grant what would otherwise be a 'conclusive' certificate may be reviewed if the power is inconsistent with EU law.⁴⁹ In the past the courts were readier to accept that executive discretion was immune from judicial review than they are today. A notorious instance of the courts' refusal to review executive discretion arose during the Second World War: in *Liversidge v Anderson*,⁵⁰ the House of Lords, Lord Atkin dissenting, held that the power of the Home Secretary to detain anyone whom he had reasonable cause to consider to be of hostile origin or association was a matter for executive discretion and that the courts must accept a statement by the Home Secretary that he believed he had cause to order the detention. This is an example of extreme judicial deference to executive decision-making, best explained by the context of wartime, and it has no authority beyond its own specific context.⁵¹

There are various substantive grounds on which the exercise of discretion may be reviewed by the courts. In practice, these grounds overlap and a decision may be defective on several grounds.

1. Error of law

As we have seen, any error of law by a public authority is outwith its jurisdiction and a matter over which the courts will exercise control. An authority which is entrusted with a discretion must direct itself properly on the law or its decision may be declared invalid.

In *R v Home Secretary, ex p Venables*, the Home Secretary increased from 10 to 15 years the 'tariff period' which two young murderers would have to serve before being considered for release. The Home Secretary stated that young offenders sentenced to detention during Her Majesty's pleasure would be dealt with on the same basis as adult offenders on whom mandatory life sentences had been imposed. Held, by 3–2, the Home Secretary by this statement misdirected himself in law. 'His legal premise was wrong: the two sentences are different. A sentence of detention during Her Majesty's pleasure requires the Home Secretary to decide from time to time . . . whether detention is still justified. The Home Secretary misunderstood his duty. This misdirection by itself renders his decision unlawful.'⁵²

So too, when a county council decided to ban deer hunting over its land, but without considering the extent of its powers, the policy was quashed.⁵³ Decisions such as these illustrate Lord Diplock's statement that 'the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it'.⁵⁴

⁴⁷ E.g. *R v Hillingdon Council, ex p Royco Homes Ltd* [1974] QB 720.

⁴⁸ *R v Home Secretary, ex p Fayed* [1997] 1 All ER 228.

⁴⁹ E.g. Case C-222/84, *Johnston v Chief Constable, RUC* [1987] QB 129.

⁵⁰ [1942] AC 206. See *R v F V Heuston* (1970) 86 LQR 33, (1971) 87 LQR 161; Simpson, *In the Highest Degree Odious*.

⁵¹ *Nakkuda Ali v MF de S Jaywatne* [1951] AC 66.

⁵² *R v Home Secretary, ex p Venables* [1998] AC 407, 518–19 (Lord Steyn).

⁵³ *R v Somerset CC, ex p Fewings* [1995] 3 All ER 20.

⁵⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408.

The notion of error of law goes wider than a mere mistake of statutory interpretation. A minister commits an error of law if (inter alia) he or she acts when there is no evidence to support the action or comes to a conclusion to which, on the evidence, he or she could not reasonably have come.⁵⁵ These principles were highlighted in 1976 when a Labour Secretary of State and a Conservative council clashed over the re-organisation of secondary education.

Under a power now contained in s 496 of the Education Act 1996, if the Secretary of State was satisfied that an education authority was proposing to act unreasonably, he or she could issue such directions to the authority as appeared expedient. When in May 1976 the newly elected Tameside council proposed, contrary to an earlier plan, to continue selection for entry to five grammar schools in the coming September, the Secretary of State directed the council to adhere to the earlier plan. The House of Lords refused to enforce this direction, holding that it was valid only if the Secretary of State had been satisfied that no reasonable authority could act as the council was proposing to. 'Unreasonable' in s 68 did not mean conduct which the Secretary of State thought was wrong. On the facts, there was no material on which the Secretary of State could have been satisfied that the council was acting unreasonably. He must therefore have misdirected himself as to the grounds on which he could act.⁵⁶

Reliance on error of law as a ground for controlling discretion places the courts in a position of strength vis-à-vis the administration since it is peculiarly for the courts to identify errors of law. As the *Tameside* case indicated, error of law is a sufficiently pliable concept to enable the judges, if they feel it is necessary, to make a very close scrutiny of the reasons for a decision and the facts on which it was based.

2. Error of fact

Apart from the jurisdictional fact doctrine mentioned above, an attempt to seek judicial review of a decision based on the claim that the decision-maker made an error of fact will generally be met by the reply that judicial review does not provide a right of appeal. This is more likely if there was some evidence for and some against the disputed finding, since the claimant is, in effect, asking the court to substitute itself for the decision-maker in deciding an issue of fact.⁵⁷ But suppose that there has been an evident mistake in a finding of fact that is directly material to the decision? In *R v Criminal Injuries Compensation Board, ex p A*,⁵⁸ four members of the House of Lords accepted that a decision could be quashed for a material error of fact. In 2004 the Court of Appeal held that a mistake of fact giving rise to unfairness

⁵⁵ *Edwards v Bairstow* [1956] AC 14; applied to ministers' decisions in *Coleen Properties Ltd v Minister of Housing* [1971] 1 All ER 1049. On error of law generally, see J Beatson (1984) 4 OJLS 22.

⁵⁶ *Education Secretary v Tameside Council* [1977] AC 1014 (D Bull (1987) 50 MLR 307).

⁵⁷ On the law/fact distinction, see W A Wilson (1963) 26 MLR 609, (1969) 32 MLR 361; E Mureinik (1982) 98 LQR 587 and T Endicott (1998) 114 LQR 292. And see text at note 55 above; and *Edwards v Bairstow* [1956] AC 14 (error of law where factual findings unsupported by any evidence).

⁵⁸ [1999] 2 AC 330 (on a matter of 'crucial importance' to A's claim for compensation, the Board proceeded on basis of inaccurate police evidence about a medical examination). See T H Jones [1990] PL 507 on the earlier authorities.

is a separate head of challenge where there is an appeal on a point of law.⁵⁹ There are four conditions to this jurisdiction. First, there must have been a mistake as to an existing fact. Second, the existence of the fact must be uncontentious and objectively verifiable. Third, the claimant should not have been responsible for the mistake. Fourth, the mistake must have been material to the earlier decision, though it need not necessarily have been decisive. Related to this is the consideration that if, for the purposes of art 6(1) ECHR, an official decision affects an individual's civil rights, a reviewing court must be able to control essential findings of fact, although it is not required to provide a rehearing on every evidentiary issue.⁶⁰

3. Irrelevant considerations

Powers are not lawfully exercised if the decision-maker takes into account factors that in law are irrelevant or leaves out of account relevant matters. Thus the Home Secretary acted unlawfully when, in deciding whether it was justified to release from prison two young men who as children had been convicted of murder, he took into account an irrelevant matter (public petitions demanding that the murderers be imprisoned for life) and refused to take account of a relevant matter (their progress and development in detention).⁶¹ A decision to award a council house to a councillor, enabling her to go in front of others on the housing list, was unlawful, having been influenced by the view of the chairman of the housing committee that it would help her to be re-elected.⁶² Where rates of over £50,000 had been overpaid to a council on an unoccupied warehouse, the council did not lawfully exercise its statutory discretion to refund overpaid rates when it refused to do so for reasons which disregarded the statutory purpose of the discretion.⁶³

The court's power to rule that certain considerations are irrelevant may severely limit the scope of general words in a statute,⁶⁴ but the courts do not always interpret statutory discretion narrowly.⁶⁵ The converse of the proposition that an authority must not take into account irrelevant considerations is that it must take into account relevant considerations. However, to invalidate a decision it is not enough that considerations have been ignored which *could* have been taken into account: it is only when the statute 'expressly or impliedly identifies considerations *required to be taken into account* by the authority as a matter of legal obligation' that a decision will be invalid because relevant considerations were ignored.⁶⁶ Thus there are factors which the decision-maker *may* take into account, but need not do so.⁶⁷ While it is for the court to rule whether particular factors are relevant or irrelevant and whether they were taken into consideration, it is generally for the decision-maker to decide what weight to give

⁵⁹ *E v Home Secretary* [2004] EWCA Civ 49, [2004] QB 1044. See P Craig [2004] PL 788, R Williams (note 38 above) who examines the effects of different forms of error of fact and CF Forsyth in Forsyth, Elliott, Jhaveri, Scully-Hill and Ramsden (eds), *Effective Judicial Review*, ch 15. For the application of *E* see: *Richmond upon Thames LBC v Kubicek* [2012] EWHC 3292 (QB).

⁶⁰ *R (Alconbury Developments Ltd) v Environment Secretary* (p 611 above), esp Lord Slynn at [53] and Lord Nolan at [61].

⁶¹ *R v Home Secretary, ex p Venables* [1998] AC 407.

⁶² *R v Port Talbot Council, ex p Jones* [1988] 2 All ER 207.

⁶³ *R v Tower Hamlets Council, ex p Chetnik Developments Ltd* [1988] AC 858.

⁶⁴ See e.g. *Mixnam's Properties Ltd v Chertsey UDC* [1965] AC 735 (G Ganz (1964) 27 MLR 611).

⁶⁵ E.g. *Robertson v Environment Secretary* [1976] 1 All ER 689 (risk of assassination of Prime Minister relevant to diversion of footpath on Chequers Estate); *R v Westminster Council, ex p Monahan* [1990] 1 QB 87 (relevant to permission for office development near Covent Garden that profits would fund improvements in opera house).

⁶⁶ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 183 (Cooke J) (emphasis supplied), approved in *Re Findlay* [1985] AC 318, 333.

⁶⁷ See *R v Somerset CC, ex p Fewings* [1995] 3 All ER 20, at 32 (Simon Brown LJ). (By 2–1, ban on hunting deer on council's land held unlawful as council had not based ban on its powers of land management; but belief that deer hunting was cruel was not necessarily irrelevant.)

to a relevant consideration that is taken into account.⁶⁸ However, if undue weight is given to one factor, this may cause the decision to be reviewed on grounds of reasonableness or proportionality.⁶⁹

The case law has not always been clear as to the effect of a decision-maker having taken into account an irrelevant consideration, or failed to take into account a relevant one. Such a decision should always be unlawful but where it can be shown that it made no difference to the decision the courts need not quash the decision.⁷⁰ The *Tameside* case, above, is also authority for the proposition that a decision-maker is required not only to direct himself correctly in relation to the scope of the relevant function, but is also obliged to take reasonable steps to acquaint himself with relevant considerations in order to exercise that function.⁷¹

4. Improper purposes

The exercise of a power for an improper purpose is invalid. Improper purposes include malice or personal dishonesty on the part of the officials making the decision, but examples of this kind are rare. Most instances of improper purpose have arisen out of a mistaken interpretation by a public authority of its powers, sometimes contributed to by an excess of zeal in the public interest. Thus a city council which was empowered to buy land compulsorily for the purpose of extending streets or improving the city could not validly buy land for the purpose of taking advantage of an anticipated increase in value of the land.⁷² In *Congreve v Home Office*, where the Home Office had threatened certain holders of television licences that their licences would be revoked by the Home Secretary if they did not each pay an extra £6, the Court of Appeal held that it was an improper exercise of the Home Secretary's power of revocation 'to use a threat to exercise that power as a means of extracting money which Parliament had given the Executive no mandate to demand'.⁷³ In *Porter v Magill*,⁷⁴ it was unlawful for the Conservative majority on the Westminster council to adopt a policy of selling council houses in certain parts of the city in the belief that home owners were more likely than council tenants to vote Conservative. The House of Lords accepted that councillors are elected and in due course may stand for re-election, but stressed that a council's powers must be used for the purposes for which they were conferred, not to promote the electoral advantage of a political party.

Difficulty arises when the public body is motivated both by lawful and unlawful purposes.

In *Westminster Corporation v London and North Western Railway Co*, the Corporation was empowered to provide public conveniences but not pedestrian subways. Underground conveniences were designed so that the subway leading to them provided a means of crossing a busy street. It was sought to stop the scheme on the ground that the real object was the provision of a crossing and not public conveniences. The court refused to intervene. 'It

⁶⁸ *Tesco Stores v Environment Secretary* [1995] 2 All ER 636; *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437; *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129.

⁶⁹ See pp 643–9 below.

⁷⁰ *R v Rochdale MBC, ex p Cromer Ring Mill Ltd* [1982] 3 All ER 761; *R (FDA) v Secretary of State for Work and Pensions* [2012] EWCA Civ 332, [2013] 1 WLR 444.

⁷¹ *Secretary of State for Education v Tameside MBC* [1977] AC 1014.

⁷² *Municipal Council of Sydney v Campbell* [1925] AC 338. In *Crédit Suisse v Allerdale Council* (above), the scheme was designed to evade a statutory borrowing restriction.

⁷³ [1976] QB 629, 662 (Geoffrey Lane LJ).

⁷⁴ [2001] UKHL 67, [2002] 2 AC 357. See also *R v Lewisham Council, ex p Shell UK Ltd* [1988] 1 All ER 938.

is not enough to show that the corporation contemplated that the public might use the subway as a means of crossing the street. In order to make out a case of bad faith, it must be shown that the corporation constructed the subway as a means of crossing the street under colour and pretence of providing public conveniences not really wanted.⁷⁵

Although the case law is not always consistent, the weight of authority supports an approach whereby the court considers the dominant purpose of the decision, and if this was improper, the decision is unlawful. If the dominant purpose was a proper one, improper subsidiary purposes will not invalidate the decision.⁷⁶ As a result, it can be rather difficult in practice to categorise a case as being about irrelevant considerations or improper purposes,⁷⁷ although doing so may matter at the stage of considering the remedial effect of the unlawful decision and whether it should be quashed.

5. Unauthorised delegation

A body to which the exercise of discretion has been entrusted by statute may not delegate the exercise of that discretion to another person or body unless the statute can be read as having authorised such delegation. In general, a statute that authorises one level of delegation does not thereby authorise further delegation. In *Barnard v National Dock Labour Board*, the national board lawfully delegated disciplinary functions over registered dockers to local boards; a local board acted unlawfully when it sub-delegated the power to suspend dockers to the port manager.⁷⁸

The rule against unauthorised delegation of powers might seem to require all powers vested in a minister to be exercised by him or her personally. However, in the case of central government the courts have accepted that powers and duties conferred on a minister may properly be exercised by officials for whom the minister is responsible to Parliament or by a junior minister.⁷⁹ Accordingly, information available to officials advising a minister is deemed to be information taken into account by the minister.⁸⁰ But where a statutory duty is vested in one minister, he or she may not adopt a policy by which the decision is effectively made by another minister.⁸¹ And, where a discretion is vested in a subordinate officer, it may not be taken away by orders from a superior.⁸² Similar principles apply to statutory agencies. Thus the Police Complaints Board could not adopt a rule of taking no action on complaints which the Director of Public Prosecutions had decided should not lead to criminal proceedings,⁸³ but the Commission for Racial Equality could delegate to its staff the task of conducting

⁷⁵ *Westminster Corpn v London and North Western Railway Co* [1905] AC 426, 432 (Lord Macnaghten); cf *Webb v Minister of Housing* [1965] 2 All ER 193.

⁷⁶ *Westminster Corporation* (above); *R v Southwark Crown Court, ex p Bowles* [1998] AC 641; *Re Kelly's Application for Judicial Review* [2000] NI 103.

⁷⁷ As to which, see G D S Taylor [1976] CLJ 272.

⁷⁸ [1953] 2 QB 18. And e.g. *Young v Fife Regional Council* 1986 SLT 331.

⁷⁹ *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560; *Re Golden Chemical Products* [1976] Ch 300. See also *R v Home Secretary, ex p Oladehinde* [1991] 1 AC 254; D Lanham (1984) 100 LQR 587; *R v Home Secretary, ex p Doody* [1994] 1 AC 531, 566 (power of Home Secretary to determine penal element of life sentence for murder); and ch 11 D.

⁸⁰ *National Association of Health Stores v Health Secretary* [2005] EWCA Civ 154.

⁸¹ *Lavender & Son Ltd v Minister of Housing* [1970] 3 All ER 871, distinguished in *Audit Commission v Ealing Council* [2005] EWCA Civ 556; J Braier [2005] JR 216.

⁸² *Simms Motor Units Ltd v Minister of Labour* [1946] 2 All ER 201.

⁸³ *R v Police Complaints Board, ex p Madden* [1983] 2 All ER 353.

formal investigations into alleged discrimination.⁸⁴ In local government, there is now wide authority for councils to delegate their functions to committees, sub-committees and officers.⁸⁵

6. Discretion may not be fettered

The powers of public bodies typically include making discretionary decisions, whether in granting a benefit sought by an individual – be it planning permission, a licence, or admission to a school – or imposing a penalty (such as revoking a licence or excluding a pupil for misconduct). In law, the decision-maker must consider the matter ‘on its merits’, taking into account all relevant circumstances. It is impossible to assess the merits of an individual case without considering general matters, such as relevant standards, current policies and decisions made in other cases. These principles apply to the exercise of discretionary powers vested in government departments, but departments cannot function effectively unless they formulate policies as to how a particular discretion will be exercised. Such policies may not be treated as binding rules.

Under a scheme for discretionary investment grants to industry, the Board of Trade applied a rule that grants could not be paid in respect of items costing less than £25 and refused to pay a grant to a firm which had spent over £4 million on gas cylinders costing £20 each: the House of Lords accepted that the department was entitled to make such a rule or policy, provided that it was prepared to listen to arguments for the exercise of individual discretion.⁸⁶

In such a case, individuals may find it very difficult to persuade officials that they should receive preferential treatment. Their right might be more realistically described as a right to ask that the general policy should be changed.⁸⁷ Good administration would seem to require that public authorities should be able to adopt definite policies without this interfering with the proper exercise of discretion.⁸⁸ Four general types of fettering case can be analysed.⁸⁹

The first is where legislation requires the decision-maker to have and operate a policy, the operation of which is challengeable only on the ordinary principles of judicial review.⁹⁰ Second, the exercise of a common law power – i.e. not one derived from statute – is not subject to the fetter principle.⁹¹ Alternatively, this second category could be considered an exception to the first category.

The third type of situation is the most common: fettering in law. The *British Oxygen* case above is the classic example. It occurs when a decision-maker adopts a policy as to the exercise of a discretion, but applies it in an over-rigid manner. The decision-maker may adopt a general policy and indicate that it will be applied in the absence of exceptional circumstances,⁹² but may not have a rule that certain applications will always be refused.⁹³

⁸⁴ *R v Commission for Racial Equality, ex p Cottrell & Rothern* [1980] 3 All ER 265. Cf *Financial Ombudsman Service v Heather Moor and Edgecomb Ltd* [2008] EWCA Civ 643, [2009] 1 All ER 328. M Freedland [1996] PL 19.

⁸⁵ Local Government Act 1972, s 101.

⁸⁶ *British Oxygen Co v Board of Trade* [1971] AC 610.

⁸⁷ *Ibid*, at 631 (Lord Dilhorne).

⁸⁸ Cf *A-G ex rel Tilley v Wandsworth BC* [1981] 1 All ER 1162 and *R v Rochdale BC, ex p Cromer Ring Mill Ltd* [1982] 3 All ER 761.

⁸⁹ CJS Knight [2009] JR 73.

⁹⁰ *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067.

⁹¹ *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213.

⁹² See e.g. *R v Home Secretary, ex p P and Q* [2001] 2 FLR 383 (policy of allowing mothers in prison to keep babies with them under the age of 18 months).

⁹³ *R v Port of London Authority, ex p Kynoch* [1919] 1 KB 176, 184 (dictum of Bankes LJ). See D J Galligan [1976] PL 332. Also *R v Home Secretary, ex p Venables* [1998] AC 407 (discretion fettered by rigid policy of ignoring child’s development in prison) and *R v Home Secretary, ex p Hindley* [2001] 1 AC 410 (Home Secretary prepared to reconsider decision on whole life tariff at any time).

The fourth type of case is fettering in fact, where a policy admits of exceptions but is actually operated so rigidly as to constitute a fetter.⁹⁴ There is a clear overlap here with a case of failing to take account of relevant considerations. A decision-maker may be required to set out the exceptional circumstances the policy allows for.⁹⁵ Public authorities that have adopted policies must take steps to see that they are applied consistently, and must bring them to the notice of the actual decision makers.⁹⁶ A government department that adopts and applies a policy which is contrary to its published policy is acting unlawfully.⁹⁷

7. Unreasonableness (irrationality)

A judge may not on judicial review set aside an official decision merely because he or she considers that the matter should have been decided differently. Judicial review does not provide a right to appeal on the merits of the decision. However, in exceptional circumstances a decision may be set aside for unreasonableness and if this ground for review is raised the court will have the difficult task of considering whether a decision that is otherwise within the powers of the authority may be said to be ‘unreasonable’.

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*⁹⁸ concerned the Sunday Entertainments Act 1932, that gave a local council power to permit cinemas to open on Sundays, ‘subject to such conditions as the [council] think fit to impose’. The Wednesbury council allowed cinemas to show films on Sundays, on condition that no children under 15 should be admitted to the performances, with or without an adult. Very many councils permitted children to go to the cinema on a Sunday if they were accompanied by an adult. The condition in *Wednesbury* was challenged by one of the cinemas. *Held*, the condition was neither ultra vires nor unreasonable.

In his much-quoted judgment, Lord Greene MR set out what is now termed the *Wednesbury* test, namely that a court may set aside a decision for unreasonableness only when the authority has come to a conclusion ‘so unreasonable that no reasonable authority could ever have come to it’.⁹⁹ The judgment emphasised that unreasonableness is closely related to other grounds of review, such as irrelevant considerations, improper purposes and error of law. What is important to remember is that unreasonableness operates as both a self-standing head of substantive review *and* as the standard of review (the level of scrutiny the court adopts) in certain types of case.

The meaning of ‘unreasonable’ was central to the *Tameside* case, as we have seen. Lord Diplock said there that ‘unreasonable’ denotes ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt’.¹⁰⁰ In the *GCHQ* case, the same judge made the test more exacting by calling the test one of irrationality: it

⁹⁴ *R v North West Lancashire Health Authority, ex p A* [2000] 1 WLR 977; *R v Southwark London Borough Council, ex p Melak* (1997) 29 HLR 223.

⁹⁵ *R (Rogers) v Swindon NHS PCT* [2006] EWCA Civ 392, [2006] 1 WLR 2649.

⁹⁶ *R (Rashid) v Home Secretary* [2005] EWCA Civ 744; and see *M Elliott* [2005] JR 281.

⁹⁷ *R (Lumba) v Home Secretary* [2011] UKSC 12, [2012] 1 AC 245.

⁹⁸ [1948] 1 KB 223.

⁹⁹ On the principles of *Wednesbury* review, see *J Jowell and A Lester* [1987] PL 368, *P Walker* [1995] PL 556, *Lord Irvine of Lairg* [1996] PL 59, *R Carnwath* [1996] PL 245, *J Laws in Forsyth and Hare* (eds), *The Golden Metwand and the Crooked Cord*, pp 185–201, *A Le Sueur* [2005] JR 32, *M Fordham* [2008] JR 266, *P Daly* [2011] PL 238, *J Goodwin* [2012] PL 445 and *P P Craig* [2013] CLP 1.

¹⁰⁰ *Education Secretary v Tameside Council* [1977] AC 1014, at 1064.

meant ‘a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’.¹⁰¹ In 1998, Lord Cooke regretted that some *Wednesbury* phrases had become ‘established incantations’; he preferred ‘the simple test’ of whether the decision under review ‘was one which a reasonable authority could reach’.¹⁰²

What can now be seen is that the test of unreasonableness does not apply uniformly to all kinds of decision. There are some decisions (for instance, allocating financial resources to local councils) where the court would intervene for unreasonableness only in exceptional circumstances.¹⁰³ These include the allocation of scarce resources, the exercise of specialist expertise, or inherently policy-driven or political judgments.¹⁰⁴

By contrast, if fundamental human rights are in issue, as where the life of an asylum seeker may be at risk, ‘the basis of the decision must surely call for the most anxious scrutiny’.¹⁰⁵ In 1996, the Court of Appeal held that an unreasonable decision was

one beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.¹⁰⁶

Despite this significant development, the court upheld the government’s policy that banned homosexuals from serving in the armed forces. However, the policy later failed the test of proportionality in European human rights law, because of its effect on the claimants’ right to respect for their private lives.¹⁰⁷

The *Wednesbury* test has often been said to present too high a hurdle in the way of a challenge to official action, and critics have argued that the European test of proportionality provided a better approach to the control of discretion. In 1991, an attempt to get British courts to adopt the test of proportionality was made in *R v Home Secretary, ex p Brind*.¹⁰⁸ The House of Lords held that, without incorporation of the European Convention on Human Rights (and except when rights in EU law were affected),¹⁰⁹ British courts could not review executive decisions on the basis of proportionality. Applying the *Wednesbury* test, the House upheld a government ban on the broadcasting of direct statements by representatives of proscribed organisations in Northern Ireland.

In 2001, Lord Cooke described the *Wednesbury* case as ‘an unfortunately retrogressive decision’ in that it ‘suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation’.¹¹⁰ Yet decisions have continued to be based on the *Wednesbury* test. The Home Secretary’s decision to include Pakistan in a ‘white list’ of countries in which persecution of

¹⁰¹ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.

¹⁰² *R v Chief Constable of Sussex, ex p International Trader’s Ferry Ltd* [1999] 2 AC 418, 452.

¹⁰³ *R v Environment Secretary, ex p Nottinghamshire CC* [1986] AC 240.

¹⁰⁴ Respectively: *Nottinghamshire* (above), *R (London and Continental Railway) v The Rail Regulator* [2013] EWHC 2 607 (Admin), *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756.

¹⁰⁵ *R v Home Secretary, ex p Bugdaycay* [1987] AC 514, 531. The impact on an individual is relevant to the level of scrutiny: *R (KM) v Cambridgeshire County Council* [2012] UKSC 23, [2012] PTSR 1189.

¹⁰⁶ *R v Ministry of Defence, ex p Smith* [1996] QB 517, 554 (Sir Thomas Bingham MR).

¹⁰⁷ *Lustig-Preen v UK* (1999) 29 EHRR 548.

¹⁰⁸ [1991] 1 AC 696.

¹⁰⁹ As in the *International Trader’s Ferry* case (above).

¹¹⁰ *R (Daly) v Home Secretary* [2001] UKHL 26, [2001] 2 AC 532, at [32].

individuals was unlikely to occur was held irrational.¹¹¹ By contrast, a scheme for compensating British civilians interned by the Japanese during the Second World War was upheld: it was considered reasonable for British citizens who claimed compensation to be required to show that they had a close link with the United Kingdom and the introduction of proportionality was rejected.¹¹²

The application of irrationality has led to a number of areas which can either be seen as sub-categories of irrationality as a head of review, or as separate heads of review for which irrationality is the standard: for instance, cases producing arbitrary or discriminatory results, and cases of alleged conspicuous unfairness.¹¹³

8. Proportionality

Proportionality is not the same as *Wednesbury* unreasonableness. It requires a structured analysis by the court of the decision challenged and the justification of the decision-maker for that challenge. The general standard of review under Human Rights Act claims is proportionality,¹¹⁴ as it is under EU law. Even anxious scrutiny *Wednesbury* review is insufficiently intensive.¹¹⁵ In many cases, the outcome under *Wednesbury* and proportionality will be the same, but not in all. Proportionality requires the court to take additional steps and engage with the challenged decision in much greater depth.¹¹⁶

Lord Steyn famously set out the difference between the two tests in *Daly*:

The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights . . . In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way.¹¹⁷

¹¹¹ *R v Home Secretary, ex p Javed* [2001] EWCA Civ 789, [2002] QB 129.

¹¹² *R (ABCIFER) v Defence Secretary* [2002] EWCA Civ 473, [2003] QB 1397. In a later decision, the scheme was held to be indirectly discriminatory under the Race Relations Act 1976: [2006] EWCA Civ 1293, [2006] 1 WLR 3213.

¹¹³ Respectively: *Matadeen v Pointu* [1999] 1 AC 98 and *R (Lewisham LBC) v AQA* [2013] EWHC 211 (Admin).

¹¹⁴ *R v Home Secretary, ex p Daly* [2001] UKHL 26; [2001] 2 AC 532.

¹¹⁵ *Smith & Grady v UK* (1999) 29 EHRR 493.

¹¹⁶ M Elliott in Forsyth, Elliott, Jhaveri, Scully-Hill and Ramsden (eds), *Effective Judicial Review*, ch 16.

¹¹⁷ *Daly* (above) at [27]–[28].

It is quite possible that in time proportionality will be recognised as a ground of judicial review, or as the standard of review in substantive challenges, in purely domestic judicial review cases which have no connection to either the HRA or EU law. However, at the moment, proportionality is not fully a part of domestic judicial review and it has not supplanted *Wednesbury*.¹¹⁸

The proportionality test adopted by the English courts has been set out by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* as a carefully structured analysis.¹¹⁹ The court must ask whether: (1) the legislative objective is sufficiently important to justify limiting a fundamental right; (2) the measures designed to meet the legislative objective are rationally connected to it; and (3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. The House of Lords in *Huang v Home Secretary* added the following fourth step, that the analysis must: ‘always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage.’¹²⁰

In truth, the fourth step rolls back into the third, but it broadens the scope of the exercise under step three. That broader third step is the balancing test, where the court must assess whether a fair balance has been struck between the factors which the parties rely on. The addition from *Huang* makes clear that the third step is not to ask whether a less restrictive approach was possible, although that is relevant to consider, but whether the decision as a whole has struck a fair balance, taking into account the importance of the right and any other possible methods of achieving the legitimate aim. The addition of the fourth stage is now well-established, having been repeatedly approved and applied by the Supreme Court.¹²¹

What proportionality adds to unreasonableness, beyond the sense of fair balance, is a need for structured justification. Once the claimant has shown that there is an interference with a right (that the facts fall within the scope of an ECHR right), it will be for the claimant to prove that there is no legitimate aim, and that there is no rational connection. These two stages will invariably be difficult to prove and are rarely met. But it is for the public authority to prove the key third stage (and fourth, following *Huang*) that the impairment of the right has been no more than necessary. The bulk of the work of proportionality is done at the third stage, and the burden being on the public authority requires the court to closely engage with the justifications put forward by the authority.

It is important that the proportionality analysis be conducted properly and in a structured manner in each case in which it is raised. In certain types of case lower courts and tribunals have learnt from long experience that particular arguments are often run but that they will almost never succeed under the existing law. There is a consequent, and understandable, tendency on the part of those courts and tribunals to simply apply a test of ‘exceptionality’: does this case have something about it which takes it out of the ordinary? Such an approach is not permitted. The proportionality analysis must always be gone through carefully and cautiously. It may in fact be only in exceptional cases that the infringement of the right will be disproportionate (for example, article 8 ECHR rights overcoming deportation of those with no right to be in the UK), but this cannot be converted into a legal test, and the wording

¹¹⁸ Lord Hoffmann in Ellis (ed), *The Principle of Proportionality in the Laws of Europe*; Schwarze, *European Administrative Law*, ch 5; M Elliott [2001] CLJ 301; J Rivers [2006] CLJ 174; T Hickman [2008] PL 694; Dame Mary Arden [2013] PL 498; Sir Phillip Sales (2013) 129 LQR 223. Note, however, the majority judgments in *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, esp [51]–[55] (Lord Mance).

¹¹⁹ [1999] 1 AC 69.

¹²⁰ [2007] UKHL 11, [2007] 2 AC 167 at [19].

¹²¹ *R (Quila) v Home Secretary* [2011] UKSC 45; [2012] 1 AC 6; *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39; [2013] 3 WLR 179.

of ‘exceptionality’ is best avoided altogether. The Supreme Court has stressed and re-stressed in a variety of contexts that there can be no test of exceptionality.¹²² Exceptionality must be the outcome of the test, not the threshold.

Much judicial and academic ink has been spilt on the subjects of margins of appreciation for, discretionary areas of judgment of, and deference to, the decision-maker.¹²³ This involves the court in some way recognising that the decision-maker’s justifications and reasoning may have advantages over the legal process. These advantages, as acknowledged in the case law, may be constitutional – in the sense that the decision-maker has been specifically allocated its function by Parliament, or where primary legislation is challenged under the HRA the decision-maker may be Parliament itself – or it may be institutional – in the sense that the decision-maker is best placed to undertake the balancing exercise because it has particular expertise in the area. It is undoubtedly the case that, despite considerable academic debate, the courts have always been willing to afford the decision-maker a degree of latitude in the choices made, in a similar manner to the European Court of Human Rights affording a margin of appreciation to individual states. In *Huang* the House of Lords, in a single opinion, took the whole debate back to basics:

Much argument was directed on the hearing of these appeals, and much authority cited, on the appellate immigration authority’s proper approach to its task, due deference, discretionary areas of judgment, the margin of appreciation, democratic accountability, relative institutional competence, a distinction drawn by the Court of Appeal between decisions based on policy and decisions not so based, and so on. We think, with respect, that there has been a tendency, both in the arguments addressed to the courts and in the judgments of the courts, to complicate and mystify what is not, in principle, a hard task to define, however difficult the task is, in practice, to perform . . . The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed.¹²⁴

Proportionality is ultimately, like all legal tests, a matter for the court.

When an infringement of a Convention right is alleged it is for the court to make the determination. The House of Lords in *R (SB) v Governors of Denbigh High School* stressed that what matters is the result.¹²⁵ The fact that the decision-maker has taken into account Convention rights in reaching its conclusion will not save that decision if the court finds it to be disproportionate. Equally, where no apparent balancing exercise has taken place this will not prove to be a ground of illegality under the Human Rights Act 1998 unless the decision

¹²² *Huang* (above); *Norris v Government of the USA* [2010] UKSC 9, [2010] 2 WLR 572; *Re W (Children)* [2010] UKSC 12, [2010] 1 WLR 701.

¹²³ See Lord Hoffmann’s criticism of deference in *R (Pro-Life Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 at [74]–[77]; R Clayton [2004] PL 33; R Edwards (2002) 65 MLR 859; J Jowell [2000] PL 671, [2003] PL 592 and ch 4 in Craig and Rawlings (eds), *Law and Administration in Europe*; Lord Steyn [2005] PL 346; M Hunt in Bamforth and Leyland (eds), *Public Law in a Multi-Layered Constitution*, ch 13; T R S Allan [2006] CLJ 671; A L Young (2009) 72 MLR 554; A Kavanagh (2010) 126 LQR 222; T R S Allan (2011) 127 LQR 96.

¹²⁴ *Huang* (above) at [14]–[16].

¹²⁵ [2006] UKHL 15, [2007] 1 AC 100.

in substance infringes a Convention right. The decision-maker ‘cannot be expected to make such decisions with textbooks on human rights law at their elbows’.¹²⁶ In *Belfast City Council v Miss Behavin’ Ltd* it was suggested that where the balancing exercise had been undertaken it would be accorded due weight.¹²⁷ If a ‘good’ rights balance made by the decision-maker is relevant to the court’s adjudication, why is a ‘bad’ or a non-existent one not relevant too? If conducting their own proportionality exercise is to be accorded some weight in deciding that the decision actually was proportionate, the fact that the decision-maker has not conducted that exercise should logically be accorded at least some weight on the question of whether the decision itself is held to be proportionate.

The better view is that consideration should be given to the decision-making process adopted in reviewing the human rights compliance of a discretionary decision. It is, for the purposes of the court, irrelevant. It may be useful for the decision-maker to consider the matter in a judicial manner (i.e. to have acted as though it were a court, with the accompanying procedural protections and emphasis on law), but only instrumentally in that it will increase the likelihood of reaching the same answer as the court will. However, the two are separate factors. The court must be entirely unconcerned with whether or not the decision-maker has ‘talked the rights talk’. It is the job of the court to assess whether or not the decision-maker has ‘walked the rights walk’. A case which falls into an area where the courts would ordinarily show a certain degree of deference to the primary decision-maker may be treated differently. Where they would do so, it may be relevant in reaching a judgment on whether the decision-maker has ‘walked the rights walk’ to take into account whether it has persuasively ‘talked the rights talk’. It is relevant in this type of case because the court is already concerned with what the decision-maker is saying, as well as what they are doing. Thus in *Denbigh* and *Miss Behavin’* if the decision-makers had balanced the rights themselves that would have been a relevant factor to consider, providing one accepts that some deference is due in the areas of uniform policy and free speech restrictions in cases of pornography.¹²⁸

In outline, if action to achieve a lawful objective is taken in a situation where it will restrict a fundamental right, the effect on the right must not be disproportionate to the public purpose sought to be achieved. The test applies in respect of European Convention rights, many of which (for instance, the right to freedom of expression) are subject to such restrictions ‘as are prescribed by law and are necessary in a democratic society’ for specified public purposes.¹²⁹ A restriction cannot be regarded as ‘necessary in a democratic society’ unless it is proportionate to the legitimate aim pursued.¹³⁰ If in a given situation there is a need for public action to restrict the right, the restriction ‘must be necessary and proportionate to the damage which the restriction is designed to prevent’.¹³¹ Any further restriction is unjustifiable.

One striking effect of the Human Rights Act has been to require the courts to apply the test of proportionality in almost every case when a claim for judicial review is based on an infringement or restriction of a Convention right. The test may be applied in challenges to Acts of Parliament or to the exercise of discretion,¹³² and whether the remedy is sought by

¹²⁶ *Denbigh* (above) at [68] (Lord Hoffmann).

¹²⁷ [2007] UKHL 19, [2007] 1 WLR 1420.

¹²⁸ CJS Knight [2007] JR 221.

¹²⁹ Art 10(2) ECHR. See *Sunday Times v UK* (1979) 2 EHRR 245; and ch 4 C.

¹³⁰ As in *Dudgeon v UK* (1981) 4 EHRR 149.

¹³¹ *R v Home Secretary, ex p Brind* [1991] 1 AC 696, 751 (Lord Templeman).

¹³² See, respectively, *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68; *R (Farrakhan) v Home Secretary* [2002] EWCA Civ 606, [2002] QB 1391.

judicial review or by appeal.¹³³ In *R (Daly) v Home Secretary*,¹³⁴ a prison policy that barred a prisoner in a closed prison from being present while his cell was searched, even when letters between him and his solicitor were examined, was held by the House of Lords to be unlawful on common law grounds. It was also held to infringe Daly's right under art 8(1) ECHR to respect for his correspondence to a greater extent than was necessary. Lord Steyn commented that proportionality was likely to mean a greater intensity of review than the *Wednesbury* test or even the heightened scrutiny test applied in *R v Ministry of Defence, ex p Smith*,¹³⁵ but he denied that this meant there had been a shift to 'merits review'.

The fact that proportionality is now a key mechanism in the protection of Convention rights raises difficult questions about the extent to which the courts may substitute their views for decisions taken by ministers, Parliament or, for instance, the broadcasting authorities.¹³⁶ Must the courts decide every human rights case by applying their view of what they regard as correct? As we have seen, the court is required by the Human Rights Act to decide whether there has actually been a violation of the Convention, and must not find that there has been a breach merely because the decision-maker has not used words that refer to the ECHR.¹³⁷ But this does not mean that a considered assessment of the implications by a responsible decision-maker must be ignored by the court. Depending on the context, issues of constitutional respect and institutional competence may arise. When in 2004 the Law Lords held indefinite detention for suspected terrorists to be incompatible with the Convention right to liberty,¹³⁸ the decision cannot be said to have been deferential to Parliament or the government, even though the context of national security might have called for this.¹³⁹

Acting incompatibly with Convention rights

The Human Rights Act 1998, s 6(1), provides: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' An act for this purpose includes a failure to act – but not a failure to make any primary legislation (s 6(6)). And the act of a public authority is not unlawful if, as a result of primary legislation, the authority could not have acted differently or if it gives effect to legislation that cannot be read in a way compatible with Convention rights.

While issues as to the lawfulness of a public authority's act under s 6(1) may be raised in any court or tribunal proceedings to which they are relevant (s 7(1)), the scheme of the Act extends the scope of judicial review into the broad expanse of all Convention rights, including the right to life (art 2), the right to a fair hearing (art 6(1)), the right to respect for private and family life (art 8) and freedom of expression (art 10). It follows that decisions of public authorities are subject to judicial review and may be held unlawful, even if apart from the Act

¹³³ On recourse by way of appeal, see *Huang v Home Secretary* [2007] UKHL 11, [2007] 2 AC 167.

¹³⁴ [2001] UKHL 26, [2001] 2 AC 532.

¹³⁵ See text at note 106.

¹³⁶ As in *R (Pro-Life Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185.

¹³⁷ See *R (Begum) v Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; *Belfast Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 3 All ER 1007.

¹³⁸ *A v Home Secretary*, note 32 above.

¹³⁹ Cf *Home Secretary v Rehman* [2001] UKHL 47, [2003] 1 AC 153, [62] (Lord Hoffmann). And see A Kavanagh [2009] PL 287.

no such claim could have been made. In practice, applicants for judicial review may seek to rely both on Convention rights and on the grounds for review that are available at common law. In some cases, the human rights claims do not affect the outcome; in others, as we have seen in respect of proportionality, they may be decisive in the claimant's favour because of the different standard of review applied by the courts.

Judges in the United Kingdom dealing with judicial review must (because of the Human Rights Act, s 2) take account of case law from Strasbourg, which may mean applying that case law even if they consider it to be unsatisfactory.¹⁴⁰ When decisions by a public authority are under review, it does not matter that the authority did not expressly deal with Convention issues in making its decision,¹⁴¹ for the task of the reviewing court is to decide whether the actual outcome on the facts was a breach of Convention rights. However, a public authority that ignores its obligations under the Act must obviously be at greater risk of its decisions being challenged as unlawful.

B. Legitimate expectations

A ground of judicial review linked with fairness that has undergone rapid development since the 1980s is that of legitimate expectations.¹⁴² It now has both substantive and procedural content and is consequently best placed between the two other sections of this chapter. The protection of legitimate expectations exists in other systems of law (including those of Canada, Germany and the EU)¹⁴³ and is an aspect of legal certainty. In their dealings with public agencies, private persons need to know if they can rely on statements by officials or on decisions that have been notified to them, and when those representations can be departed from.

Five broad types of case should be considered. First, where there has been the revocation of an existing favourable decision. Secondly, a procedural entitlement said to arise from a representation that a particular procedure will be followed. Thirdly, a procedural entitlement said to arise out of an interest in a substantive benefit which cannot fairly be withdrawn without some right to comment. Fourth, a representation as to a substantive entitlement. Finally, cases which arise out of representations that are held to be *ultra vires*.

Revocation of an existing decision

We deal first with the unusual situation in which a public body has made a *decision* conferring a benefit upon an individual that it later tries to revoke and replace with a fresh decision that is less favourable to her. If the agency took the first decision properly and told her of it, without qualifying it as 'provisional' or 'subject to review', a court will hold that the agency has exercised its discretion and may not alter the decision to the individual's disadvantage.¹⁴⁴

¹⁴⁰ See *Home Secretary v AF (no 3)* [2009] UKHL 28, [2009] 3 All ER 643, applying *A v UK* (2009) 26 BHRC 1 (use of special advocates); see esp speeches of Lords Hoffmann and Rodger ([98]: 'Even though we are dealing with a UK statute, in reality, we have no choice').

¹⁴¹ See cases cited in notes 125–7 above.

¹⁴² See *R Baldwin and D Horne* (1986) 49 MLR 685; *C F Forsyth* [1988] CLJ 238; *P P Craig* (1992) 108 LQR 79; *C J S Knight* [2009] PL 15. For an account of the law today, see Moules, *Actions against Public Officials*, chs 2, 3 and Auburn, Moffett and Sharland, *Judicial Review: Principles and Procedure*, ch 19.

¹⁴³ Schwarze, *European Administrative Law*, ch 6; Schonberg, *Legitimate Expectations in Administrative Law*; Moules, ch 3.

¹⁴⁴ *Re 56 Denton Road Twickenham* [1953] Ch 51.

This position is subject to express statutory provision. Apart from legislation, an authority that has conferred a continuing benefit on someone under a mistake of fact may revoke the benefit for the future when it discovers the true position.¹⁴⁵ And when the original benefit was based on a mistake of law, the authority may make a fresh decision based on a correct view of the law.¹⁴⁶

When a legitimate expectation may arise

For the remaining categories of case, it is necessary to consider when a legitimate expectation can arise. The easiest case is that of an *express assurance*. When the Hong Kong government gave a public assurance to illegal entrants into the colony who had come from Macao that they would be interviewed and their merits considered before it would be decided whether to deport them, the Judicial Committee explained why this assurance should be enforced:

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 implement its promise, so long as implementation does not interfere with its statutory duty.¹⁴⁷

For an assurance of this kind to be enforceable, the official statement must have been ‘clear, unambiguous and devoid of relevant qualification’.¹⁴⁸ Whether an assurance meets this test is determined by reference to how, on a fair reading of the promise as made, it would reasonably have been understood by those to whom it was made.¹⁴⁹

It is common practice for a public authority to make known the policy that it intends to follow on a given subject: while that policy is in place, individuals may reasonably expect that the policy will be applied to them and will not be simply ignored.¹⁵⁰ If there is a *change of policy*, especially if this is done without any warning or publicity, individuals may be disappointed not to receive the benefit that they had expected. All public authorities must be able to change their policies from time to time, and the courts have held that while individuals may hope to get the benefit of an existing policy or legal rule, they do not ordinarily have a legitimate expectation that the policy or rule will not be changed.¹⁵¹ But in certain circumstances, the change in policy which resiles from a legitimate expectation may be subjected to procedural requirements or even substantively prevented. A general policy statement can create a legitimate expectation, but only where that policy has a ‘pressing and focussed’ impact will a legitimate expectation arise in favour of a procedural remedy. Only if the policy amounts to a pressing and focused assurance of the continuation of the policy will a substantive legitimate expectation be found.¹⁵²

A legitimate expectation may arise even in the absence of an assurance, where a public agency has followed a *consistent practice* of acting in a certain way, and then suddenly changes the practice without any warning. In the GCHQ case,¹⁵³ the invariable practice of the government had been to consult with civil service unions before changing terms of employment for

¹⁴⁵ *Rootkin v Kent CC* [1981] 2 All ER 227.

¹⁴⁶ *Cheung v Herts CC*, *The Times*, 4 April 1986; C Lewis [1987] PL 21.

¹⁴⁷ *A-G of Hong Kong v Ng Yuen Shiu* [1983] AC 629, 638 (Lord Fraser). And see *R v Liverpool Corporation, ex p Liverpool Taxis Association* [1972] 2 QB 299.

¹⁴⁸ *R v IRC, ex p MFK Ltd* [1990] 1 All ER 91, 110; approved in *R (Bancoult) v Foreign Secretary (No.2)* [2008] UKHL 61, [2009] AC 453.

¹⁴⁹ *Paponette v AG of Trinidad and Tobago* [2010] UKSC 32, [2012] 1 AC 1.

¹⁵⁰ As it was in *R (Rashid) v Home Secretary* [2005] EWCA Civ 744.

¹⁵¹ See *Re Findlay* [1985] AC 318; and *Hughes v DHSS* [1985] AC 776 (civil servants hoping for benefit of favourable retirement age, but age raised before they could retire).

¹⁵² *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755.

¹⁵³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375.

civil servants; because of this, the unions had a legitimate expectation of being consulted before the Thatcher government withdrew from staff at GCHQ the right to join a union. However, there was some evidence from the Cabinet Secretary that the government decided against consultation for reasons of national security; this factor was held to prevail over the unions' legitimate expectation. In another case, for 25 years the Revenue had accepted tax refund claims without taking any notice of a statutory time limit: it was held that the Revenue could not without notice begin to refuse refunds on the basis that the claims were late.¹⁵⁴ The test for such cases set out by the Supreme Court is that the practice must have been 'so unambiguous, so widespread, so well-established and so well-recognised as to carry with it a commitment to a group'.¹⁵⁵

The ability of the court to enforce an expectation may be affected by other factors affecting the public interest. In a similar case, where tax officials had told taxpayers that an element in proposed dealings would be treated as capital and not as income, but later dealt with it as income, Bingham LJ said:

If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation . . . But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue's discretion . . . is limited. Fairness requires that its exercise should be on a basis of full disclosure.¹⁵⁶

Thus, for the Revenue's assurance to be enforced, the taxpayer must have 'put all his cards face upwards on the table'.¹⁵⁷ And the individual's claim to a legitimate expectation may yield to a broader notion of fairness, taking account of the public interest and the principle of legality.¹⁵⁸

Procedural remedies from procedural expectations

Where the individual has an expectation of a particular procedure which will be followed – for example, an assurance or consistent practice before any change in policy of consultation – this is the 'paradigm case' of a legitimate expectation.¹⁵⁹ It will only be defeated if there are overriding reasons to resile from it. Because the expectation only imposes a procedural requirement on the public authority, the courts are slow to permit such expectations to be bypassed, although they may be if, for example, time was too limited to carry out a consultation exercise.¹⁶⁰

Procedural remedies from substantive interests

The cases in which an individual has substantive interest, such as the benefit of a licence, to which the courts will attach a procedural remedy without there being a representation of such a procedure are rare. One example arose from the closure of a residential care home, in

¹⁵⁴ *R v IRC, ex p Unilever plc* [1996] STC 681.

¹⁵⁵ *R (Davies) v HMRC* [2011] UKSC 47, [2011] 1 WLR 2625 at [49] (Lord Wilson).

¹⁵⁶ *R v IRC, ex p MFK Ltd*, 110–1.

¹⁵⁷ See *R v IRC, ex p MFK Ltd* above.

¹⁵⁸ See the estoppel cases mentioned at page 654 below.

¹⁵⁹ *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [49] (Laws LJ).

¹⁶⁰ *R (Cheshire East Council) v Environment, Secretary* [2011] EWHC 1975 (Admin).

which case the court found that a long-standing resident had a legitimate expectation that she would be consulted because of her substantive interest in what had become her home.¹⁶¹

When a legitimate expectation may lead to a substantive remedy

The judgment in *R v Ministry of Agriculture, ex p Hamble Fisheries Ltd* broke new ground by holding (a) that a legitimate expectation might lead to the award of a substantive benefit; and (b) that the court must conduct a balancing exercise in considering whether the effect of a changed policy was ‘fair’, or amounted to an abuse of power, not merely whether the policy met the *Wednesbury* test of unreasonableness.¹⁶² The *Hamble Fisheries* judgment (initially described by the Court of Appeal as heresy),¹⁶³ was approved in *R v North Devon Health Authority, ex p Coughlan*.¹⁶⁴

In 1993, a health authority moved seriously disabled patients into a new facility after assuring them that they could live there for as long as they chose. In 1998, the authority decided to close the facility and transfer the patients to local authority care. Held, the decision to terminate care in the NHS was based on a mistaken view of the legislation. The promise to the patients had created a legitimate expectation of a substantive benefit, the frustration of which would be so unfair as to amount to an abuse of power. There was no ‘overriding public interest’ to justify departure from the promise.

The court’s reasoning in *Coughlan* raised difficult questions as to what criteria should be applied by the court in appraising the new policy and assessing the implications for the public authority in granting a substantive remedy. One result of *Coughlan* was a surge in the number of cases in which claims based on legitimate expectations were made, seldom with the success that was achieved in *Coughlan*. In *R (Bibi) v Newham Council*, the court made a valuable analysis of what such a claim involves:

In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposed to act unlawfully in relation to its commitment; the third is what the court should do.¹⁶⁵

It is particularly difficult for the court to grant a substantive remedy when an assurance has been given to the claimant about the granting of something from a limited stock of resources (e.g. housing) on which there are many competing claims.¹⁶⁶

One of the most difficult issues has been what standard of review is applied by the courts in assessing the fairness of resiling from a substantive expectation. In *Nadarajah*, Laws LJ suggested that the standard of review was proportionality rather than *Wednesbury*.¹⁶⁷ Although this has yet to be formally approved by the higher courts, the weight of authority

¹⁶¹ *R v Devon County Council, ex p Baker* [1995] 1 All ER 73.

¹⁶² [1995] 2 All ER 714.

¹⁶³ *R v Home Secretary, ex p Hargreaves* [1997] 1 WLR 906.

¹⁶⁴ [2001] QB 213, distinguishing *Hargreaves*.

¹⁶⁵ [2001] EWCA Civ 607, [2002] 1 WLR 237. On the implications of this approach, see I Steele (2005) 121 LQR 300; also P Sales and K Steyn [2004] PL 564.

¹⁶⁶ As in *R (Bibi) v Newham Council* (above).

¹⁶⁷ *R (Nadarajah) v Home Secretary* [2005] EWCA Civ 1363.

supports it¹⁶⁸ and it provides the flexible and variable intensity required in such fact-sensitive situations.¹⁶⁹

In many cases of legitimate expectation, claimants can show that they have relied to their detriment upon the policy or statement under review, and this may strengthen their case for a substantive remedy, but proof of such reliance is not an invariable requirement.¹⁷⁰

Unlawful representations and estoppel

An area in which there remains considerable scope for development of the law is an expectation based upon a representation which was not lawfully made. The courts have consistently held that no *legitimate* expectation can arise from an unlawful representation.¹⁷¹ This is a deeply unsatisfactory position for two reasons. First, it is difficult to see why it should be the innocent individual who pays the price for the initial illegality of the public body's action.¹⁷² Secondly, English law is apparently inconsistent with the position taken by the European Court of Human Rights, which treats ultra vires expectations as a possession such as to invoke the right to property in article 1 of the First Protocol, which can only be proportionately interfered with.¹⁷³ The unhappy disjunction in protection is neither justifiable nor sustainable.

At an earlier time, the courts rejected the use of the private law doctrine of estoppel in easing the plight of someone who had relied on an assurance from an official only to find that it was not binding because it was thought to allow officials to play fast and loose with legal rules and the limits of a public authority's powers, duties or jurisdiction.¹⁷⁴ Thus estoppel could not affect the obligation to perform a statutory duty. The House of Lords reconsidered the issue in 2002, in which Lord Hoffmann said:

It seems to me that in this area, public law has already absorbed what is useful from the moral values which underlie the private law concept of estoppel and the time has come for [public law] to stand upon its own two feet.¹⁷⁵

As a result, the analogy between legitimate expectations and estoppel is not one which is likely to be of any utility in the near future.

C. Review on procedural grounds

Although the content of a public body's decision may be within the powers of the body taking it, exercise of the power may be lawful only if the proper procedure for making the decision

¹⁶⁸ *Bhatt Murphy* (above); *R (Cheshire East Council) v Secretary of State for the Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin); *R (Wood) v Secretary of State for Education* [2011] EWHC 3256 (Admin), [2012] ELR 172; *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at [311]–[312] (Lord Phillips, dissenting). The more macro-political the subject-matter, the lesser the intensity of review: *R v Secretary of State for Education, ex p Begbie* [2000] 1 WLR 1115.

¹⁶⁹ See P Craig and S Schönberg [2000] PL 684, 698–700; C J S Knight [2007] JR 117; cf M Elliott [2000] JR 27, arguing that *Wednesbury* provides the proper standard of review.

¹⁷⁰ See *R (Bibi) v Newham Council* (above).

¹⁷¹ *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2005] Ch 1.

¹⁷² *Rowland* (above); Craig, *Administrative Law*, ch 22 and Y Vanderman [2012] PL 85, cf S Hannett and L Busch [2005] PL 729.

¹⁷³ *Pine Valley v Ireland* (1993) 16 EHRR 379; *Stretch v UK* (2004) 38 EHRR 12.

¹⁷⁴ *Maritime Electric Co v General Dairies Ltd* [1937] AC 610; *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257; *Essex Congregational Union v Essex CC* [1963] AC 808.

¹⁷⁵ *R (Reprotech (Pebsham) Ltd) v East Sussex CC* [2002] UKHL 8, [2002] 4 All ER 58. A W Bradley [2002] PL 597 and M Elliott [2003] JR 71.

has been observed. Procedural review is about examining the process by which a decision has been reached. If there is a failure to observe essential procedural requirements, then the decision will be invalid. These requirements are often found in the legislation which confers the power in question. Others are derived from the common law doctrine of natural justice or, as it is now widely known, the doctrine of fairness. Fundamentally, as will be seen, natural justice and procedural fairness impose no concrete rules: what is fair depends upon – and varies significantly between – the circumstances of each case.

Statutory requirements

Where statute authorises a decision to be made after a certain procedure has been followed, failure to observe the procedure may result in the purported decision being declared a nullity.

In *Ridge v Baldwin*, the Brighton police committee summarily dismissed their chief constable following his trial at the Central Criminal Court on charges of conspiracy; his acquittal had been accompanied by serious criticism of his conduct by the trial judge. Disciplinary regulations under the Police Act 1919 required a formal inquiry to be held into charges brought against a chief constable before he could be dismissed. The committee contended that this procedure did not apply to a power of dismissal authorised by an earlier Act. The House of Lords held that the disciplinary regulations applied to the dismissal: ‘inasmuch as the decision was arrived at in complete disregard of the regulations it must be regarded as void and of no effect’.¹⁷⁶

But not every procedural error invalidates administrative action. The courts have often distinguished between procedural requirements which are mandatory (breach invalidates) and those which are directory (breach does not invalidate). This seemingly clear distinction takes no account of whether there has been a total or partial failure to observe the procedure; nor of whether the procedural defect caused actual prejudice to anyone.¹⁷⁷

In 1979, Lord Hailsham suggested that the courts in this area are faced with ‘not so much a stark choice of alternatives but a spectrum of possibilities’. He continued: ‘The jurisdiction is inherently discretionary, and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind.’¹⁷⁸ In that case, a planning authority failed to notify landowners of their right of appeal to the Secretary of State against a decision that adversely affected them: this failure invalidated the decision. In a later case, the Court of Appeal held that where a required procedure had not been observed, to ask if the requirement was mandatory or directory was no more than a ‘first step’ leading to such questions as whether there was substantial compliance; whether the non-compliance was capable of being waived; and what was the position if it had not been or could not be waived.¹⁷⁹ In 2005, the House of Lords held in *R v Soneji* that the mandatory/directory distinction was not useful: the emphasis ought to be on examining the effects of non-compliance and on

¹⁷⁶ [1964] AC 40, 117 (Lord Morris of Borth-y-Gest).

¹⁷⁷ Compare *Coney v Choyce* [1975] 1 All ER 979 (no prejudice from failure to notify school closure at school entrance) with *Bradbury v London Borough of Enfield* [1967] 3 All ER 434 (complete failure to notify proposed changes in composition of schools).

¹⁷⁸ *London and Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876, 883.

¹⁷⁹ *R v Immigration Appeal Tribunal, ex p Jeyeanthan* [1999] 3 All ER 231, applied in *Attorney-General’s Reference (No 3 of 1999)* [2001] 2 AC 91.

appraising the intention of the legislature in laying down the procedures to be followed.¹⁸⁰ In several cases thereafter, the judges took a more relaxed view of incorrect procedure, so much so that doubts were raised about the value of having rules that need not be observed. Where a fundamental rule of criminal procedure had not been observed, Lord Bingham emphasised that the effect of the ‘sea change wrought by *Soneji*’ had been exaggerated and did not warrant ‘a wholesale jettisoning of all rules affecting procedure’.¹⁸¹ The Court of Appeal has since held that the test for invalidity was whether there had been substantial compliance with the relevant statutory requirements.¹⁸² Good administration will not be encouraged if statutory procedures can be lightly set aside.

Natural justice

The origin of natural justice is to be found in certain assumptions made in the past by judges about the procedures that should be followed if justice is to be done; those assumptions have led to the emergence of rules, and such rules continue to evolve today. Many aspects of natural justice at common law are reinforced under the Human Rights Act 1998 by the right to a fair hearing under art 6(1) ECHR:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The common law rules are generally consistent with the Convention right to a fair hearing, but the two systems are far from identical. On the one hand, common law rules are at the mercy of legislation by Parliament, which may lay down procedures that on any showing are unfair; but under the Human Rights Act, such legislation may be declared incompatible with art 6(1).¹⁸³ Also, art 6(1) requires the hearing to be before an ‘independent and impartial tribunal’, and this enables issues to be raised about guarantees for judicial independence that are outside the scope of natural justice.¹⁸⁴ On the other hand, the European meaning of ‘civil rights and obligations’ in art 6(1) does not include important areas of public law, such as taxation and immigration, even though natural justice applies to them as a matter of national law.¹⁸⁵

Before considering natural justice as a principle of administrative law, two of the main rules of natural justice can be illustrated with examples of how they apply to the ordinary courts.

1. The rule against bias

The essence of a fair judicial decision is that it has been made by an impartial judge. This has been the subject of many decisions at common law, to which can now be added decisions of the European Court of Human Rights, interpreting the right under art 6(1) ECHR to a determination by an ‘independent and impartial tribunal’.¹⁸⁶ In very rare cases, a judge may

¹⁸⁰ [2005] UKHL 49, [2006] 1 AC 340.

¹⁸¹ *R v Clarke* [2008] UKHL 8, [2008] 2 All E 665, [20].

¹⁸² *R (Herron) v Parking Adjudicator* [2011] EWCA Civ 905, [2012] 1 All ER 709.

¹⁸³ E.g. *R (Wright) v Health Secretary* [2009] UKHL 3, [2009] 2 All ER 129 (statute authorising suspension of nurse’s right to work but without a prior right to be heard).

¹⁸⁴ See e.g. *Starrs v Ruxton* 2000 JC 208; (1999) 8 BHRC 1.

¹⁸⁵ See e.g. *R (Smith and West) v Parole Board* [2005] UKHL 1, [2005] 1 All ER 755. On the interaction of art 6(1) and fairness, see M Westgate [2006] JR 57; P Craig [2003] PL 753; and A W Bradley, in Supperstone, Goudie and Walker (eds), *Judicial Review*, pp 65–75.

¹⁸⁶ The leading Convention cases on judicial bias were reviewed in *Hoekstra v HM Advocate* 2001 SLT 28. And see D Williams [2000] PL 45 and K Maleson (2002) 22 LS 53.

actually be biased against a party, in the sense of being partial or prejudiced. But the main rule against bias is that a judge may be disqualified from acting in a case on two grounds, the first being where he or she has a direct pecuniary interest, however small, in the subject matter of the case; thus a judge who is a shareholder in a company appearing as a litigant must decline to hear the case, except with consent of the parties.¹⁸⁷ The automatic disqualification of a judge also applies where there is no financial interest, but the decision of the case between the parties would affect the promotion of a cause by one party with which the judge is closely involved.¹⁸⁸ This situation arose when, as one of five Law Lords who heard an appeal concerning General Pinochet's extradition, Lord Hoffmann was director of a charity associated with Amnesty International, that had argued at the appeal in support of the extradition and was thus in the position of being a party to the case. The judge's involvement with the charity was not disclosed during the hearing. It was held that the decision could not stand and the appeal was heard again by a different panel of Law Lords.

Secondly, apart from a pecuniary interest or identification with one of the parties, a judge is disqualified when (in Lord Hope's words) 'the fair-minded and informed observer, having considered the facts [relating to an allegation of bias], would conclude that there was a real possibility that the tribunal was biased'.¹⁸⁹ Under this form of the test, disqualification is not automatic but depends on whether an informed observer would conclude there was a 'real possibility of bias' once the facts had been ascertained.

Three comments may be made on the test. First, where bias is alleged, the reviewing court does not have to decide whether the judge was in fact biased, since 'bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect'.¹⁹⁰ Second, the test acknowledges that 'in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality'.¹⁹¹ Lord Hewart's dictum, that it is 'of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done', comes from *R v Sussex Justices, ex p McCarthy*:

The acting clerk to the justices was a member of a firm of solicitors who were to represent the plaintiff in civil proceedings as a result of a collision in connection with which the applicant was summoned for a road traffic offence. The acting clerk retired with the bench, but was not asked to advise the justices on their decision to convict the applicant. Held, that, as the clerk's firm was connected with the case in the civil action, he ought not to advise the justices in the criminal matter and therefore could not properly discharge his duties as clerk. The conviction was quashed, despite the fact that he had taken no part in the decision.¹⁹²

Third, the test for judicial bias approved in *Porter v Magill* resolves long-standing uncertainty as to whether in establishing bias it was enough that an observer had a 'reasonable suspicion' that a tribunal might be biased, or whether it must beyond this be shown that in fact there was a 'real likelihood' or 'real danger' of bias. On this issue there had been

¹⁸⁷ *Dimes v Grand Junction Canal (Proprietors of)* (1852) 3 HLC 759. And see R Cranston [1979] PL 237.

¹⁸⁸ *R v Bom Street Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119. For comment on 'automatic disqualification', see T Jones [1999] PL 391 and A Olowofoyeku [2000] PL 456.

¹⁸⁹ *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, at [103] (Lord Hope).

¹⁹⁰ *R v Gough* [1993] AC 646, 672 (Lord Woolf).

¹⁹¹ *Ex p Pinochet Ugarte (No 2)*, at 139 (Lord Nolan).

¹⁹² [1924] 1 KB 256.

divergence between the English and Scottish courts. An earlier formula adopted by the House of Lords, that sought to lay down a single test for all purposes,¹⁹³ was not followed in some Commonwealth decisions.¹⁹⁴ Nor was it consistent with the Strasbourg case law on art 6(1) ECHR, which favours an objective test of the risk of bias in the light of all factors known to the court.¹⁹⁵

In *Locabail (UK) Ltd v Bayfield Properties Ltd*,¹⁹⁶ the Court of Appeal dealt with five cases in which bias was alleged in respect of such matters as a judge's opinions, social relationships and former professional activities. The court stressed the importance of full disclosure. A judge 'would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance'; but 'if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal'.¹⁹⁷ Questions often arise about the impartiality of members of courts and tribunals, and juries.¹⁹⁸ Situations in which there was held to be a 'real possibility of bias' include the following:

- (a) a Scottish judge heard a case brought by a prisoner that challenged the interpretation placed on a statute by the government, when the judge had earlier (while sitting in Parliament as a minister) upheld that interpretation as being the correct view;¹⁹⁹
- (b) during a lengthy hearing in the Restrictive Practices Court, the economist member of the court asked economic consultants, who were giving expert evidence for one party in the case, about the prospects of obtaining employment with them;²⁰⁰
- (c) shortly before hearing a long commercial case, a High Court judge realised that a principal witness for one side was planned to be a friend whom he had known for 30 years, but he decided to hear the case after ascertaining that his friend would not in fact be called; the Court of Appeal required the judge to recuse himself, even though this would delay the hearing.²⁰¹

But there was held to be no 'real possibility of bias' when

- (i) it was claimed that the medically qualified member of a disability tribunal, who had long experience of providing medical reports to the Department of Work and Pensions, would be unconsciously biased because of this;²⁰² and
- (ii) a Scottish judge refused to withdraw from an immigration case concerning a Palestinian asylum-seeker, formerly active in the Palestine Liberation Organisation, who claimed that the judge could not be impartial because of her membership of the International Association of Jewish Lawyers.²⁰³

¹⁹³ *R v Gough* [1993] AC 646.

¹⁹⁴ E.g. *Webb v R* (1994) 181 CLR 41.

¹⁹⁵ *Piersack v Belgium* (1982) 5 EHRR 169 and decisions cited by Lord Hope in *Porter v Magill*, [99]–[102].

¹⁹⁶ [2000] QB 451.

¹⁹⁷ *Locabail*, at [21] and [25].

¹⁹⁸ *R v Abdoukovic* [2007] UKHL 37, [2008] 1 All ER 315; *R v Khan* [2008] EWCA Crim 531, [2008] 3 All ER 502 (circumstances in which police officers, prosecuting solicitors and prison officers may not sit as jurors).

¹⁹⁹ *Davidson v Scottish Ministers* [2004] UKHL 34, [2004] UKHRR 1079. Cf *R (Al-Hasan) v Home Secretary* [2005] UKHL 13, [2005] 1 WLR 688.

²⁰⁰ *In re Medicaments and Related Classes of Goods* [2001] 1 WLR 700.

²⁰¹ *AWG Group Ltd v Morrison* [2006] EWCA 6, [2006] 1 All ER 967. Cf *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528.

²⁰² *Gillies v Work and Pensions Secretary* [2006] UKHL 2, [2006] 1 All ER 731.

²⁰³ *Helow v Home Secretary* [2008] UKHL 62, [2009] 2 All ER 1031 (no evidence that the judge endorsed some views expressed in the Association's publications). And see L Blom-Cooper [2009] PL 199.

In exceptional circumstances of necessity, a judge may have to deal with a case where the law makes no provision for any other person to do so.²⁰⁴

2. The right to a fair hearing

It is fundamental to a just decision that each party should have the opportunity of knowing the case against him or her and of replying to this. The principle of open justice is fundamental to the constitution, the administration of justice and the rule of law.²⁰⁵ Both parties must have the chance to present their version of the facts and to make submissions on the relevant rules of law. Each side must be able to comment on all material considered by the judge, and neither side must communicate with the judge behind the other's back. Although the court's rules of procedure embody these principles, the unwritten right to a hearing may operate even in the courts. Thus the High Court could not order a solicitor personally to bear costs caused by his misconduct without giving him an opportunity to deal with the complaint.²⁰⁶ However, the requirements of natural justice are not invariable: although a party to civil proceedings is normally entitled to know all the material considered by the judge, there may be exceptional circumstances, particularly regarding the welfare of children, when a court may take into account material that has not been seen by all the parties.²⁰⁷ In a controversial decision, the House of Lords held by 3–2 that the Parole Board (which in some cases must give an oral hearing to a prisoner whose release on licence has been revoked)²⁰⁸ need not disclose to a prisoner or his lawyer sensitive material directly affecting his release on licence, but could make it available to a special advocate on condition that it was not disclosed to the prisoner or his lawyer.²⁰⁹

Natural justice and administrative authorities

The rules of natural justice have been applied to many decisions made outside the courts. From those rules has developed what is now a universal rule that public authorities must act fairly in making decisions, and this has contributed to a greater openness in government. Before that rule developed, a court would ask whether in relation to a particular decision there was a duty to observe natural justice (a duty to 'act judicially'). If the power to decide affected a person's rights, property or character, it was more likely to be subject to natural justice; so was a decision made by a procedure involving a choice between two opposing views, in a manner resembling litigation.²¹⁰ The essential rules of natural justice (including the individual's right to know the charges against him, and a right to reply to them) applied to the use of disciplinary powers, including such penalties as expulsion, by bodies such as universities²¹¹ and trade unions.²¹² The same rules were applied in a classic 19th-century decision to action by a local authority directed against an individual's property.

²⁰⁴ *Jeffs v New Zealand Dairy Board* [1967] 1 AC 551. But cf *Kingsley v UK* (2001) 33 EHRR 288; and *I Leigh* [2002] PL 407.

²⁰⁵ *Scott v Scott* [1913] AC 417; *Ahmed v HM Treasury (No.1)* [2010] UKSC 1, [2012] 2 AC 697.

²⁰⁶ *Abraham v Jutsun* [1963] 2 All ER 402.

²⁰⁷ See *Re K (Infants)* [1965] AC 201. Contrast *McMichael v UK* (1995) 20 EHRR 205.

²⁰⁸ *R (West) v Parole Board* [2005] UKHL 1, [2005] 1 All ER 755.

²⁰⁹ *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738 (note the powerful dissenting speeches by Lords Bingham and Steyn).

²¹⁰ See *R B Cooke* [1954] CLJ 14. Cf *Durayappah v Fernando* [1967] 2 AC 337, 349.

²¹¹ *Dr Bentley's case* (1723) 1 Stra 557; cf *Ceylon University v Fernando* [1960] 1 All ER 631.

²¹² *Annamunthodo v Oilfield Workers' TU* [1961] AC 945; cf *Breen v AEU* [1971] 2 QB 175.

In *Cooper v Wandsworth Board of Works*, the plaintiff sued the board for damages in trespass for demolishing his partly built house. He had failed to notify his intention to build the house to the board, which thereupon had a statutory power to demolish the building. *Held*, that the board should have given a hearing to the plaintiff before exercising their statutory power of demolition. 'Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law shall supply the omission of the legislature.'²¹³

The rule against bias has also been applied to local authorities. When the Barnsley markets committee revoked a stallholder's licence for a trivial and isolated misdemeanour, that decision was quashed. Not only did the committee hear the evidence of the market manager (who was in the position of a prosecutor) in the absence of the stallholder, but the manager was present throughout the committee's deliberations.²¹⁴ When the grant of permission for a superstore was challenged by an environmental group because of the private interests of members of the planning authority (only some of which had been declared), it was held that the rules of bias arising from personal interest were not limited to judicial bodies but applied generally in public law, albeit with adjustments for the statutory context in question.²¹⁵ In a development of particular significance in the policy context, if the fair-minded and informed observer, knowing the facts, would consider that there was a real possibility that the decision-maker had predetermined the matter, then the public authority will have acted unlawfully.²¹⁶ This is a delicate line to tread: public authority decision-makers will inevitably have some sort of policy view, and may have been elected or appointed with a particular policy mandate, and the courts have sought not to prevent such individuals expressing strongly held views. The Localism Act 2011, s 25, provides that decision-makers of local authorities are not to be taken to have closed their minds simply because of the expression of a prior view.

The scope of natural justice

The importance of natural justice in judicial review of administrative action has not been in doubt since the landmark decision of the House of Lords in *Ridge v Baldwin*, the facts of which we have already seen in relation to statutory procedures.

The power of the Brighton police committee under an Act of 1882 was to dismiss 'any constable whom they think negligent in the exercise of his duty or otherwise unfit for the same'. Claiming to act under this power, they dismissed the chief constable without giving him a hearing. The Court of Appeal held that in dismissing the chief constable, 'the defendants were acting in an administrative or executive capacity just as they did when they appointed him'.²¹⁷ The House of Lords overruled this view: quite apart from the procedure laid down by the discipline regulations, natural justice required that a hearing should have been given before the committee exercised its power. The failure to give a hearing invalidated the dismissal, and the subsequent hearing given to Ridge's solicitor did not cure the earlier defect.²¹⁸

²¹³ (1863) 14 CB (NS) 180, 194 (Byles J).

²¹⁴ *R v Barnsley Council, ex p Hook* [1976] 3 All ER 452.

²¹⁵ *R v Environment Secretary, ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304.

²¹⁶ *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ 746, [2009] 1 WLR 83.

²¹⁷ [1963] 1 QB 539, 576 (Harman LJ).

²¹⁸ [1964] AC 40; and see *A W Bradley* [1964] CLJ 83.

This decision could have been regarded narrowly as one based on an interpretation of specific legislation. In fact, *Ridge v Baldwin* was the first of a group of House of Lords decisions during the 1960s that began to lay the foundations for judicial review today. Especially important was the holding in *Ridge* that the duty to observe natural justice was not confined to powers classified as ‘judicial’ or ‘quasi-judicial’. This enabled the courts to apply natural justice in a very wide variety of situations. In 1970, Megarry J remarked that the courts were tending to apply natural justice to all powers of decision unless the circumstances indicated to the contrary.²¹⁹ The benefits of *Ridge v Baldwin* spread to many persons, including students,²²⁰ police officers,²²¹ school teachers,²²² market stallholders,²²³ residents of local authority homes at risk of closure,²²⁴ those affected by decisions of self-regulatory bodies²²⁵ and, most notably, convicted prisoners in respect of prison discipline and the parole system.²²⁶ In 1980, on an appeal from the Bahamas concerning refusal of an individual’s constitutional right to citizenship, the Judicial Committee held that natural justice must be observed by any person with authority to determine questions affecting the rights of individuals.²²⁷ But natural justice, now more commonly referred to as fairness, is not limited to situations in which private rights are affected, and the courts protect a wide variety of individual interests against unfair action by public bodies.

Fairness and natural justice

The scope of natural justice is best understood against the broad perception that it is the duty of the courts to ensure that *all* administrative powers are exercised fairly, that is, in accordance with principles of fair procedure. It has never been possible to describe the contents of natural justice except in general terms. Today, the essence of natural justice may be explained simply in terms of fairness. In 1994, a challenge by mandatory life prisoners to the procedure for making parole decisions led to the following analysis by Lord Mustill, who derived six principles from the authorities in answer to the question, ‘What does fairness require in the present case?’:

(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied

²¹⁹ *Gaiman v National Association for Mental Health* [1971] Ch 317, 333 (power to expel members of company limited by guarantee) In *Bates v Lord Hailsham* [1972] 3 All ER 1019, the same judge held (in an extempore response to an ex parte application) that a general duty of fairness does not arise in respect of delegated legislation. The Supreme Court’s firm upholding of the principles of natural justice to a statutory instrument designating an Iranian bank for financial sanctions in *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39; [2013] 3 WLR 179 confirms that *Bates* states far too absolute a proposition.

²²⁰ E.g. *R v Aston University Senate, ex p Roffey* [1969] 2 QB 538; and *Glynn v Keele University* [1971] 2 All ER 89.

²²¹ *R v Kent Police Authority, ex p Godden* [1971] 2 QB 662; *Chief Constable of North Wales v Evans* [1982] 3 All ER 141.

²²² *Hannam v Bradford Corpn* [1970] 2 All ER 690; *Malloch v Aberdeen Corpn* [1971] 2 All ER 1278.

²²³ *R v Barnsley Council, ex p Hook* [1976] 3 All ER 452; *R v Wear Valley Council, ex p Binks* [1985] 2 All ER 699.

²²⁴ *R v Devon CC, ex p Baker* [1995] 1 All ER 73.

²²⁵ *R v LAUTRO, ex p Ross* [1993] QB 17.

²²⁶ E.g. *R v Hull Prison Visitors, ex p St Germain* [1979] QB 425 and (the same) (*No 2*) [1979] 3 All ER 545; *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533; *R v Home Secretary, ex p Doody* [1994] 1 AC 531.

²²⁷ *A-G v Ryan* [1980] AC 718.

by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf, either before the decision is taken, with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.²²⁸

The procedural effects of natural justice and fairness

On the basis that a public authority must act fairly in making its decisions, and remembering that fairness is concerned with procedural matters, not with the substance of a decision, what in practical terms must the public authority do? Much depends on the nature of the decision. In a situation where a public office or other benefit is being withdrawn for reasons of misconduct or incompetence, the ‘irreducible minimum’ at the core of natural justice is (a) the right to a decision by an unbiased tribunal; (b) the right to have notice of the charges against the individual; and (c) the right to be heard in answer to those charges.²²⁹

In cases where no misconduct is alleged (for example, in the case of school or residential home closures, where parents or residents must in fairness be consulted by the local authority), then (a) consultation must take place at a time when the proposals are at a formative stage; (b) sufficient reasons must be given for the proposal to permit intelligent consideration and response; (c) adequate time must be allowed; and (d) the product of consultation must be conscientiously taken into account when the ultimate decision is taken.²³⁰ Although a failure to consult can be an important route of challenge to a policy decision, there is no general duty to consult.²³¹

Many detailed procedural questions arise to which there are no general answers. In some contexts individuals do not have the right of an oral hearing,²³² but if the body in question has to decide questions as to someone’s conduct or competence, the individual is entitled to know what evidence is given against him or her and must have a fair opportunity to rebut it.²³³ Regulatory bodies that expect officials to do preliminary work for them must nonetheless be in a position to come to their own decisions.²³⁴ Where a soldier claimed that he had been subject to racial harassment, members of the Army Board could not decide on the complaint judicially without meeting to consider the matter; and the soldier was entitled to see all the material on which the board reached its decision, other than documents for which

²²⁸ *R v Home Secretary, ex p Doody* [1994] 1 AC 531, 557 (establishing the right of prisoners to be informed of relevant material and reasons for decisions affecting their release on parole).

²²⁹ Lord Hodson in *Ridge v Baldwin* [1964] AC 40, at 132.

²³⁰ Known as the *Gunning* requirements: *R v Brent LBC, ex p Gunning* (1985) 84 LGR 168. See too: *R v North Devon Health Authority, ex p Coughlan* [2001] QB 213, at [108] (Lord Woolf MR) and *R v Devon CC, ex p Baker* [1995] 1 All ER 73.

²³¹ E.g. *R (Harrow Community Support Ltd) v Defence Secretary* [2012] EWHC 1921 (Admin) (placement of surface to air missiles on a residential tower block during the Olympics without consultation of residents lawful).

²³² *Lloyd v McMahon* [1987] AC 625. Also *R (Smith) v Parole Board (No 2)* [2005] UKHL 1, [2005] 1 All ER 755 (Board need not give oral hearing in every case, but must do so in some cases); *R (Hammond) v Home Secretary* [2005] UKHL 69, [2006] 1 AC 603.

²³³ *Chief Constable of North Wales v Evans* [1982] 3 All ER 141.

²³⁴ *R v Commission for Racial Equality, ex p Cottrell and Rothern* [1980] 3 All ER 265.

public interest immunity was properly claimed.²³⁵ An individual has no universal right to be legally represented regardless of the nature of the proceedings in question,²³⁶ but in some circumstances a body with power to permit legal representation may not reasonably refuse it.²³⁷

There is no absolute rule that natural justice does not apply in the case of preliminary investigations, inspections or suspensions pending a final decision,²³⁸ but the right to a hearing is often excluded or restricted because of the need for urgent action or because the individual's rights will be observed at a later stage.²³⁹

Many aspects of procedure raise issues of fairness: thus it may be unfair for a tribunal to refuse adjournment of a hearing.²⁴⁰ The manner in which evidence is obtained by tribunals is subject to constraints of natural justice,²⁴¹ but hearsay evidence is usually permitted.²⁴² An individual may be entitled to cross-examine those giving evidence against him or her²⁴³ or obtain the names of potential witnesses from the other side.²⁴⁴ But it is sometimes sufficient that only the gist of allegations against an individual is made known.²⁴⁵ It was held contrary to natural justice for a commission with investigative powers to make findings of fact that individuals had been guilty of serious misconduct, when the findings were supported by no evidence of probative value and there had been no opportunity to rebut them.²⁴⁶

Considerations of national security may seriously reduce the scope for natural justice.²⁴⁷ The current practice of appointing 'special advocates' to deal with sensitive matters affecting national security enables allegations and evidence to be withheld from the individual. The use of special advocates 'is an attempt to resolve the tension between due process and national security'²⁴⁸ and this limited way of protecting the right to fair procedure is arguably better than nothing; but the special advocate cannot in the ordinary sense of the word be said to be 'representing' the individual.

Three matters may be mentioned briefly. First, if fairness or natural justice would entitle someone to be heard, a court should be slow to brush aside that right on the ground that a hearing would make no difference to the outcome.²⁴⁹ The second matter is whether the failure by an authority to give a hearing to which the individual is entitled is cured by a full and fair hearing given later by an appellate body. No absolute rule applies: sometimes the appeal proceedings may take the form of a full rehearing and this may cure the earlier defect, but in other situations the individual may be entitled to a fair hearing at both stages.

²³⁵ *R v Army Board of Defence Council, ex p Anderson* [1992] QB 169. And see ch 26 D.

²³⁶ *R v Maze Prison Visitors, ex p Hone* [1988] AC 379.

²³⁷ *R v Home Secretary, ex p Tarrant* [1985] QB 251.

²³⁸ *Rees v Crane* [1994] 2 AC 173 (Trinidad judge entitled to notice of complaints against him at initial stage of dismissal procedure).

²³⁹ *Wiseman v Borneman* [1971] AC 297; *Furnell v Whangarei High Schools Board* [1973] AC 660; *Norwest Holst Ltd v Trade Secretary* [1978] Ch 201.

²⁴⁰ *R v Cheshire CC, ex p C* [1998] ELR 66.

²⁴¹ *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456; *Crompton v General Medical Council* [1982] 1 All ER 35.

²⁴² *T A Miller Ltd v Minister of Housing* [1968] 2 All ER 633.

²⁴³ *R v Board of Visitors, ex p St Germain (No 2)* [1979] 3 All ER 545. Cf *R v Commission for Racial Equality, ex p Cottrell and Rothern* (note 213).

²⁴⁴ *R v Blundeston Board of Visitors, ex p Fox-Taylor* [1982] 1 All ER 646.

²⁴⁵ *R v Gaming Board, ex p Benaim and Khaida* [1970] 2 QB 417; *Maxwell v Dept of Trade* [1974] QB 523.

²⁴⁶ *Mahon v Air New Zealand Ltd* [1984] AC 808.

²⁴⁷ *R v Home Secretary, ex p Hosenball* [1977] 3 All ER 452; *R v Home Secretary, ex p Cheblak* [1991] 2 All ER 319.

²⁴⁸ J Ip, [2008] PL 717, 741. See ch 26 D.

²⁴⁹ *John v Rees* [1970] Ch 345, 402; and *R v Chief Constable, Thames Valley, ex p Cotton* [1990] IRLR 344, 352. And see Lord Bingham [1991] PL 64.

In intermediate cases, the court must decide ‘whether, at the end of the day, there has been a fair result, reached by fair methods’.²⁵⁰

The third matter concerns the legal effect, if any, of a decision reached in breach of natural justice. When a breach of natural justice is established, then on the authority of *Ridge v Baldwin* the decision in question is void and a nullity.²⁵¹ However, until such a decision is declared to be void by a court, it is capable of having some effect in law and it may be the basis of an appeal to a higher body.²⁵²

Does fairness require reasons to be given?

Although the giving of reasons ‘is one of the fundamentals of good administration’,²⁵³ at common law there is no general duty to give reasons for decisions.²⁵⁴ In many situations, legislation requires reasons to be given, whether only if requested²⁵⁵ or in all cases (for instance, whenever planning permission is refused). Despite the absence of a general duty to give reasons, the courts do often require reasons to be given. Thus, reasons must be stated for a discretionary decision, if a right of appeal is valueless without this.²⁵⁶ Fairness may require the giving of reasons, because of the impact of the decision on the individual.²⁵⁷ Thus a prisoner sentenced to a mandatory life sentence was entitled to know the reasons for the Home Secretary’s decision as to the minimum period that he must serve. In the leading case, Lord Mustill said:

The giving of reasons may be inconvenient, but I can see no grounds at all why it should be against the public interest: indeed, rather the reverse. That being so, I would ask simply: Is refusal to give reasons fair? I would answer without hesitation that it is not.²⁵⁸

This approach applies to many decisions that closely affect the individual. Moreover, reasons must be given if a decision in the absence of explanation may appear arbitrary, harsh, mistaken or unreasonable.²⁵⁹

if all 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.²⁶⁰

Even when a statute excluded the giving of reasons for the refusal of naturalisation, the Home Secretary’s duty to act fairly was held to mean that he must give sufficient information on the matters that concerned him to enable the applicants to make such representations as they could on those matters.²⁶¹

²⁵⁰ *Calvin v Carr* [1980] AC 574.

²⁵¹ The holding in *Durayappah v Fernando* [1967] 2 AC 337 that failure to give a hearing made the decision voidable and not void was contrary to legal principle: see H W R Wade (1967) 83 LQR 499 and (1968) 84 LQR 95.

²⁵² *Calvin v Carr* (above). And see S Sedley [1989] PL 32.

²⁵³ *Breen v AEU* [1971] 2 QB 175, 191 (Lord Denning MR). See also G Richardson [1986] PL 437; P Neill, in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord*, pp 161–84; P P Craig [1994] CLJ 282.

²⁵⁴ *R v Trade Secretary, ex p Lonrho plc* [1989] 2 All ER 609; *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651; *Hasan v Trade and Industry Secretary* [2008] EWCA Civ 1311, [2009] 3 All ER 539.

²⁵⁵ E.g. Tribunals and Inquiries Act 1992, s 10 (certain tribunals must on request supply reasons); now ch 23 A.

²⁵⁶ *Minister of National Revenue v Wright’s Canadian Ropes* [1947] AC 109.

²⁵⁷ *R v Home Secretary, ex p Doody* [1994] 1 AC 531.

²⁵⁸ *Ibid.*, at 564–5.

²⁵⁹ *R v Civil Service Board, ex p Cunningham* [1991] 1 All ER 310 (J Herberg [1991] PL 340).

²⁶⁰ *R v Trade Secretary, ex p Lonrho plc* [1989] 2 All ER 609, 620 (Lord Keith).

²⁶¹ *R v Home Secretary, ex p Al Fayed* [1997] 1 All ER 228.

Although the courts indirectly require the giving of reasons in many situations, they have not held that reasons should be given for all decisions.²⁶² Indeed, the exceptions to the rule have arguably almost swallowed the general rule itself. A general ruling to this effect is overdue,²⁶³ even if it were accompanied by an exception for situations in which public interest considerations had to prevail over the general rule.

As it is, the procedure of judicial review supports the giving of reasons. If an individual receives no reasons for a decision and obtains permission for judicial review, the decision-maker will be expected to disclose relevant information so that the court can properly decide the claim for review.²⁶⁴ A court is likely to hold that there must have been some operative reasons at the time the decision was made and will wish to discover what these were; little weight may be attached to reasons created after the decision was made.²⁶⁵ The court may sometimes accept evidence as to the reasoning of the decision-maker even if it was not explained at the time, but breach of a statutory duty to give reasons with the decision may cause the court to quash the decision for error of law.²⁶⁶ Where there is a duty to give reasons, ‘proper and adequate reasons must be given’ which are intelligible and deal with the substantial points in issue.²⁶⁷ Concise reasons may be enough, but a general formula that does not deal with the disputed issues in a case is unlikely to be acceptable.

European Union law requires that reasons be given when this is necessary to secure effective protection of an EU right.²⁶⁸ Where art 6(1) ECHR entitles the individual to a fair hearing before an independent and impartial court or tribunal, the court or tribunal is expected to give reasons for its decision, so that the parties and the public may understand the basis for it.²⁶⁹

Space does not permit this chapter to include an account of the extensive case law of the European Court of Human Rights on the right to a fair trial under art 6(1) ECHR.²⁷⁰ If judicial review of a public authority’s decision is sought on grounds of fairness, both the common law and art 6(1) may well be relevant but it must be remembered that the scope of art 6(1) is both wider and narrower than the common law of fairness.²⁷¹

The public sector equality duty

Although generally overlooked by academic commentators,²⁷² the public sector equality duty has proved to be a fruitful and vital tool for practitioners and claimants seeking to attack policy decisions which cannot be defeated on substantive grounds, most commonly because they involve the difficult allocation of scarce resources or are large-scale political decisions. The content of the duty is both simple and complex. Section 149 of the Equality Act 2010²⁷³

²⁶² See *Stefan v General Medical Council* [1999] 1 WLR 1293. And see Lord Bingham’s summary of the law in *R v Ministry of Defence, ex p Murray* [1998] COD 134.

²⁶³ M Elliott [2011] PL 56.

²⁶⁴ Cf *R v Lancashire CC, ex p Huddleston* [1986] 2 All ER 941 (and A W Bradley [1986] PL 508).

²⁶⁵ See A Schaeffer [2004] JR 151 and *R (Nash) v Chelsea College of Art and Design* [2001] EWHC 538 (Admin).

²⁶⁶ *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302. See also *R (Richardson) v North Yorkshire CC* [2003] EWCA Civ 1869, [2004] 2 All ER 31, [31]–[42].

²⁶⁷ *Re Poyser and Mills’ Arbitration* [1964] 2 QB 467, 478. On the adequacy of reasons for a planning decision, see *South Bucks DC v Porter (No 2)* [2004] UKHL 33, [2004] 4 All ER 775.

²⁶⁸ See e.g. *Case 222/86, UNECTEF v Heylens* [1989] 1 CMLR 901.

²⁶⁹ *Hadjianastassiou v Greece* (1992) 16 EHRR 219.

²⁷⁰ See e.g. Harris, O’Boyle and Warbrick, *Law of the ECHR*, ch 6.

²⁷¹ See p 656 above.

²⁷² T Hickman [2013] PL 325, S Fredman [2011] ILJ 405, Sir Philip Sales [2011] JR 1.

²⁷³ Previous versions were contained in the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995, all as amended.

requires public authorities to have ‘due regard’ to the statutory needs to eliminate the forms of discrimination prohibited in the Act, advance equality of opportunity and foster good relations between those who share protected characteristics (such as race) and those who do not. This opens the door to a multitude of scenarios of potential relevance.

The duty is a procedural one.²⁷⁴ It allows the courts to consider the manner by which the public authority reached its decision, not the substance of that decision itself. As Laws LJ put the point:

the discipline of the PSED lies in the required quality, not the outcome, of the decision-making process. This is well borne out by the learning; but in my judgment it reflects a more general constitutional balance. Much of our modern law, judge-made and statutory, makes increasing demands on public decision-makers in the name of liberal values: the protection of minorities, equality of treatment, non-discrimination, and the quietus of old prejudices. The law has been enriched accordingly. But it is not generally for the courts to resolve the controversies which this insistence involves. That is for elected government. The cause of constitutional rights is not best served by an ambitious expansion of judicial territory, for the courts are not the proper arbiters of political controversy. In this sense judicial restraint is an ally of the s 149 duty, for it keeps it in its proper place, which is the process and not the outcome of public decisions.²⁷⁵

The effect is that so long as the public authority has regard to the fact that the policy may, for example, disproportionately impact on black people or on women, it may nonetheless lawfully adopt the policy.

Due regard means only the regard which is appropriate in all the circumstances. The decision-maker must be aware of his duty (although it need not be specifically be mentioned); the duty must be fulfilled before and at the time that the decision is considered; it must be exercised in substance, with rigour and an open mind, rather than as a tick-box exercise; the duty is a non-delegable one (although this does not exclude reliance on the work of officials); it is a continuing duty; and an accurate record, usually but not necessary in the form of an Equality Impact Assessment, should be kept to evidence the consideration given.²⁷⁶

Following an upsurge in s 149 cases to challenge austerity measures, the courts have more recently sought to reduce the ease with which a public authority can be challenged on the basis of a scenario it had failed to appreciate. Three points may be used by way of illustration. First, it has been held that the process should not be subjected to the level of forensic scrutiny a QC would deploy in court.²⁷⁷ Secondly, the courts have settled into accepting that the weight to be applied to any of the statutory needs is a matter to be assessed on *Wednesbury* grounds (above, in section A) alone.²⁷⁸ Thirdly, there has been an increased recognition that the considerable number of potential protected characteristics, forms of discrimination and needs the s 149 duty relates to means that the decision-maker need only have due regard to matters which are likely to arise; purely speculative cases need not be considered.²⁷⁹ As a result, a balance is usually reached between avoiding the depth of

²⁷⁴ Although one major work treats it as a substantive ground of review: Auburn, Moffett and Sharland, *Judicial Review: Principles and Procedure*, ch 15.

²⁷⁵ *R (MA) v Work and Pensions Secretary* [2013] EWHC 22113 (Admin).

²⁷⁶ *R (Brown) v Work and Pensions Secretary* [2008] EWHC 3158 (Admin), [2009] PTSR 1506; *R (Baker) v Local Government Secretary* [2008] EWCA Civ 141, [2008] LGR 239; summarised in *R (Luton BC) v Education Secretary* [2011] EWHC 217 (Admin), [2011] ELR 222 and *R (Essex CC) v Education Secretary* [2012] EWHC 1460 (Admin).

²⁷⁷ *R (Bailey) v Brent London Borough Council* [2011] EWCA Civ 1586, [2012] LGR 530 at [102] (Davis LJ).

²⁷⁸ *Luton BC* (above); *R (Hurley) v Business Secretary* [2012] EWHC 201 (Admin), [2012] EqLR 447.

²⁷⁹ *Bailey* (above); *R (Greenwich Community Law Centre) v Greenwich LBC* [2012] EWCA Civ 496, [2012] EqLR 72; *R (Lewisham LBC) v AQA* [2013] EWHC 211 (Admin).

scrutiny which strays into examining the merits of the decision and imposing an unreasonable administrative burden, whilst holding the public authority to compliance with an important legal and constitutional duty.

D. Conclusion

Judicial review is an essential tool by which executive power can be checked. It ensures that administrative decision-making, which may affect a few individuals or it may affect almost the entirety of the population, is held to particular standards. As we have seen, those standards go to both the substance of the decision or action, and the process by which that decision was reached.

In the former type of case, substantive challenges, the courts have generally been reluctant to take too interventionist an approach. The court has no mandate to determine policy. Its role is to review the policy adopted by the decision-maker against a series of tests that derive from the general principles of administrative law. A decision or policy should be reached which has not got the law wrong; it should take into account relevant matters and not irrelevant ones; a power should be used for a purpose for which it was granted; and the decision ought not to be so unreasonable that it defies logic or is otherwise irrational. In cases involving human rights law, or European Union law, or, possibly, some areas of domestic law, the court may subject the decision or policy choice to a more structured and searching examination, requiring the decision-maker to justify what it has done whilst recognising the particular expertise that the decision-maker is likely to possess.

Complying with a fair process is similarly a matter of what most would consider basic fairness. A decision-maker ought not to be biased against an individual; where a major policy is being determined consultation with interested parties may be appropriate; individual decisions should not be taken without the individual having the chance to make representations; and in some sorts of situation, reasons for the decision ought to be given.

The development of the principle of legitimate expectation has been one of the major changes in administrative law over the last decade. The principle has grown considerably, in size, scope and complexity. It is an area of the law in which court decisions are often difficult to understand because of a lack of rigour in analysing which type of legitimate expectation has arisen. But as we have seen, it is at its heart another example of judicial review seeking to ensure fairness in the administrative process: if citizens justifiably believe that a decision-maker will act in a certain way – because he has said that he will, or because he always has – the decision-maker ought to be required to put forward good reasons why that expectation should be overridden.

Although judicial review has a morass of principles, rules and case law it can be summarised very straightforwardly: the purpose of judicial review is to ensure that administrative policy and decision-making is carried out fairly and in accordance with the law.

CHAPTER 25

Judicial review II: procedure and remedies

In chapter 24 we considered the principles which the courts apply to the exercise of administrative powers by public authorities. We now examine the procedures by which the courts exercise their supervisory jurisdiction.¹ Review may take place indirectly, when an issue as to the validity of administrative action is decided in the course of ordinary civil or criminal proceedings. So too, the validity of action by a public authority may be relevant to a private law action in contract or tort (chapter 26). But here we are mainly concerned with the procedures by which the acts and decisions of public authorities are subject to direct review by the courts.

The primary procedure in English law² is that of an application (or claim) for judicial review, often referred to in short as ‘judicial review’. It was created by reforms between 1977 and 1982 which, like many procedural reforms of the common law, did not seek to change the jurisdiction of the High Court in reviewing the legality of the work of public authorities. The relief sought in judicial review proceedings is most commonly a quashing order (previously certiorari), a mandatory order (mandamus) or a prohibitory order (prohibition): the three prerogative remedies. Judicial review has derived benefits from reforms in the general procedure of civil litigation, but there are still reasons for maintaining a distinctive procedure for judicial review.³ This chapter will look first at the relevant procedure, then in section B at the case law establishing the scope and extent of judicial review and its exclusivity. Section C will consider forms of limitation and exclusion of judicial review. Section D will set out the various remedies which can be obtained, including a brief consideration of habeas corpus and the differences in Scotland.

A. The judicial review procedure

The creation of applications for judicial review

We turn now to examine the procedure by which the remedies considered above may be obtained. The procedure today presents a remarkable contrast with the position in the 1970s, when there was an urgent need for reform in the remedies available in administrative law. The procedural difficulties were such that the success of a case often depended on the choice of remedy, and there were many procedural differences between the prerogative orders on the one hand, and declarations and injunctions on the other. These matters provided serious obstacles to a court’s ability to deal with the substantive issues of public law that might arise.⁴ In 1977, a new Rule of the Supreme Court (Order 53), created the procedure of ‘application for judicial review’ and this reform was confirmed by Parliament in 1981. In 2000, Order 53 was replaced by Part 54 of the Civil Procedure Rules; and the court in which sit the High

¹ The leading book dealing with the topics in this chapter is Lewis, *Judicial Remedies in Public Law*. See also the works on administrative law that have already been cited.

² A similar but not identical procedure was created in Scotland in 1985; p 692 below. For Northern Ireland, see P Maguire, in Hadfield (ed.), *Judicial Review, A Thematic Approach*, app.

³ For arguments to the contrary, see D Oliver [2002] PL 91.

⁴ Report on Remedies in Administrative Law, Cmnd 6407, 1976.

Court judges designated to hear claims for judicial review and related cases was named the Administrative Court.⁵

Applications for judicial review: the procedure

By s 31 of the Senior Courts Act 1981 (previously known as the Supreme Court Act 1981), as amended, applications to the High Court for mandatory, prohibiting and quashing orders⁶ (and for an injunction restraining a person from acting in a public office to which he or she is not entitled) *must* be made, in accordance with rules of court, by an application for judicial review. The High Court also has power (1981 Act, s 31(2)) to make a declaration or grant an injunction whenever an application for judicial review has been made seeking that relief, if it would be ‘just and convenient’ to do so. In exercising this discretion the court must have regard among other things to the nature of the matters in respect of which the prerogative orders apply, the nature of the persons and bodies against whom the orders lie, and all the circumstances. Thus, if account is taken of the scope of the prerogative orders, declarations and injunctions *may* be granted on an application for judicial review. The Act does not state whether within this field an application for judicial review is to be the sole means of obtaining an injunction or declaration.

Permission of the court is needed for every application for judicial review (s 31(3)). By this rule, derived from earlier procedure for the prerogative orders, a two-stage process exists: (a) the court decides whether to permit an application for review to proceed and, if so, (b) a substantive hearing of the application takes place.

The first step in the procedure before any claim is filed with the court is that a prospective claimant should if possible comply with the pre-action protocol.⁷ In outline, this involves a letter to the public authority or official whose act or decision is in question containing sufficient information to enable a reasoned reply to be given, in the hope that the issues may be identified and litigation avoided. If it cannot be avoided, the claimant must file a claim form with the Administrative Court,⁸ stating the act or decision to be reviewed, the relevant facts and grounds, and the remedy sought. Notice is given to the defendant and other interested parties; who must within 21 days state whether they intend to contest the claim and, if so, must give a summary of the grounds they will rely on. The granting of permission is generally decided on the papers by a single judge,⁹ but the judge may request a short hearing in open court. A hearing is held if interim relief is sought. If permission is refused or granted subject to conditions, the claimant may ask for a hearing to renew the application for permission.¹⁰ If permission is still withheld, the claimant may appeal to the Court of Appeal.¹¹ In the past, the ‘filter’ stage operated very unevenly, but it is a safeguard against a flood of

⁵ CPR, Part 54.

⁶ These orders may for convenience be referred to as ‘the prerogative orders’. The change of names in 2004 did not affect the jurisdiction of the High Court to make them.

⁷ Civil Procedure Rules, Pre-Action Protocol for Judicial Review.

⁸ This will mostly be in the High Court in London, but may be filed and heard in Birmingham, Cardiff, Leeds or Manchester. There are some types of claim, particularly terrorism related, which can only be heard in London. See Practice Direction 54D (and S Nason [2009] PL 440).

⁹ In 2013, over 50 High Court judges were designated to sit in the Administrative Court and in addition very many permission applications are determined by Deputy High Court judges.

¹⁰ This right has been excluded from judicial reviews of decisions of the Upper Tribunal: CPR r 54.7A and see ch 23 A.

¹¹ CPR, r 52.15. If the Court of Appeal also refuses leave, the Supreme Court has no jurisdiction to grant leave: *Lane v Esdaile* [1891] AC 210. And see *R (Burrage) v Hammersmith LBC* [2002] UKHL 23, [2002] 3 All ER 97 (HL has jurisdiction if CA grants leave but rejects claim on its merits). Applications for permission to appeal from a refusal of permission to judicially review a decision of the Upper Tribunal are considered on the papers only and the appellant is not entitled to an oral hearing to consider leave to appeal.

‘hopeless’ cases and vexatious challenges.¹² Once permission has been granted, further evidence may be filed and the substantive hearing takes place before a single judge or a divisional court (that usually consists of a Lord Justice of Appeal, sitting with a High Court judge).

Claims for judicial review must be made promptly and ‘in any event not later than three months after the grounds to make the claim first arose’, but the period may be shorter for a particular claim if legislation so provides.¹³ If the court considers that the case is one which requires urgent action (for instance, a challenge to school admission decisions or where third parties are affected),¹⁴ it may refuse permission for a claim that is not made promptly, even within the three-month period. The court may extend time if there is a good reason to do so, but the parties may not extend time by agreement.¹⁵ In practice, where there is a ‘clearcut’ case on the merits, the courts are not minded to allow the potential illegality to continue unchallenged for such formalistic procedural reasons.¹⁶

The promptness requirement has been the subject of considerable dispute following the decision of the European Court of Justice in *Uniplex (UK) Ltd v NHS Business Services Authority*¹⁷ which held that the requirement to bring procurement proceedings promptly breached the EU law principles of legal certainty and access to an effective remedy. The Court of Appeal subsequently held that the application of *Uniplex* was not clear, but that the promptness requirement should not be applied in claims asserting rights under EU law. The majority considered that it should still apply to claims not within the scope of EU law, even when brought at the same time as an EU law claim.¹⁸ The European Court of Human Rights held that promptness was compatible with article 6 ECHR, but this is an issue which is likely to resurface as a result of *Uniplex*.¹⁹

Under the Senior Courts Act 1981, s 31(6), the court may refuse to grant leave for an application or may refuse relief sought by the claimant if it considers that the granting of the relief ‘would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration’. Despite some difficulty arising from the interaction of this provision with the procedure rules, it is now established that where permission has been granted for judicial review, the court at the substantive hearing may not set aside that permission on the ground that there had been unjustified delay in the claim being made; however, delay may be a reason for withholding relief that would otherwise be justified.²⁰

¹² See A Le Sueur and M Sunkin [1992] PL 102; Bridges, Meszaros and Sunkin, *Judicial Review in Perspective*, chs 7, 8 and (same authors) [2000] PL 651.

¹³ CPR, r 54.5. For the operation of these rules, see *R (Burkett) v Hammersmith LBC* (above); *R (Nash) v Barnet London Borough Council* [2013] EWCA Civ 1004 and M J Beloff, in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord*, pp 267–95. A shorter period of six weeks for planning cases and 30 days for public procurement cases was introduced in 2013 with the aims of reducing challenges and increasing certainty in areas where considerable amounts of money are expended. No promptness requirement applies: r 54.5 as amended.

¹⁴ *R v Rochdale Metropolitan Borough Council, ex p B* [2000] Ed CR 117 and *R (Camelot UK Lotteries Ltd) v Gambling Commission* [2012] EWHC 2391 (Admin) respectively.

¹⁵ CPR, rr 3.1(2)(a); 54.5(2).

¹⁶ *R (Finn-Kelcey) v Milton Keynes Borough Council* [2008] EWCA Civ 1067, [2009] Env LR 17; C J S Knight [2009] JR 113.

¹⁷ Case C-406/08 [2010] 2 CMLR 47; C J S Knight [2010] CJQ 297.

¹⁸ *R (Berky) v Newport City Council* [2012] EWCA Civ 378, [2012] LGR 592.

¹⁹ *Lam v UK* (ECtHR, 5 July 2001); *Hardy v Pembrokeshire County Council* [2006] EWCA Civ 240, [2006] Env LR 28; but see now: *R (Macrae) v County of Herefordshire District Council* [2012] EWCA Civ 457, [2012] JPL 1356.

²⁰ See *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330; *R v Dairy Produce Tribunal, ex p Caswell* [1990] 2 AC 738 (and A Lindsay [1995] PL 417). However, the effect of *Uniplex* (above) appears to be that in cases asserting EU law rights it would breach legal certainty and the right to an effective remedy to refuse relief in the discretion of the court: *R (Berky)* (above), by a majority, and *AG Quidnet Hounslow v London Borough of Hounslow* [2012] EWHC 2639 (TCC), [2013] PTSR 828.

If permission to proceed with a claim for judicial review is given, the court may order a stay of proceedings to which the claim relates.²¹ The court may grant other interim relief, including mandatory orders and interim declarations,²² applying the test of balance of convenience that is appropriate in civil proceedings generally,²³ but with regard to special considerations applicable to public law litigation.²⁴

The 1981 Act did not expressly provide for interim relief against the Crown, but in *M v Home Office*²⁵ it was held that the language of s 31 enabled coercive orders (including interim injunctions) to be made against ministers and officers of the Crown in judicial review proceedings.

On an application for judicial review, the court may award damages, restitution or the recovery of money if such an award has been claimed and the court is satisfied that it could have been obtained by an action brought for the purpose.²⁶ But this does not alter the basic principle of English administrative law that an unlawful act of a public authority does not, of itself, give rise to a right to damages.²⁷ Thus even successful applicants for judicial review are seldom able to obtain damages: however, under the Human Rights Act 1998, s 8, the court may grant compensation if it is satisfied that this is ‘necessary to afford just satisfaction’ to the person whose Convention rights have been infringed.²⁸

A claim for judicial review must be supported by such written evidence as is available and a witness statement confirming the truth of the facts relied on; the defendant may file evidence in reply. The claimant owes a duty to the court to disclose all relevant material of which he or she is aware, even if it weakens the claim; the defendant has a similar ‘duty of candour’ to disclose relevant material the existence of which may be unknown to the claimant.²⁹ The court may order disclosure of specific documents, further information and, very exceptionally, cross-examination of witnesses, except where the defendant establishes that certain evidence is protected by public interest immunity.³⁰ In practice, many cases turn on the documents that record the decision-making process. It is often said that a claim for judicial review is unsuitable for resolving disputes of fact. However, the court must decide issues of fact that are essential to a claim (such as whether a decision-maker was biased, or whether proper consultation took place); and questions requiring disclosure may well arise on issues of proportionality on a claim under the Human Rights Act.³¹

Where the court decides to quash the decision under review, it generally remits the matter to the decision-maker, with an appropriate direction, but if there is no purpose in remitting it the court may take the decision itself.³² The Civil Procedure Rules permit claims begun by ordinary procedure to be transferred, with permission of the court, into a claim for judicial review and, conversely, a claim for judicial review may be transferred into an ordinary claim.³³

²¹ CPR, r 54.10. Under the former RSC Order 53, r 10, ‘stay of proceedings’ was interpreted broadly in *R v Education Secretary, ex p Avon Council* [1991] 1 QB 558.

²² CPR, r 25.1(1). This power was not formerly available: *R v IRC, ex p Rosminster Ltd* [1980] AC 952.

²³ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

²⁴ See e.g. *R v Kensington and Chelsea BC, ex p Hammell* [1989] QB 518 and *R v Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 4 All ER 321.

²⁵ [1994] 1 AC 377 (H W R Wade (1991) 107 LQR 4; M Gould [1993] PL 368). For the Crown Proceedings Act 1947, s 21, see ch 26 C.

²⁶ Senior Courts Act 1981, s 31(4).

²⁷ Ch 26 A; e.g. *Dunlop v Woollahra Council* [1982] AC 158.

²⁸ And see page 708 below.

²⁹ See O Sanders [2008] JR 244, discussing effect of *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650.

³⁰ See ch 26 C.

³¹ And see *Tweed v Parades Commission* (above), [32], [38]–[40] (Lord Carswell); [56]–[57] (Lord Brown).

³² Senior Courts Act 1981, s 31(5); and CPR, r 54.19.

³³ CPR, Part 30 and r 54.20. For effect of this on the ‘exclusive remedy’ issue, see p 678 below.

Standing to apply for judicial review

At the stage when leave is sought for an application for judicial review, the court must not grant leave ‘unless it considers that the applicant has a sufficient interest in the matter to which the application relates’.³⁴ The test of ‘sufficient interest’ plainly allows the court discretion to decide what may constitute ‘sufficient interest’.

In *R v Inland Revenue Commissioners, ex p National Federation of Self-employed*, a body of taxpayers challenged arrangements made by the Commissioners for levying tax on wages paid to casual employees on Fleet Street newspapers. For many years the employees had given fictitious names to evade tax, but the Commissioners agreed with the employers and unions on a scheme for collecting tax in future and for two previous years, in return for an undertaking by the Commissioners not to investigate any earlier years. The Federation, complaining that their members were never treated so favourably, applied for a declaration that the arrangement was unlawful, and a mandamus ordering the Commissioners to collect tax as required by law. The Court of Appeal held, assuming the agreement to be unlawful, that the Federation had sufficient interest in the matter for their application to be heard. The House of Lords held that the question of sufficient interest was not merely a preliminary issue to be decided when leave was being sought on an application for judicial review, but had to be resolved in relation to what was known by the court of the matter under review. On the evidence, the tax agreement was a lawful exercise of the Commissioners’ discretion. In general, unlike local ratepayers,³⁵ a taxpayer did not have an interest in challenging decisions concerning other taxpayers. In the circumstances, the Federation did not have sufficient interest to challenge the Commissioners’ decisions.³⁶

The speeches in this case contain a wide diversity of opinions about the test of ‘sufficient interest’. The above account is based on the views of three judges (Lords Wilberforce, Fraser and Roskill), although Lord Fraser also stressed that the test of ‘sufficient interest’ was a logically prior question which had to be answered before any question of the merits arose. Lord Scarman paid lip-service to the existence of a test of standing separate from the merits, but his conclusion (that the Federation had no sufficient interest *because* they had not shown that the tax authorities had failed in their duties) virtually eliminated any prior test of standing separate from the merits. Lord Diplock, emphasising the utility of the then new procedure of application for judicial review, argued for a very broad test of standing; he was alone in holding that the Federation had sufficient interest to seek review, but that the case for review failed on its merits.

What emerges from the case is that at the permission stage, the court has a discretion to turn away those without a legitimate concern (‘in other words a busybody’),³⁷ but at the substantive hearing other questions of standing may be raised. A court should not refuse permission for lack of sufficient interest unless it knows enough of the legal and factual context to be sure that this is justified; in advance of examining the merits, the court may be unable to make a surgical separation between ‘sufficient interest’ and the essence of the case.

³⁴ Senior Courts Act 1981, s 31(3).

³⁵ *Arsenal FC v Ende* [1979] AC 1.

³⁶ [1982] AC 617; *P Cane* [1981] PL 322.

³⁷ *R v Somerset CC, ex p Dixon* [1998] Env LR 111. And see *R (Edwards) v Environment Agency* [2003] EWHC 736 (Admin), [2004] 3 All ER 21. In the Fleet Street case, above, Lord Scarman referred to the exclusion of ‘busybodies, cranks and mischief-makers’ but it may not always be obvious whether a claimant is a mischief-maker or a champion of liberty.

In most claims for judicial review, the question of sufficient interest presents no problems, although for the parties not to raise the issue does not confer on the court jurisdiction that is otherwise absent.³⁸ An ordinary taxpayer had interest to challenge the government's proposal to designate as a 'Community treaty' a treaty providing extra funds to the EU.³⁹ The Equal Opportunities Commission had standing to challenge statutory provisions which discriminated against women employees in breach of their EU law rights.⁴⁰ Trade unions acting in their members' interests and environmental groups have standing to challenge decisions on relevant issues,⁴¹ but difficulties may arise when a claimant is not personally affected by a decision and is acting in the public interest. Thus a non-profit-making company formed to protect the site of a Shakespearian theatre had no standing to review a minister's decision refusing to schedule the site as a historic monument.⁴² Relatives of a child who was killed by two young boys had no standing to seek review of a decision by the Lord Chief Justice as to the minimum period in detention that the two youths should serve.⁴³ As with time limits, the courts will be very reluctant to refuse permission on standing grounds where they see a meritorious claim, in order to assess potential wrongdoing on the part of a public authority.⁴⁴

A different test of standing was created by the Human Rights Act 1998, s 7: a claim that a public authority acted incompatibly with a Convention right (in breach of s 6) may be brought only by someone who is a 'victim' of the act within the meaning of art 34 ECHR. Strasbourg case law does not permit cases to be brought by representative bodies and pressure groups unless they themselves are victims of a breach of their Convention rights.⁴⁵ Such bodies must thus ensure that one or more 'victims' are claimants for judicial review in order to rely on s 6 of the 1998 Act. There is no victim test for persons who wish to rely on other provisions of the Act, such as the requirement by s 3 that legislation must be interpreted consistently with the Convention, wherever this is possible.

Alternative remedies⁴⁶

Another issue considered at the permission stage stems from the principle that the prerogative orders are a residual remedy. In a leading 19th-century case, mandamus was refused where a statute created both a duty and a specific remedy for enforcing it (complaint to central government).⁴⁷ Today, an individual must use an express right of appeal if this will meet the substance of the complaint.⁴⁸ Tribunals exist for deciding claims to social security, disputes over tax, immigration claims and so on. Judicial review is not an optional substitute for an appeal to a tribunal with relevant jurisdiction.⁴⁹ The existence of an alternative remedy does

³⁸ *R v Social Services Secretary, ex p CPAG* [1990] 2 QB 540.

³⁹ *R v HM Treasury, ex p Smedley* [1985] QB 657; *R v Foreign Secretary, ex p Rees-Mogg* [1994] QB 552. See also *R v Felixstowe Justices, ex p Leigh* [1987] QB 582.

⁴⁰ *R v Employment Secretary, ex p EOC* [1995] 1 AC 1.

⁴¹ *R v Inspectorate of Pollution, ex p Greenpeace Ltd (No 2)* [1994] 4 All ER 329; *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 AC 513; *R v Foreign Secretary, ex p World Development Movement* [1995] 1 All ER 611. See: *P Cane* [1995] PL 276 and *C Harlow* (2002) 65 MLR 1.

⁴² *R v Environment Secretary, ex p Rose Theatre Trust Co* [1990] 1 QB 504. See *K Schiemann* [1990] PL 342 and *P Cane* [1990] PL 307.

⁴³ *R (Bulger) v Home Secretary* [2001] EWHC 119 (Admin), [2001] 3 All ER 449. The claim was also rejected on its merits.

⁴⁴ *World Development Movement* (above); *R v Somerset County Council, ex p Dixon* [1998] Env LR 111.

⁴⁵ See *Harris, O'Boyle and Warbrick, Law of the ECHR*, 790–99; *J Miles* [2000] CLJ 133.

⁴⁶ See *C Lewis* [1992] CLJ 138 and (same author) *Judicial Remedies in Public Law*, ch 11 G.

⁴⁷ *Pasmore v Oswaldtwistle Council* [1898] AC 387. And see *Barracough v Brown* [1897] AC 615 (declarations).

⁴⁸ *R v Paddington Valuation Officer, ex p Peachey Property Co* [1966] 1 QB 380; *R (Davies) v Financial Services Authority* [2003] EWCA Civ 1128, [2003] 4 All ER 1196.

⁴⁹ *R (G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 2 All ER 165.

not deprive the Administrative Court of jurisdiction, but requires the court to exercise its discretion: whether leave for judicial review to proceed is granted will depend on whether the statutory remedy is a satisfactory and effective alternative to review.⁵⁰ Thus, the default powers of ministers concerning social service complaints may deal with the factual issues raised by a complaint, but do not enable important points of law to be resolved.⁵¹ Sometimes the reason for withholding permission is merely that the application for judicial review is premature, as, for instance, where a right of appeal is open to the individual. In other cases, a judicial remedy may be justified, if the decision at first instance is manifestly ultra vires⁵² or there has been abuse of statutory procedure by the authority.⁵³ In such cases, the court considers such matters as the comparative speed, expense and finality of the alternative processes, the need for fact-finding and the desirability of an authoritative ruling on points of law.⁵⁴

B. The extent of judicial review

Scope and extent of judicial review

If an application for review concerns decisions of a public authority or official, the courts readily accept jurisdiction in judicial review, except if a reason to the contrary is shown.⁵⁵ Thus, decisions taken under prerogative powers are subject to review, unless the court considers their subject matter to be non-justiciable.⁵⁶ Also reviewable are decisions by local authorities in controlling access to public property, initiating legal proceedings and matters preliminary to the award of contracts.⁵⁷ Two broad exceptions to the availability of judicial review exist. First, some decisions are subject to statutory appeals and similar procedures which, to a greater or lesser extent, exclude judicial review.⁵⁸ Second, public authorities are in general subject to the ordinary law of contract, tort and property. Since *O'Reilly v Mackman*,⁵⁹ such branches of law are said to fall within private law, to distinguish them from the rules of public law applied on judicial review. A claim for judicial review may not be used in place of an ordinary action in contract or tort, just because the defendant is a public authority.

Thus, when such an authority dismisses an employee, the employee's primary remedy is a claim for unfair dismissal or a claim under the contract of employment.⁶⁰ However, depending on the circumstances, decisions by public authorities as employers may stem from

⁵⁰ *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533. If an appeal against an immigration decision can be brought only from outside the United Kingdom, this may not be a satisfactory alternative to judicial review; cf *Chikwamba v Home Secretary* [2008] UKHL 40, [2009] 1 All ER 363.

⁵¹ *R v Devon CC, ex p Baker* [1995] 1 All ER 73. Cf *R (Cowl) v Plymouth Council* (below, note 38).

⁵² *R v Hillingdon Council, ex p Royco Homes Ltd* [1974] 1 QB 720.

⁵³ *R v Chief Constable, Merseyside, ex p Calveley* [1986] QB 424.

⁵⁴ *R v Falmouth Port Health Authority, ex p South West Water Ltd* [2001] QB 445.

⁵⁵ See Auburn, Moffett and Sharland, *Judicial Review: Principles and Procedure*, ch 2; Lewis, *Judicial Remedies in Public Law*, chs 2, 4.

⁵⁶ See the *CCSU* case, below; *R v Ministry of Defence, ex p Smith* [1996] QB 517; *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61, [2009] 1 AC 453. Cf *Reckley v Minister of Public Safety (No 2)* [1996] AC 527.

⁵⁷ Respectively *Wheeler v Leicester City Council* [1985] AC 1054; *Avon CC v Buscott* [1988] QB 656; and *R v Enfield Council, ex p TF Unwin (Roydon) Ltd* [1989] 1 Admin LR 51.

⁵⁸ See pp 679–82 below.

⁵⁹ [1983] 2 AC 237, p 677 below.

⁶⁰ *R v BBC, ex p Lavelle* [1983] 1 All ER 241.

or involve issues of public law.⁶¹ Public sector employees such as NHS hospital staff⁶² and civil servants⁶³ must generally use procedures open to them in employment law rather than seek judicial review. This does not necessarily apply to holders of public office such as police and prison officers⁶⁴ whose position is based on statute. Judicial review may be available if an employment dispute raises issues as to the powers of the public authority or other matters suitable for redress by judicial review.⁶⁵

A difficult question is what constitutes a ‘public law dispute’ for judicial review purposes. The prerogative orders were not, and judicial review is not, available against bodies such as trade unions or commercial companies.⁶⁶ Membership of a trade union is based on contract. If a trade unionist complains that her expulsion from the union was in breach of union rules or infringed natural justice, she may sue the union for damages and an injunction. Bodies such as the National Greyhound Racing Club and the Jockey Club are not subject to judicial review, even if they regulate major areas of sport, but contractual remedies will often be available.⁶⁷ Nor are decisions by religious bodies subject to judicial review.⁶⁸ The position of the universities is more complex. In older colleges and universities that have a visitor, academic staff or students with grievances against the institution had to refer them to the visitor, whose decisions are subject to judicial review, but only on certain grounds.⁶⁹ Legislation has now excluded from the visitor’s jurisdiction employment disputes involving academic staff, and complaints by students and former students.⁷⁰ Many of the newer universities and colleges have no visitor and their decisions are subject to judicial review on the usual grounds.⁷¹

The most difficult case is that of regulatory bodies which derive their powers neither directly from statute⁷² nor from contract. Despite having no formal legal status, the City Panel on Takeovers and Mergers is subject to judicial review, since its functions ‘de facto’ are in the nature of public law powers and are indirectly supported by statutory sanctions.⁷³

⁶¹ E.g. *CCSU v Minister for Civil Service* [1985] AC 374; cf *H W R Wade* (1985) 101 LQR 180, 190–6 and see now *R (Shoemith) v Ofstead* [2011] EWCA Civ 642, [2011] PTSR 1459.

⁶² *R v East Berks Health Authority, ex p Walsh* [1985] QB 152, and p 718 below.

⁶³ *R v Lord Chancellor’s Department, ex p Nangle* [1992] 1 All ER 897.

⁶⁴ *R v Home Secretary, ex p Benwell* [1985] QB 554. By the Criminal Justice and Public Order Act 1994, s 126, prison officers acquired the same employment rights as other civil servants: *G S Morris* [1994] PL 535. Contrast *R (Tucker) v National Crime Squad* [2003] EWCA Civ 2, [2003] ICR 599 (no judicial review of decision to end police secondment) with *R (Simpson) v Chief Constable of Greater Manchester* [2013] EWHC 1858 (Admin) (selection pool for promotion of police officers raised policy issues amenable to judicial review).

⁶⁵ See *McLaren v Home Office* [1990] ICR 824. Also *S Fredman and G Morris* [1988] PL 58, [1991] PL 484, (1991) 107 LQR 298.

⁶⁶ *R (West) v Lloyd’s of London* [2004] EWCA 506, [2004] 3 All ER 251 (Lloyd’s underwriting syndicates not within public law).

⁶⁷ *Law v National Greyhound Racing Club Ltd* [1983] 3 All ER 300; *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853. And see *M Beloff* [1989] PL 95; *N Bamforth* [1993] PL 239. Cf *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (private association exercising function of major national importance).

⁶⁸ *R v Chief Rabbi, ex p Wachmann* [1993] 2 All ER 249.

⁶⁹ *R v Hull University Visitor, ex p Page* [1993] AC 682.

⁷⁰ See respectively Education Reform Act 1988, s 206 and Higher Education Act 2004, s 20.

⁷¹ See *R v Metropolitan University of Manchester, ex p Nolan* [1994] ELR 380 and cf *Clark v University of Lincolnshire* [2000] 3 All ER 752.

⁷² Unlike the Law Society; see e.g. *Smain v Law Society* [1983] 1 AC 598.

⁷³ *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 817 (C F Forsyth [1987] PL 356; *D Oliver* [1987] PL 543); *R v Advertising Standards Agency, ex p Insurance Service plc* (1990) 2 Admin LR 77.

Publicly owned undertakings are subject to judicial review in respect of some of their functions.⁷⁴ The effect of privatisation and ‘market testing’ of public services has produced some conflicting decisions.⁷⁵ However, the courts have settled into applying a multi-factorial test which can be difficult to predict but which considers such matters as the source of the power being exercised, the nature of the body (i.e. whether it is underpinned by statute, or is part of a system of public regulation), whether monopoly control is exercised and whether it receives public funding.⁷⁶

Inferior courts, such as magistrates’ courts and county courts, are subject to judicial review. So is the Crown Court, ‘other than its jurisdiction in matters relating to trial on indictment’.⁷⁷ This limitation expresses an important principle that makes it necessary to distinguish between those decisions of the Crown Court that are subject to judicial review and others which can be challenged only by appeal after a trial. A somewhat similar situation arises when the legislation setting up a particular tribunal indicates that judicial review is available in respect of some but not all decisions by the tribunal.⁷⁸

This discussion has not yet taken account of the effects of the Human Rights Act 1998. As we have seen,⁷⁹ the Act obliges public authorities (and bodies that exercise functions both of a public nature and of a private nature) to act consistently with Convention rights. The defining of public authorities under the 1998 Act has given rise to difficult decisions.⁸⁰ It has been observed that the case law on the scope of judicial review is not determinative of whether a body is a public authority for the purposes of the Act,⁸¹ but the two bodies of case law must not be developed in isolation from each other.

Does judicial review provide an exclusive procedure?⁸²

Although the House of Lords failed to sound a clear note in the *National Federation* case, the House in two later cases was unanimous in holding that litigants who wished to challenge official decisions must do so by applying for judicial review. The question arose because the Senior Courts Act 1981 did not expressly exclude someone from suing in public law cases for an injunction or declaration, or for damages for breach of statutory duty. The issue had arisen in numerous cases concerning immigrants, prisoners, homeless persons and others.

⁷⁴ *R v British Coal Corpn, ex p Vardy* [1993] ICR 720. See ch 12 E.

⁷⁵ Compare *R v Lord Chancellor, ex p Hibbit & Saunders* [1993] COD 326 (D Oliver [1993] PL 214) and *R v Legal Aid Board, ex p Donn & Co* [1996] 3 All ER 1.

⁷⁶ See variously: *Datafin* (above); *Aga Khan* (above); *R (Siborurema) v Office of Independent Adjudicator* [2007] EWCA Civ 1365, [2008] ELR 209; *R (Beer (t/a Hammer Trout Farm)) v Hampshire Farmer’s Market Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233; J W F Allison [2007] CLJ 698; C D Campbell [2009] CLJ 90 and (2009) 123 LQR 491.

⁷⁷ Supreme Court Act 1981, s 29(3); *R Ward* [1990] PL 50; *In re Ashton* [1994] 1 AC 9 and *R v Manchester Crown Court, ex p DPP* [1993] 4 All ER 928. See also *R v DPP, ex p Kebeline* [2000] 2 AC 326 (decision to prosecute subject to criminal process, not to judicial review).

⁷⁸ See *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AIC 663.

⁷⁹ See ch 14 C.

⁸⁰ Including *Poplar Housing Association Ltd v Donohue* [2001] EWCA Civ 595, [2002] QB 48; *Aston Cantlow PCC v Wallbank* [2003] UKHL 37, [2004] 1 AC 546; *YL v Birmingham Council* [2007] UKHL 27, [2008] AC 95. The articles include D Oliver [2000] PL 476, [2004] PL 329; M Sunkin [2004] PL 643; C Donnelly [2005] PL 785; J Landau [2007] PL 630; A Williams [2011] PL 139.

⁸¹ *Aston Cantlow PCC v Wallbank* (above), [52] (Lord Hope).

⁸² See Auburn, Moffett and Sharland, *Judicial Review: Principles and Procedure*, ch 23; Wade and Forsyth, *Administrative Law*, pp 566–81; Craig, *Administrative Law*, ch 27.

In *O'Reilly v Mackman*, convicted prisoners who had lost remission of sentence in disciplinary proceedings after riots at Hull prison sued for a declaration that the decisions were null and void because of breaches of natural justice.⁸³ The defendants applied to have the action struck out on the ground that the decisions in question could be challenged only by an application for judicial review. *Held* (House of Lords) while the court had jurisdiction to grant the declarations sought, the prisoners' case was based solely on rights and obligations arising under public law. Order 53, by its requirement of leave from the court and by its time limit, protected public authorities against groundless or delayed attacks. It would 'as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provision of Order 53 for the protection of such authorities' (Lord Diplock).⁸⁴ And in *Cocks v Thanet DC*, the House held that a homeless person who challenged a decision by a local authority that he was not entitled to permanent accommodation must do so under Order 53, not by suing in the county court for a declaration and damages for breach of statutory duty.⁸⁵

These two decisions left no doubt that the Law Lords wished to take further than Parliament had done the issue of exclusivity. The step taken in *O'Reilly* was justified on practical grounds, namely that litigants could be required to use the judicial review procedure as the former defects in the prerogative orders had been cured. But in seeking to protect public authorities from a flood of litigation,⁸⁶ *O'Reilly* relied heavily on the public law/private law distinction, despite the difficulties that this presents in English law.⁸⁷

One consequence of *O'Reilly* was that much expensive litigation ensued in testing the procedural choices made by litigants, rather than in deciding the merits of their grievances. Sir William Wade's view in 2000 was dramatic: 'The need for law reform is clearly greater now than it was before 1977.'⁸⁸ This view arguably understated the general benefits that resulted from the reforms in 1977–82. Moreover, several decisions by the Lords after *O'Reilly* showed that there is no absolute rule of procedural exclusivity.⁸⁹ In *O'Reilly*, Lord Diplock had stated that an exception to the rule might exist where the invalidity of an official decision arose 'as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law'.⁹⁰ The converse of this situation arose when a local council sued one of its tenants for non-payment of rent and the tenant raised the defence that rent increases made by the council were ultra vires. Although the tenant could have sought judicial review of the increases (and had not done so), the defence was held to be a proper defence of the tenant's private rights.⁹¹

In 1992, Lord Diplock's suggested exception was applied directly in *Roy v Kensington Family Practitioner Committee*. An NHS committee, acting under statutory powers, had

⁸³ See *R v Board of Visitors of Hull Prison, ex p St Germain* [1979] QB 425.

⁸⁴ [1983] 2 AC 237, 285. And see C F Forsyth [1985] CLJ 415; and Justice/All Souls Report, *Administrative Justice*, ch 6.

⁸⁵ [1983] 2 AC 286. In *O'Rourke v Camden Council* [1998] AC 188, the decision in *Cocks* was applied but other aspects of the case were disapproved.

⁸⁶ See Woolf, *Protection of the Public – A New Challenge*, ch 1; and (the same) [1986] PL 220; [1992] PL 221, 231. Ch 27.

⁸⁸ Wade and Forsyth, *Administrative Law* (8th edn, 2000), p 653.

⁸⁹ *Davy v Spelthorne Council* [1984] AC 262 (action in negligence relating to disputed enforcement notice).

⁹⁰ [1983] 2 AC 237, 285.

⁹¹ *Wandsworth Council v Winder* [1985] AC 461.

deducted 20 per cent from money due to Dr Roy for providing medical services to the NHS. Dr Roy sued by ordinary action for the full amount. He was granted a declaration that the deduction had not been properly made, and judicial review of the deduction was not required.⁹² This decision by the Lords was a significant step in reassessing the limits of the exclusivity rule. Lords Bridge and Lowry favoured restricting the *O'Reilly* rule to situations in which the individual's *sole* aim was to challenge a public law act or decision; thus the rule would not apply when an action to vindicate private rights *might* involve some questions as to the validity of a public law decision.⁹³ In 1995, the Lords further limited the effect of *O'Reilly*, holding that a regulatory decision interpreting a statutory licence might be questioned by proceedings in the Commercial Court.⁹⁴ Subsequent decisions reinforced the trend towards greater procedural flexibility and discouraged reliance on procedural defences.⁹⁵

A relevant factor in this trend is that the Civil Procedure Rules permit transfer into and out of judicial review proceedings: a transfer in either direction will be decided by a judge designated to sit in the Administrative Court, who will consider if the claim raises issues of public law to which Part 54 CPR should apply.⁹⁶ Since the time limit that applies to judicial review is much shorter than for most civil claims,⁹⁷ a case that begins as a claim for judicial review is unlikely to strike a problem of limitation if it is transferred into ordinary procedure. In the converse situation, where the judicial review time-limit has not been observed even though the claim is solely concerned with public law issues, the judge may refuse to transfer the claim into judicial review procedure and this may cause the claim to fail for abuse of process.⁹⁸

We have seen that in *O'Reilly*, Lord Diplock said that an exception to the rule of exclusivity could exist where the invalidity of an official decision arose 'as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law'.⁹⁹ One form of collateral review occurs when tribunals whose task it is to decide whether a particular benefit should be paid to an individual under a statutory scheme are able to decide on the validity of the relevant regulations.¹⁰⁰ The issue of procedural exclusivity was raised when individuals sought to defend themselves against enforcement action by public authorities. It is now settled that an individual prosecuted for breach of subordinate legislation such as by-laws can as a defence plead that the legislation is invalid, and is not barred from doing so by failure to seek judicial review.¹⁰¹ But under certain statutory schemes (for instance, the licensing of sex shops or the enforcement of planning control),¹⁰² someone adversely affected by a public authority's decision may have no choice but to seek judicial review if he or she wishes to raise issues that will be outside the scope of a criminal court to determine.

⁹² [1992] 1 AC 624 (P Cane [1992] PL 193).

⁹³ [1992] 1 AC 624, at 629 and 653 respectively.

⁹⁴ *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575.

⁹⁵ See *Rye (Dennis) Pension Fund v Sheffield Council* [1997] 4 All ER 747 (county court action to secure payment of housing grant); *Steed v Home Secretary* [2000] 3 All ER 226 (HL); *Clark v University of Lincolnshire* [2000] 3 All ER 752; *D v Home Office* [2005] EWCA Civ 38, [2006] 1 All ER 183 (detained immigrants entitled to sue for damages on basis that their detention unlawful and not bound to seek judicial review); *Bunney v Burns Anderson* [2007] EWHC 1240 (Ch), [2007] 4 All ER 246.

⁹⁶ CPR, Part 30; CPR r 54.20.

⁹⁷ See page 670 above.

⁹⁸ And see *Clark v University of Lincolnshire* (above).

⁹⁹ Page 677 above.

¹⁰⁰ *Chief Adjudication Officer v Foster* [1993] 1 All ER 705 (D Feldman (1992) 108 LQR 45 and A W Bradley [1992] PL 185).

¹⁰¹ *Boddington v British Transport Police* [1999] 2 AC 143 (C Forsyth [1998] PL 364).

¹⁰² Respectively *Quiethym Ltd v Plymouth Council* [1988] QB 114; *R v Wicks* [1998] AC 92. And see A W Bradley [1997] PL 365.

C. The limitation and exclusion of judicial review

Statutory machinery for challenge

The technicalities of the prerogative remedies in their unreformed state often led in the past to legislation providing a simpler procedure for securing judicial review. Such legislation always related to specific powers of government and usually included provisions excluding other forms of judicial review.

An important example is provided by the standard procedure for the compulsory purchase of land. After a compulsory purchase order has been made by the local authority and, if objections have been raised, an inquiry has been held into the order, the minister must decide whether to confirm the order. If it is confirmed, there is a period of six weeks from the confirmation during which any person aggrieved by the purchase order may challenge the validity of the order in the High Court¹⁰³ on two grounds: (1) that the order is not within the powers of the enabling Act; or (2) that the requirements of the Act have not been complied with and that the objector's interests have been substantially prejudiced thereby.¹⁰⁴ These grounds have been interpreted as covering all grounds upon which judicial review may be sought, including in (1) matters affecting vires, abuse of discretion and natural justice, and in (2) observance of all relevant statutory procedures.¹⁰⁵ When an aggrieved person makes an application to the High Court, the court may make an interim order suspending the purchase order, either generally or so far as it affects the applicant's property. If the order is not challenged in the High Court during the six-week period, the order is statutorily protected from challenge; any other form of judicial review of the order is excluded, before or after the confirmation of the order.¹⁰⁶

This method of challenge, which first appeared in the Housing Act 1930, was a distinct improvement on legislative attempts to exclude judicial review of ministers' actions altogether and the remedy it provided was much more effective than reliance on the prerogative orders at common law. Today, it provides a statutory form of review in respect of many decisions relating to the control of land.¹⁰⁷ Use of this remedy has enabled the High Court to give its entire attention to the principles of judicial review in issue, uncomplicated by procedural or jurisdictional questions. The time limit on the right of challenge is necessary in order that, if no objection is taken promptly, the authorities concerned can put the decision into effect. Other statutory remedies include the right to appeal to the High Court on matters of law from some tribunals¹⁰⁸ and on points of law in respect of planning decisions.¹⁰⁹ Although these remedies are not applications for judicial review within the meaning of the Senior Courts Act 1981, s 31, they are heard in the Administrative Court. By enabling there to be judicial review of executive decisions, they help to satisfy the requirements of art 6 ECHR.¹¹⁰ In 2013, any judicial review of a decision under planning legislation was made subject to a six-week time limit (r 54.5(5)).

¹⁰³ Or in Scotland in the Court of Session. On when the six weeks begin to run, see *Griffiths v Environment Secretary* [1983] 2 AC 51.

¹⁰⁴ Acquisition of Land Act 1981, s 23 (consolidating earlier Acts).

¹⁰⁵ *Ashbridge Investments Ltd v Minister of Housing* [1965] 3 All ER 371; *Coleen Properties Ltd v Minister of Housing* [1971] 1 All ER 1049.

¹⁰⁶ Acquisition of Land Act 1981, s 23; and see p 680 below.

¹⁰⁷ E.g. Town and Country Planning Act 1990, ss 284–8; Planning and Compulsory Purchase Act 2004, s 113.

¹⁰⁸ Tribunals and Inquiries Act 1992, s 11.

¹⁰⁹ Town and Country Planning Act 1990, s 289.

¹¹⁰ See *R (Alconbury Developments Ltd) v Environment Secretary* [2001] UKHL 23, [2003] 2 AC 295 and *Bryan v UK* (1995) 21 EHRR 342.

An applicant to the court must, however, come within the scope of the procedure and the question of who may do so depends on the statutory provisions. The six-week right to challenge compulsory purchase orders and planning decisions is given to ‘any person aggrieved’. This clearly includes owners who object to their land being compulsorily purchased, and it has been interpreted to include the officers of an amenity association who had opposed new development at a public inquiry.¹¹¹ The term ‘person aggrieved’ should be given a meaning consistent with the broad test of ‘sufficient interest’ that applies to judicial review in general.

A tight time limit for bringing proceedings can be justified where the challenger is likely to have been involved in the events leading up to the challenge. Six weeks is tight but not unreasonable. Of more concern is the 30 days introduced for a judicial review of a public procurement matter (r. 54.5(6)), although this does align the position in judicial review with the time limit for proceedings brought directly under the Public Contracts Regulations 2006. There must, however, be a point at which a time limit becomes an effective bar to the bringing of any challenge.

Statutory exclusion of judicial control¹¹²

When judges are interpreting legislation, they apply a strong presumption that the legislature does not intend access to the courts to be denied. Where Parliament has appointed a specific tribunal for the enforcement of new rights and duties, it is necessary to have recourse to that tribunal in the first instance. In principle, the tribunal’s decisions will be subject to judicial review. But many statutes have contained words intended to oust the jurisdiction of the courts. Such provisions have long been interpreted by the judges so as to leave, if possible, their supervisory powers intact.¹¹³ One frequent clause was that a particular decision ‘shall be final’, but this does not exclude judicial review.¹¹⁴ Such a clause means simply that there is no right of appeal from the decision. Another clause which does not deprive the courts of supervisory jurisdiction is where a statutory order when made shall have effect ‘as if enacted in the Act’ which authorised it; the court may nonetheless hold the order to be invalid if it conflicts with provisions of the Act.¹¹⁵ The fact that a tribunal is described by statute as a ‘superior court of record’ is not sufficient to exclude the supervisory jurisdiction of the High Court.¹¹⁶

It is then only by an exceptionally strong formula that Parliament can deprive the High Court or the Court of Session of supervisory jurisdiction over inferior tribunals and public authorities. As we have seen, exclusion clauses frequently accompany the granting of an express right to challenge the validity of an order or decision during a limited time. Thus, subject to the possibility of challenge to the order within six weeks of its confirmation, a compulsory purchase order ‘shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever . . .’¹¹⁷

¹¹¹ *Turner v Environment Secretary* (1973) 72 LGR 380.

¹¹² Wade and Forsyth, *Administrative Law*, pp 610–34; Craig, *Administrative Law*, ch 28.

¹¹³ E.g. *Colonial Bank of Australasia v Willan* (1874) 5 PC 417 (express exclusion of certiorari not effective where manifest defect of jurisdiction).

¹¹⁴ *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574.

¹¹⁵ *Minister of Health v R* [1931] AC 494.

¹¹⁶ *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), [2010] 2 WLR 1012 (but note the distinction in respect of judicial review drawn between the Special Immigration Appeals Commission and the Upper Tribunal). The point was not discussed to the same degree in the Supreme Court: [2011] UKSC 28, [2012] 1 AC 663.

¹¹⁷ Acquisition of Land Act 1981, s 25.

In *Smith v East Elloe Council* the plaintiff, whose land had been taken compulsorily for the building of council houses nearly six years previously, alleged that the making of the order had been caused by wrongful action and bad faith on the part of the council and its clerk. She submitted that the exclusion clause did not exclude the court's power in cases of fraud and bad faith. The House of Lords held by 3–2 that the effect of the Act was to protect compulsory purchase orders from judicial review except by statutory challenge during the six-week period. Although the validity of the order could no longer be challenged, the action against the clerk of the council for damages could proceed.¹¹⁸

A very different attitude towards an exclusion clause was taken by the House of Lords in 1968 in a decision which we have already considered in relation to jurisdictional control.

In *Anisimic Ltd v Foreign Compensation Commission*, the Foreign Compensation Act 1950, s 4(4), provided that the determination by the commission of any application made under the Act 'shall not be called in question in any court of law'. The commission was a judicial body responsible for distributing funds supplied by foreign governments as compensation to British subjects. It rejected a claim made by Anisimic, for a reason which the company submitted was erroneous in law and exceeded the commission's jurisdiction. *Held*, by a majority, s 4(4) did not debar a court from inquiring whether the commission had made in law a correct decision on the question of eligibility to claim. 'Determination' meant a real determination, not a purported determination. By taking into account a factor which in the view of the majority was irrelevant to the scheme, the commission's decision was a nullity. Lord Wilberforce said, 'What would be the purpose of defining by statute the limits of a tribunal's powers, if by means of a clause inserted in the instrument of definition, those limits could safely be passed?'¹¹⁹

The decision is a striking example of the ability of the courts to interpret privative clauses in such a way as to maintain the possibility of judicial review. Although the authority of *Smith v East Elloe Council* was questioned in the *Anisimic* case, it was not overruled: indeed, the issues involved in considering the finality of a compulsory purchase order are different from those involved in considering whether an award of compensation should be subject to review. A further distinction is between a statute that seeks to exclude the jurisdiction of the courts entirely (as in *Anisimic*) and a statute that confers a right to apply to the courts for review within a stated time (as in the case of a compulsory purchase order) but excludes judicial review thereafter. In 1976, the statutory bar on attempts to challenge the validity of a purchase order after the six-week period was held to be absolute: an aggrieved owner could not bring such a challenge some months later, even though he alleged that the order had been vitiated by a breach of natural justice and good faith which he had only discovered after the six-week period.¹²⁰ Even if the purchase order must stand, this will not prevent the owner from seeking compensation from those responsible for acts which engage liability in tort.

¹¹⁸ [1956] AC 736.

¹¹⁹ [1969] 2 AC 147, 208 (and ch 24 A above). For the legislative sequel, see Foreign Compensation Act 1969, s 3.

¹²⁰ *R v Environment Secretary, ex p Ostler* [1977] QB 122 (N P Gravells (1978) 41 MLR 383 and J E Alder (1980) 43 MLR 670). Also *R v Cornwall CC, ex p Huntington* [1994] 1 All ER 694.

In *A v B (Investigatory Powers Tribunal)*¹²¹ a former member of the Security Service wished to publish a book about his work and had to seek consent from the Service to do so. Permission to publish parts of the manuscript was refused and he sought judicial review of that refusal, relying on his rights under article 10 ECHR. The Supreme Court held that, under the Regulation of Investigatory Powers Act 2000, it was only the Investigatory Powers Tribunal that had jurisdiction to deal with the case. The 2000 Act said expressly that the Investigatory Powers Tribunal was ‘the only appropriate tribunal’ for the purposes of proceedings against the Security Service that relied on the Human Rights Act. The effect of the relevant legislation was to bring A’s claim within the principle applied in *Barraclough v Brown*¹²² and (distinguishing *Anisminic*) it was not open to the court to interpret the legislation so as to maintain the possibility of judicial review. Lord Brown concluded that: ‘Parliament has not ousted judicial scrutiny of the acts of the intelligence services; it has simply allocated them to the Investigatory Powers Tribunal’.¹²³

Parliamentary authority to exclude judicial review

We have seen that in the debate about the foundations of judicial review even those who denied that parliamentary intent was the basis of judicial review accepted that Parliament could restrict or exclude judicial review in specific instances.¹²⁴ Today, an attempt by Parliament to do so might conflict with European law. Thus a certificate issued by the Secretary of State for Northern Ireland that purported to be ‘conclusive evidence’ that a police decision was taken for reasons of national security was held to be contrary to the principle of effective judicial control in European Community law.¹²⁵ When a similar certificate prevented a Roman Catholic company from pursuing a complaint of religious discrimination in the award of contracts, the ‘conclusive evidence’ rule was held to be a disproportionate restriction on the right of access to a court and thus it breached art 6(1) ECHR.¹²⁶ Where a matter concerns ‘civil rights and obligations’, as in that case, exclusion of access to a court will violate art 6(1).¹²⁷ According to the Strasbourg case law, a national legislature may impose reasonable time limits on access to a court, but such restrictions must not impair the essence of the right.¹²⁸ The rule that judicial review must be sought promptly and in any event within three months would be likely to comply with art 6; so in most cases would the six-week rule on challenges to planning and compulsory purchase decisions. But an absolute exclusion of review after six weeks might be disproportionate in a case where relevant information is concealed by officials until after the right of access to a court has lapsed. No issues as to art 6 of the ECHR are raised by the exclusion of judicial review on matters that do not necessarily involve an individual’s ‘civil rights and obligations’, such as the validity of an Act of the Scottish Parliament¹²⁹ or a Speaker’s certificate under the Parliament Act 1911.¹³⁰

Parliament has an uneven record in relation to the exclusion of the courts. The Franks committee in 1957 recommended that no statute should oust the prerogative orders. In response, the Tribunals and Inquiries Act 1958 (re-enacted in 1992, s 12) provided that:

¹²¹ [2009] UKSC 9, [2010] 2 AC 1.

¹²² [1897] AC 615 (statute creating a duty and providing a means of enforcing it). See p 709.

¹²³ [2009] UKSC 9, [2010] 2 AC 1 at [23].

¹²⁴ Ch 24, at p 630.

¹²⁵ Case 222/84 *Johnston v Chief Constable RUC* [1987] QB 129.

¹²⁶ *Tinnelly & Sons Ltd v UK* (1998) 27 EHRR 249.

¹²⁷ See e.g. *Zander v Sweden* (1993) 18 EHRR 175 and *Fayed v UK* (1994) 18 EHRR 393.

¹²⁸ *Stubbings v UK* (1996) 23 EHRR 213.

¹²⁹ Scotland Act 1998, s 28(5).

¹³⁰ Parliament Act 1911, s 3.

- (a) any provision in an Act passed before 1 August 1958 that any order or determination shall not be called into question in any court; or
- (b) any provision in such an Act which by similar words excludes any of the powers of the High Court

shall not prevent the remedies of certiorari or mandamus (now quashing and mandatory orders) from being available. A more general provision protects the supervisory jurisdiction of the Court of Session. These provisions do not apply: (i) to an order or determination of a court of law, or (ii) where an Act makes provision for application to the High Court within a stated time (for example, the power to challenge a purchase order within six weeks, as in *Smith v East Elloe Council*).¹³¹

For several reasons, s 12 of the 1992 Act is far from being a sufficient response to the problem of ouster clauses. Section 12 has been held not to apply to ‘conclusive evidence’ clauses.¹³² Given the developments in relation to judicial review in European law, there is a case to be made for a statute that would create a strong rule of interpretation to preserve the possibility of judicial review that would apply to all legislation, whenever enacted, on the lines of the Human Rights Act 1998, s 3. Such a rule would not block a determined attempt by the executive to remove judicial review from one or more areas of government. But if such an attempt were made in Parliament, it might help to ensure that the two Houses would rigorously scrutinise the government’s proposals and motivation.¹³³

The need for such scrutiny was tested by a remarkable ouster clause in the Asylum and Immigration (Treatment of Claimants etc.) Bill 2004. The government sought to remove the right to judicial review of decisions by the proposed Asylum and Immigration Tribunal, and of deportation and removal decisions made by the Home Secretary and officials. The clause expressly excluded a court from considering proceedings to determine whether a purported determination or decision was a nullity by reason of lack of jurisdiction, irregularity, error of law, breach of natural justice or any other matter; limited provision was made for review in case of bad faith or if Convention rights were affected.¹³⁴ The clause passed through a complaisant House of Commons but was withdrawn by the government before it was debated in the Lords. It raised fundamental questions about the authority of Parliament to dispense with an independent and impartial scheme of judicial review.¹³⁵

D. Remedies and relief

Judicial discretion in judicial review proceedings

It has been said that judicial discretion is at the heart of administrative law.¹³⁶ Certainly, a judge has discretion to exercise at the permission stage, for instance relating to an issue

¹³¹ *Hamilton v Secretary of State for Scotland* 1972 SLT 233.

¹³² *R v Registrar of Companies, ex p Central Bank of India* [1986] QB 1114. A different view of ‘conclusive evidence’ clauses might be taken in other contexts.

¹³³ For consideration of legislation that removed or substantially impaired the role of the High Court in judicial review, see Lord Woolf [1995] PL 57, 68; cf the comments of Lord Irvine [1996] PL 59, 75–8.

¹³⁴ The text of the clause is at [2004] JR 97, with related articles and parliamentary materials. See also Lord Woolf [2004] CLJ 317; A Le Sueur [2004] PL 225; and ch 20 B.

¹³⁵ See the discussion of ouster clauses in *Jackson v Attorney General* [2005] UKHL 56; [2006] 1 AC 262.

¹³⁶ See Lord Cooke, in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord*, pp 203–20. Also Lewis, *Judicial Remedies in Public Law*, ch 11.

of delay or alternative remedy. A study of how this discretion is exercised has shown that, especially since 2000, when permission became generally a matter to be decided on the papers (which may include the defendant's response), there has been a decline in the percentage of claims for which permission is granted.¹³⁷ In *R (Cowl) v Plymouth Council*,¹³⁸ the Court of Appeal drew attention to the importance of avoiding litigation whenever possible, and held that in the early stages of a claim for judicial review the parties and (if necessary at the permission stage) the judge, should actively consider alternative ways of resolving the dispute, whether by use of alternative procedures such as a statutory complaints procedure, or of other means such as mediation that are available under the Civil Procedure Rules.¹³⁹

At the substantive hearing, the court exercises further discretion in deciding whether to grant relief even if grounds for review have been established. Although a judge may be reluctant to withhold relief in such a case,¹⁴⁰ relief has been denied for reasons such as the applicant's conduct and motives¹⁴¹ and the public inconvenience that a remedy might entail.¹⁴² Relief was withheld where planning permission had been granted on the basis of a factual error, but the court was satisfied that it would have been granted apart from this.¹⁴³ Similar flexibility was shown when, in reviewing decisions of the City's Take-over Panel, the Court of Appeal stated that in that context the court would see its role as 'historic rather than contemporaneous', i.e. that the court would seek to guide the panel in its future conduct of affairs, not to intervene in ongoing takeover battles.¹⁴⁴ It is one thing to hold that the findings of the court speak for themselves and that no declaration is needed, but it is much less justifiable, when a claimant has made out his or her case, for the court in its discretion to discover reasons for withholding relief. Although there have been suggestions that the courts should ordinarily decline to quash an ultra vires statutory instrument,¹⁴⁵ Buxton LJ firmly restated the correct position in *R (C) v Justice Secretary*:

the court has discretion to withhold relief if there are pressing reasons for not disturbing the status quo. It is, however, wrong to think that delegated legislation has some specially protected position in that respect. If anything, the imperative that public life should be conducted lawfully suggests that it is more important to correct unlawful legislation, that until quashed is universally binding and used by the public as a guide to conduct, than it is to correct a single decision, that affects only a limited range of people.¹⁴⁶

¹³⁷ V Bondy and M Sunkin [2008] PL 647. In 2006, the success rate in non-immigration civil cases of judicial review was 35 per cent and in asylum and immigration cases, 14 per cent. Overall it was 22 per cent.

¹³⁸ [2001] EWCA Civ 1935, [2002] 1 WLR 803. Although pursuit of alternative dispute resolution or pre-action correspondence does not provide a reason the claim could not be brought within time: *R (Finn-Kelcey) v Milton Keynes Council* [2008] EWCA Civ 1067, [2009] Env LR 17.

¹³⁹ On the use of alternative dispute resolution in administrative law, see M Supperstone, D Stilitz and C Sheldon [2006] PL 299 and S Boyron [2006] PL 247. On the increasing likelihood that claims for judicial review will be settled by consent, not by adjudication, see V Bondy and M Sunkin [2009] PL 237.

¹⁴⁰ See T Bingham [1991] PL 64. Also S Sedley [1989] PL 32 (criticising the use of discretion in *R v Chief Constable of North Wales* [1982] 3 All ER 141).

¹⁴¹ E.g. *R v Commissioners of Customs and Excise, ex p Cooke* [1970] 1 All ER 1068.

¹⁴² *R v Social Services Secretary, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164.

¹⁴³ *R v North Somerset Council, ex p Cadbury Garden Centre Ltd*, *The Times*, 22 November 2000.

¹⁴⁴ *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815. And see C Lewis [1988] PL 78.

¹⁴⁵ Note 142 above.

¹⁴⁶ [2008] EWCA Civ 882, [2009] QB 657 at [41]. For an example of a refusal to quash for minor procedural breaches see: *R (Hurley) v Business Secretary* [2012] EWHC 201 (Admin), [2012] HRLR 13.

Forms of relief

When the action or decision of a public authority or official is challenged by judicial review, the claimant may ask the court to provide one or more of the following forms of relief against the defendant:

- (a) to quash, or set aside as a nullity, a decision that is ultra vires or otherwise unlawful;
- (b) to restrain the defendant from acting ultra vires or otherwise unlawfully;
- (c) to order the defendant to perform its lawful duties;
- (d) to declare the rights and duties of the parties;
- (e) to order the defendant to pay compensation for loss or injury suffered; and
- (f) to secure temporary relief, pending the outcome of the proceedings.

The main defect in English law used to be that while procedures existed for all these forms of relief to be obtained, there was no single procedure for doing so. Often the procedures for obtaining one or more of these reliefs were mutually incompatible and the law was fragmented into the law of different remedies. The main effect of the reforms was that certain remedies which had long been available – namely the prerogative orders (mandamus, prohibition and certiorari), injunctions and declarations – became forms of relief¹⁴⁷ obtainable by the single procedure of application for judicial review. These changes in procedure were accompanied by a reorganisation of the business of the Queen’s Bench Division of the High Court that led to the unpublicised creation of an administrative court,¹⁴⁸ which in 2000 was given the formal name of the Administrative Court.¹⁴⁹ In 2004, more re-naming took place when the prerogative orders lost their historic names: they are now known as mandatory orders, prohibiting orders and quashing orders.¹⁵⁰ Here references to the present procedure will wherever possible use this terminology.

The prerogative orders

The prerogative writs of mandamus, prohibition and certiorari (later restyled orders)¹⁵¹ were the principal means by which the former Court of King’s Bench exercised jurisdiction over local justices and other bodies.¹⁵² Although the writs issued on the application of private persons, the word ‘prerogative’ was apt because they had sprung from the right of the Crown to ensure that justice was done by inferior courts and tribunals. The Crown as such played no part in the proceedings, and orders could be sought by or against a minister or a government department. Since the prerogative orders upheld the public interest in the administration of justice, aspects of the procedure (in particular, the need for leave from the court, the summary procedure and the discretionary remedies) were significantly different from litigation that protected an individual’s private rights.

A *mandatory order* is an order from the High Court commanding a public authority or official to perform a public duty, in the performance of which the applicant has a sufficient legal interest. The order does not lie against the Crown as such. However, it may enforce performance of a duty imposed by statute on a minister or on a department or on named

¹⁴⁷ Senior Courts Act 1981, s 31(1). This Act was enacted as the Supreme Court Act 1981 but it was re-named by the Constitutional Reform Act 2005, which created the present Supreme Court.

¹⁴⁸ L Blom-Cooper [1982] PL 250, 260.

¹⁴⁹ Practice Note (Administrative Court: Establishment) [2000] 4 All ER 1071.

¹⁵⁰ Senior Courts Act 1981, ss 29 and 31, as amended.

¹⁵¹ Administration of Justice (Miscellaneous Provisions) Acts 1933, s 5, and 1938, s 7.

¹⁵² Henderson, *Foundations of English Administrative Law*.

civil servants, provided that the duty is one which is owed to the applicant and not merely to the Crown.¹⁵³

A mandatory order will not lie if the authority has complete discretion whether to act or not. But there may be a duty to exercise a discretion or to make a decision, such as the duty of a tribunal to hear and determine a case within its jurisdiction. Thus the Home Secretary was required by mandamus to determine an application by the wife of a UK citizen for a certificate to which she was entitled, and which would enable her to enter the United Kingdom.¹⁵⁴ So too the statutory duty of a tribunal to give reasons for its decisions may be enforced in this way. The DPP was required to promulgate a policy identifying the facts and circumstances he considered relevant to any decision to prosecute an individual for aiding and abetting suicide, but the Law Lords stopped short of mandating what those issues should be.¹⁵⁵ Failure to comply is a contempt of court and is punishable accordingly.

A *prohibiting order* is an order issued to prevent a public body from exceeding its jurisdiction, or acting contrary to the rules of natural justice, where something remains to be done which can be prohibited. It must be possible to identify an act or decision the public body might take which should be prohibited. A *quashing order* (formerly certiorari) is today a means of quashing decisions by public authorities where one or more grounds for judicial review exist. By setting aside a defective decision, a quashing order enables a fresh decision to be taken, albeit that the decision-maker's freedom is likely to be heavily circumscribed by the judgment of the court.¹⁵⁶ A quashing order will usually have the effect that the act was always of no legal effect¹⁵⁷ and it must attach to a specific identified act or decision. Although there are suggestions that an ultra vires act is a nullity such that no quashing order is required, the better view is that the order should be granted, if only to ensure clarity.¹⁵⁸

A combination of the orders may be sought in the same proceedings, such as when a decision in excess of jurisdiction has already been made and other similar decisions have yet to be made,¹⁵⁹ or in order to quash a decision in excess of jurisdiction and then to compel the tribunal to hear and determine the case according to law.¹⁶⁰

Although both certiorari and prohibition originated as means of supervising inferior courts and tribunals, they have long been available against ministers, departments, local authorities and other administrative bodies. In 1988, the House of Lords held that the governor of a prison was also subject to judicial review and Lord Bridge spoke in terms that made clear how much the language of debate had changed:

The principle is now as well established as any principle can be in the developing field of public law that where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised in accordance with natural justice, the court has jurisdiction to review the exercise of that power.¹⁶¹

¹⁵³ *R v Special Commissioners for Income Tax* (1888) 21 QBD 313, 317. Cf *R v Lords of the Treasury* (1872) LR 7 QB 387.

¹⁵⁴ *R v Home Secretary, ex p Phansopkar* [1976] QB 606.

¹⁵⁵ *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345.

¹⁵⁶ E.g. *R (A) v Lord Saville of Newdigate (No.2)* [2001] EWCA Civ 2048, [2002] 1 WLR 1249.

¹⁵⁷ *Mossell (Jamaica) Ltd v Office of Utilities Regulation* [2010] UKPC 1 at [44] (Lord Phillips); *Ahmed v HM Treasury* [2010] UKSC 5, [2010] 2 AC 534.

¹⁵⁸ Contrast *R v Dorking Justices, ex p Harrington* [1984] AC 743, 753 with *R v Hendon Justices, ex p DPP* [1994] QB 167, 178 and Lewis, *Judicial Remedies in Public Law*, p 229.

¹⁵⁹ *R v Paddington Rent Tribunal, ex p Bell Properties Ltd* [1949] 1 KB 666.

¹⁶⁰ E.g. *R v Hammersmith Coroner, ex p Peach* [1980] QB 211.

¹⁶¹ *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, 561.

In other words, if the power to make such decisions existed, no separate issue arose as to the availability of a remedy. These decisions concerned the exercise of statutory powers, but the supervisory jurisdiction extended also to prerogative powers and to certain regulatory powers, even if they did not derive from statute.¹⁶²

Injunctions¹⁶³

While the prerogative orders enabled the courts to exercise a supervisory jurisdiction over inferior tribunals and public authorities, the injunction is an equitable remedy available in all branches of law, public and private, to protect a person's rights against unlawful infringement. It is an order which may require or prohibit a person from doing something. Given the obvious overlap with the prerogative remedies, there are not many cases in which a final injunction is sought in judicial review proceedings.

Nonetheless, certain aspects of the law on injunctions may be noted. First, injunctions are not available against 'the Crown' as a legal entity, and they are not available in private law proceedings brought directly against the Crown.¹⁶⁴ In place of an injunction in private law proceedings against the Crown, the court may make an order declaring the rights of the parties, and if necessary the court may grant an interim declaration, which the Crown would be expected to observe.¹⁶⁵ However, EU law may require injunctive relief to be available against the Crown.¹⁶⁶ In 1994, the House of Lords cut down the immunity of the Crown as an entity by holding that an injunction may be issued in judicial review proceedings against government departments, ministers and civil servants.¹⁶⁷

A second matter concerns the historic procedure known as the 'relator action'. This name was given to an action by a private person seeking an injunction on a matter of public right (such as a public nuisance caused by obstruction of a highway) in which he or she did not have a personal right or interest sufficient to sue in his or her name.¹⁶⁸ This difficulty was overcome by the Attorney General, as guardian of the public interest, consenting to his name being used as nominal plaintiff. Relator actions are now very rare indeed, mainly for the reason that judicial review will nearly always be available (by the usual procedure) whenever a claimant wishes to restrain unlawful action by a public authority. Relator actions have occasionally been used in a different way to enforce the criminal law, when existing penalties are inadequate to deter breaches of the law, for example when planning controls or fire precautions are ignored by those who find it profitable to break the law.¹⁶⁹ Another reason for the rarity of relator actions is that a local authority may under the Local Government Act 1972, s 222, institute proceedings in its own name when it considers it expedient to do so for promoting the interests of local inhabitants.¹⁷⁰ Significantly, there is no recorded instance of a relator action against a government department.

Finally, the High Court may grant an injunction to restrain a person from acting in an office to which he or she is not entitled and may declare the office to be vacant. This

¹⁶² Respectively *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; and *R v Panel on Take-overs, ex p Datafin plc* [1987] QB 815.

¹⁶³ Lewis, *Judicial Remedies in Public Law*, ch 8; Wade and Forsyth, *Administrative Law*, pp 474–480.

¹⁶⁴ Crown Proceedings Act 1947, s 21; ch 26 D.

¹⁶⁵ Civil Procedure Rules, r 25.1(1). For the former position, see *R v IRC, ex p Rossminster Ltd* [1980] AC 952.

¹⁶⁶ *R v Transport Secretary, ex p Factortame Ltd* [1990] 2 AC 85; (The same) (*No 2*) [1991] 1 AC 603.

¹⁶⁷ *M v Home Office* [1994] 1 AC 377.

¹⁶⁸ See *Benjamin v Storr* (1874) LR 9 CP 400; *Boyce v Paddington BC* [1903] 1 Ch 109; *Barrs v Bethell* [1982] Ch 294.

¹⁶⁹ *A-G v Bastow* [1957] 1 QB 514; *A-G v Harris* [1961] 1 QB 74; *A-G v Chaudry* [1971] 3 All ER 938.

¹⁷⁰ *Stoke-on-Trent Council v B & Q (Retail) Ltd* [1984] AC 754; *Kirklees Council v Wickes Building Supplies Ltd* [1993] AC 227. And see B Hough [1992] PL 130.

procedure takes the place of the ancient process of an information in the nature of a writ of *quo warranto*.¹⁷¹

Declaratory judgments¹⁷²

A declaratory judgment is one which merely declares the legal relationship of the parties and is not accompanied by any sanction or means of enforcement. The authority of a court's ruling on law is such that a declaratory judgment will normally be enough to restrain both the Crown and public authorities from illegal conduct. Under the Civil Procedure Rules, r 40.20: 'The courts may make binding declarations whether or not any other remedy is claimed.' A declaration may be granted when a prerogative remedy would not be.¹⁷³

It is convenient in some public law disputes for the law to be determined in relation to particular facts without a need to seek a coercive remedy. An early example arose in *Dyson v Attorney-General*, where a taxpayer obtained a declaration against the Crown that the tax authorities had no power to request certain information from him on pain of a £50 penalty for disobedience.¹⁷⁴ The jurisdiction to grant declarations is as wide as the law itself, except that the judges may as a matter of discretion impose limits on its use. Thus an action for a declaratory judgment must be based on a concrete case which has arisen. The courts are reluctant to grant a bare declaration that can have no legal consequences¹⁷⁵ and will not give answers to hypothetical questions that have been raised in the absence of any genuine dispute about the subject matter.¹⁷⁶ However, courts have reviewed the legality of advisory guidance that in itself has no legal effect.¹⁷⁷ The courts have been understandably reluctant to be forced into making a declaration on matters of high policy about which there is much controversy; for example, a declaration that the invasion of Iraq in 2003 was unlawful in international law was refused as contrary to the public interest.¹⁷⁸

The court will not give a declaratory opinion in civil proceedings as to a matter that is in issue in concurrent criminal proceedings¹⁷⁹ and, even at the request of the Attorney General, will not grant a declaration that conduct would be criminal except in a very clear case.¹⁸⁰ Where a statute both creates a duty and provides the procedure for enforcing it, this may exclude declaratory proceedings.¹⁸¹ But the existence of a statutory procedure for obtaining a decision on whether planning permission was needed did not prevent a landowner from coming to court for a declaration as to the extent of existing development rights.¹⁸²

The Human Rights Act 1998, by enlarging the jurisdiction of the courts in protecting European Convention rights, has necessarily broadened the potential scope of declaratory

¹⁷¹ Senior Courts Act 1981, s 30; cf Local Government Act 1972, s 92.

¹⁷² Lewis, *Judicial Remedies in Public Law*, ch 7; Zamir and Woolf, *The Declaratory Judgment*.

¹⁷³ *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1; Senior Courts Act 1981, s 31(2).

¹⁷⁴ [1912] 1 Ch 158.

¹⁷⁵ *Maxwell v Dept of Trade* [1974] QB 523.

¹⁷⁶ *R (Rusbridger) v A-G* [2003] UKHL 38, [2004] 1 AC 357.

¹⁷⁷ E.g. *Gillick v West Norfolk Health Authority* [1986] AC 112. In 1994, the Law Commission recommended that the High Court be authorised in its judicial review jurisdiction to make advisory declarations on points of general importance: Law Com No 226, pp 74–6. And see J Laws (1994) 57 MLR 213.

¹⁷⁸ *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin).

¹⁷⁹ *Imperial Tobacco Ltd v A-G* [1981] AC 718.

¹⁸⁰ *A-G v Able* [1984] QB 795. Special considerations arise in medical cases where a patient cannot consent to treatment: e.g. *F (Mental Patient: Sterilisation)* [1990] 2 AC 1; *Airedale NHS Trust v Bland* [1993] AC 789; cf *R (Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800.

¹⁸¹ *Barraclough v Brown* [1897] AC 615.

¹⁸² *Pyx Granite Co Ltd v Ministry of Housing* [1960] AC 260.

judgments. A special feature of the Act is the power that it gives to a superior court to declare that a statutory provision that cannot be interpreted in a way that is consistent with a Convention right is incompatible with the right. A ‘declaration of incompatibility’ of this kind has distinctive features that do not apply to the declaratory judgments discussed above. In particular, unlike the more usual form of declaratory judgment, a declaration of incompatibility does not affect the validity, operation or enforcement of the statutory provision to which it relates, and it ‘is not binding on the parties to the proceedings in which it is made’.¹⁸³ These unusual limitations do not apply when the court gives a declaratory judgment in customary form regarding the powers of a public authority, in a case that does not require the court to rule on the compatibility of primary legislation with Convention rights.

Habeas corpus¹⁸⁴

The prerogative writ of habeas corpus is in English law an important remedy in respect of public or private action which takes away individual liberty. It was formerly used as the means of securing judicial control of executive acts in extradition law,¹⁸⁵ and it is still used to a lesser extent in other areas involving detention, such as immigration control,¹⁸⁶ mental health,¹⁸⁷ child care¹⁸⁸ and criminal procedure.¹⁸⁹ Unlike the prerogative orders, the writ has not been the subject of recent legislative reform. The writ originally enabled a court of common law to summon persons whose presence was necessary for pending proceedings. In the 15th and 16th centuries, King’s Bench and Common Pleas used habeas corpus to assert their authority over rival courts and to release persons imprisoned by such courts in excess of their jurisdiction. In the 17th century, the writ was used to check arbitrary arrest by order of the King or the King’s Council.¹⁹⁰

It was of the essence of habeas corpus that it was a procedure by which the court could determine the legality of an individual’s detention, effectively and without delay. Habeas Corpus Acts were enacted in 1679, 1816 and 1862,¹⁹¹ not to widen the jurisdiction of the courts but to enhance the effectiveness of the writ and to ensure that applications were dealt with promptly. Thus the 1679 Act prohibited evasion of habeas corpus by transfer of prisoners detained for ‘any criminal or supposed criminal matter’ to places outside the jurisdiction of the English courts on pain of heavy penalties. The 1816 Act gave the judge power in civil cases to inquire summarily into the truth of the facts stated in the gaoler’s return to the writ, even though the return was ‘good and sufficient in law’.¹⁹² The 1862 Act provided that the writ was not to issue from a court in England into any colony or foreign dominion of the Crown where there were courts having authority to grant habeas corpus. Detention within Northern Ireland and Scotland is a matter for the courts in those jurisdictions.¹⁹³

¹⁸³ Human Rights Act 1998, s 4(5).

¹⁸⁴ See Farbey, Sharpe and Atrill, *The Law of Habeas Corpus*; Clark and McCoy, *The Most Fundamental Legal Right*; Lewis, *Judicial Remedies in Public Law*, ch 12. See also S Brown [2000] PL 31.

¹⁸⁵ On the exclusion of habeas corpus by the Extradition Act 2003, see *R (Hilali) v Governor of Whitmoor Prison* [2008] UKHL 3, [2008] AC 805.

¹⁸⁶ E.g. *R v Durham Prison (Governor), ex p Hardial Singh* [1984] 1 All ER 983; and *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

¹⁸⁷ E.g. *Re S-C (mental patient)* [1996] QB 599; *GD v Edgware Community Hospital* [2008] EWHC 3572 (Admin).

¹⁸⁸ *LM v Essex CC* (1999) 1 FLR 988.

¹⁸⁹ *R (Bentham) v Governor of Wandsworth Prison* [2006] EWHC 121 (QB).

¹⁹⁰ For *Darnel’s* case and the Petition of Right, see ch 10 D.

¹⁹¹ For the detail, see Taswell-Langmead, *English Constitutional History*, pp 432–6.

¹⁹² See e.g. *R v Board of Control, ex p Rutty* [1956] 2 QB 109.

¹⁹³ *Re Keenan* [1972] 1 QB 533; *Re McElduff* [1972] NILR 1; *R v Cowle* (1759) 2 Burr 834, 856.

Habeas corpus is described as a writ of right which is granted *ex debito justitiae*. This means that a prima facie case must be shown before it is issued but, unlike the prerogative orders, it is not a discretionary remedy and it may not be refused merely because an alternative remedy exists.¹⁹⁴ Habeas corpus is a remedy against *unlawful* detention: thus it enabled the court to decide whether a profoundly retarded and autistic person incapable of giving consent could be detained under the Mental Health Act 1983 without an order being made for compulsory detention.¹⁹⁵ This decision concerned the limits of a hospital trust's statutory powers of detention. It is more difficult to know whether habeas corpus is a remedy for correcting every error made by a body with power to detain.

Certainly, the writ does not provide a right of appeal for those detained by order of a court or tribunal. It might be supposed that habeas corpus lies whenever there are grounds for judicial review of a decision to detain someone, but the position is much less clearcut than this. Indeed, the reforms in judicial review procedure that we have considered in this chapter did not apply to habeas corpus, and the two procedures remain separate. In *Rutty's* case,¹⁹⁶ the High Court, acting under the Habeas Corpus Act 1816 to examine the truth of the facts stated in the return, held that there had been no evidence before the magistrate eight years earlier to justify an order that an 18-year-old woman with learning difficulties be detained. But in a line of immigration cases during the 1970s, the courts were most reluctant to make effective use of habeas corpus as a means of reviewing executive decisions, for example in the case of someone about to be removed from the country as an illegal entrant.¹⁹⁷ We have seen that in *Khawaja's* case the House of Lords reversed this trend.¹⁹⁸

During the 1990s, the Court of Appeal distinguished between the scope of habeas corpus and the grounds of judicial review, holding that habeas corpus could mount a challenge to the jurisdiction or vires of a detention decision, but not if the decision was 'within the powers' of the decision-maker yet was defective for reasons such as procedural error, mistake of law, or unreasonableness. The reason given for this limitation on habeas corpus was that, in the latter class of cases, the decision was lawful until it had been quashed.¹⁹⁹ However, this approach seems deeply flawed: it is based on an outdated distinction (between 'errors as to jurisdiction' and 'errors within jurisdiction') which has ceased to apply in judicial review generally. It is now settled that breaches of natural justice, errors of law and so on cause a decision to be ultra vires:²⁰⁰ how then can such a decision be held to be 'within powers' in the law of habeas corpus? When individual liberty is at stake, it would be unjust for the court to refuse habeas corpus to someone who had shown that the decision to detain him or her was ultra vires but first required to be quashed by certiorari: to avoid the injustice, the court would need to grant the detainee permission to apply for judicial review and to quash the decision concerned forthwith. Although this approach has been authoritatively criticised for eroding habeas corpus,²⁰¹ it was applied in 1996 where young persons had been wrongly imprisoned for non-payment of fines, and the court held that their detention could be challenged by judicial review, but not by habeas corpus.²⁰²

¹⁹⁴ *R v Governor of Pentonville Prison, ex p Azam* [1974] AC 18, 31 (CA).

¹⁹⁵ *R v Bournemouth NHS Trust, ex p L* [1999] 1 AC 458.

¹⁹⁶ Note 192 above.

¹⁹⁷ The decisions include *R v Home Secretary, ex p Mughal* [1974] 1 QB 313 and *R v Home Secretary, ex p Zamir* [1980] AC 930. And see C Newdick [1982] PL 89.

¹⁹⁸ *R v Home Secretary, ex p Khawaja* [1984] AC 74 and ch 26 A.

¹⁹⁹ *R v Home Secretary, ex p Cheblak* [1991] 2 All ER 319; *R v Home Secretary, ex p Muboyayi* [1992] 1 QB 244.

²⁰⁰ See *Ridge v Baldwin* [1964] AC 40; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Hull University Visitor, ex p Page* [1993] AC 682.

²⁰¹ Law Commission, Law Com No 226, part XI; H W R Wade (1997) 113 LQR 55. Also A Le Sueur [1992] PL 13; M Shrimpton [1993] PL 24.

²⁰² *R v Oldham Justices, ex p Cawley* [1997] QB 1. And see S Brown [2000] PL 31. Cf *Re S-C (mental patient)* [1996] QB 599 (habeas corpus granted when social worker's application for S-C's detention was untruthful).

This uncertainty affecting habeas corpus is reflected in case law at Strasbourg: the European Court of Human Rights held in the case of a mental patient that habeas corpus did not enable the English court to determine both the substantive and formal legality of the detention,²⁰³ but reached the opposite conclusion in the case of persons suspected of terrorist offences.²⁰⁴ By art 5(4) ECHR, every person who is detained is entitled to take proceedings by which the lawfulness of the detention is decided speedily by a court, and release is ordered if the detention is unlawful. This is one of the most fundamental of all human rights and art 5(4) is known in Europe as ‘the habeas corpus provision’.²⁰⁵ The awkward interface that has developed in English law between habeas corpus and judicial review needs to be resolved.²⁰⁶ One possible reform would be to amend the Senior Courts Act 1981, s 31, to add an order of habeas corpus to the forms of relief that may be granted on judicial review, and this would leave intact the law on the writ of habeas corpus. In practice, it is already possible for an applicant to apply both for habeas corpus and, in the alternative, by judicial review for a mandatory order directing release on conditions.²⁰⁷

One consequence at a global level of the fears for national security arising from the 11 September attacks on the USA in 2001 is the practice of ‘extraordinary rendition’, by which persons suspected of links with terrorism are transferred between states and may be held for years without trial. The ancient process of habeas corpus has been invoked both in the USA²⁰⁸ and in the United Kingdom in attempts to subject rendition to the rule of law. In *Rahmatullah v Foreign Secretary* a citizen of Pakistan had in February 2004 been detained by British forces serving in Iraq.²⁰⁹

He was handed over to American forces and taken to the Bagram airbase in Afghanistan, where he was detained. In 2010, a US review board determined that he was not ‘an enduring security threat’ and that he should be released to Pakistan. But by October 2012, he was still detained. On Rahmatullah’s behalf, habeas corpus was sought in the English courts against the British Foreign and Defence Secretaries; it was argued that his detention was unlawful and that the Government retained had a sufficient degree of control over him to secure his release. This degree of control arose from a Memorandum of Understanding between the US, UK and Australian governments in 2003 which stated that transfer of prisoners of war and civilian detainees between the three states must comply with the relevant Geneva Conventions; it provided that someone such as Rahmatullah, detained by UK forces, ‘will be returned’ by the US to the UK ‘without delay upon request’ by the UK.

The Supreme Court held unanimously that there was prima facie evidence that Rahmatullah was illegally detained and that, even though the Secretaries of State did not have physical control of him, there were grounds on which they could claim to assert control, such that there was a reasonable prospect that they could produce him to the court. These grounds arose from the Memorandum of Understanding in 2003 and the UK’s obligations under the Geneva Conventions. For the court to order the Secretaries of State to make a return to the writ of habeas corpus did not involve the court in intruding upon issues of

²⁰³ *X v UK* (1981) 4 EHRR 188.

²⁰⁴ *Brogan v UK* (1988) 11 EHRR 117.

²⁰⁵ Harris, O’Boyle and Warbrick, *Law of the ECHR*, pp 182–96.

²⁰⁶ See e.g. *B v Barking, Havering and Brentwood NHS Trust* (1999) 1 FLR 106; *Sheikh v Home Secretary* [2001] ACD 93; and O Davies [1997] JR 11.

²⁰⁷ See *R (A and others) v Home Secretary* [2007] EWHC 142 (Admin).

²⁰⁸ See *Boumediene v Bush* (2008) 553 US 723.

²⁰⁹ [2012] UKSC 48, [2013] 1 AC 614; H. Hooper [2013] PL 213.

foreign policy and diplomacy. However, it was also held (by 5 to 2) that a sufficient return to the writ had already been made by the Secretaries of State, as they had made clear the US view that the continued detention was lawful and that if he were to be released, he would be released to Pakistan. Lady Hale and Lord Carnwath dissented: in their view, the strength of habeas corpus is its simplicity; if Rahmatullah had not been handed over to the US forces, he would have been released long ago. ‘Where liberty is at stake, it is not the court’s job to speculate as to the political sensitivities which may be in play’.²¹⁰ In this minority view, the Secretaries of State should be ordered to request the US authorities to transfer Rahmatullah back to UK custody, in conformity with the Memorandum of Understanding of 2003.

The outcome was that the UK courts, whilst reinvigorating habeas corpus in theory, provided no tangible support for someone detained without trial for over 8 years, most of that time outside the UK’s jurisdiction. A key question not addressed in the judgments is how the Memorandum of Understanding could create rights and obligations in the absence of an Act of Parliament to give it the force of law. But the judges must have had in mind the Geneva Conventions Act 1957, s 1, that makes a grave breach of the relevant Conventions a criminal offence.

Normally the applicant for habeas corpus will be the person detained, but a relative or other person may apply on his or her behalf if the detainee cannot do so. Application is made to the High Court *ex parte* (that is, without the other side being heard) supported by an affidavit or statement of fact.²¹¹ If prima facie grounds are shown, the court ordinarily directs that notice of motion be given to the person having control of the person detained (for example, a prison governor) but notice may also be served on a minister (for example, the Home Secretary) who is responsible for the detention and who may file evidence in reply. On the day named, the merits of the application will be argued. If the court decides that the writ should issue, it orders the prisoner’s release forthwith. Under this practice the respondent need not produce the prisoner in court at the hearing: exceptionally, an applicant may be allowed to present his or her case in person.²¹² No return to the writ is made as the writ itself has not been issued. In exceptional cases the court may order the issue of the writ on the *ex parte* application if, for example, the detainee is at risk of being taken outside the jurisdiction. Disobedience to the writ is punishable by fine or imprisonment for contempt of court, and there may be penalties under the Act of 1679. Officers of the Crown are subject to the writ.²¹³

Remedies in Scots administrative law²¹⁴

The prerogative orders were never part of Scots law, except to the extent that they were introduced into Scotland by legislation for the purposes of revenue law, nor did a separate court of equity develop in Scotland. Apart from statutory remedies like the six-week right to challenge a compulsory purchase order, which apply both in Scotland and England, administrative law remedies in Scotland are essentially the same remedies as are available in private law to enforce matters of civil obligation. The most important of these remedies (which are now available subject to procedural changes made in 1985 and subsequently) are (a) the ancient remedy of *reduction*, by which any document (including decisions of tribunals, local by-laws, the dismissal of public servants and disciplinary decisions) may be quashed as being in excess of jurisdiction, in breach of natural justice or in other ways contrary to

²¹⁰ [2012] UKSC 48, [2013] 1 AC 614 at [121], [129].

²¹¹ RSC, Ord 54 (kept in being by the Civil Procedure Rules).

²¹² *Re Wring* [1960] 1 All ER 536. And see *M v Home Office* [1994] 1 AC 377.

²¹³ *Re Thompson* (1889) 5 TLR 565; *Secretary of State v O’Brien* [1923] AC 603.

²¹⁴ *Stair Encyclopedia of the Laws of Scotland*, vol I, reissue, part 4; C M G Himsworth, in Supperstone, Goudie and Walker (eds), *Judicial Review*, ch 21; Clyde and Edwards, *Judicial Review*, part 5.

law;²¹⁵ (b) the no less ancient remedy of *declarator*, from which the English declaration of right was derived; (c) the remedies of *suspension* and *interdict*, which together serve broadly the same purposes as prohibition and injunction in English law; (d) the action for damages for breach of civil obligation; and (e) a summary remedy to enforce performance of statutory duties, comparable with but not identical to *mandamus*.²¹⁶ By contrast with the former English law, all relevant forms of relief may be sought in the same proceedings.²¹⁷

Several differences from English law may be noted. First, it was established in *Watt v Lord Advocate* that while the remedy of reduction may be used to quash decisions of tribunals which are in excess of their jurisdiction, it is not available to review errors of law made by a tribunal within jurisdiction.²¹⁸ However, the Supreme Court has recently overturned *Watt* as inconsistent with the decision in *Anisminic Ltd v Foreign Compensation Commission*²¹⁹ holding that there is, in principle, no difference between the law of England and Scots law as to the substantive grounds on which a decision by a tribunal which acts within its jurisdiction may be open to review.²²⁰

Second, in Scots law there has traditionally been a strict approach to standing, requiring the claimant to show ‘title and interest’ to sue.²²¹ This was the subject of considerable criticism by comparison to the more relaxed English test,²²² and in *AXA General Insurance Ltd v Lord Advocate* the Supreme Court held that ‘title and interest’ had no place in public law proceedings. Instead the concept of standing should be based on whether there was a sufficient interest, in the sense of a person being directly affected, grounded in the concept of interests rather than rights.²²³

Third, difficult situations brought about by official failures may sometimes be resolved by the power of the Court of Session to exercise an extraordinary equitable jurisdiction in the form of the *nobile officium* of the court.²²⁴

Since 1985 Scotland has had a procedure of application for judicial review, which shares a name with but is different from the English model. Rules of court²²⁵ established a procedure of petition, known as an application for judicial review, which *must* be used whenever an application is made to the supervisory jurisdiction of the Court of Session for one or more of the remedies mentioned earlier. The rules are intended to provide for the rapid handling of every application, with the main steps being under the control of individual judges designated for the purpose. The leave of the court is not required for an application, but an application without any merits may sometimes be briskly rejected. Although the rules impose no time limit on petitions for judicial review, under general principles of Scots law a petition may fail on a plea of *mora* (delay), taciturnity and acquiescence.²²⁶

²¹⁵ See e.g. *Malloch v Aberdeen Corpn* [1971] 2 All ER 1278; *Barrs v British Wool Marketing Board* 1957 SC 72.

²¹⁶ Court of Session Act 1988, s 45(b); *T Docherty Ltd v Burgh of Monifieth* 1971 SLT 12. Other remedies include an order *ad factum praestandum* (for performance of a specific duty) and a decree of repetition (that could for instance issue to recover money paid over in response to an ultra vires demand).

²¹⁷ E.g. *Macbeth v Ashley* (1874) LR 2 HL (Sc) 352.

²¹⁸ 1979 SC 120.

²¹⁹ [1969] 2 AC 147. Also *Stair Encyclopedia*, paras 45, 47–50; Clyde and Edwards, pp 597–603.

²²⁰ *Eba v Advocate General for Scotland* [2011] UKSC 29, [2012] 1 AC 710.

²²¹ *D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7.

²²² See Lord Hope [2001] PL 294, discussing *Rape Crisis Centre v Home Secretary* 2000 SC 527 (petitioners had no title to review Home Secretary’s decision to admit an American boxer and convicted rapist to fight in Glasgow).

²²³ [2011] UKSC 46, [2012] 1 AC 868 at [62]–[63] (Lord Hope) and [169]–[170] (Lord Reed).

²²⁴ *Ferguson, Petitioners* 1965 SC 16.

²²⁵ See now Rules of the Court of Session, ch 58.

²²⁶ *Stair Encyclopedia*, para 121; see *Hanlon v Traffic Commissioners* 1988 SLT 802; *Uprichard v Fife Council* 2000 SCLR 949; and *Somerville v Scottish Ministers* [2006] CSIH 52, 2007 SLT 96, [90]–[94].

One problem that has arisen is that the ‘supervisory jurisdiction’ of the Court of Session is not defined in legislation, though it has often been described in judgments.²²⁷ It cannot be defined by reference to the remedies that may be granted on a successful application for judicial review since those remedies are available throughout the civil law. The Court of Session in *West v Secretary of State for Scotland*²²⁸ robustly rejected the public/private law distinction. It held that the court has power under its supervisory jurisdiction ‘to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument’, in particular where there was a ‘tripartite relationship’ between the decision-maker, the individual affected and the person or body from whom the power to decide was derived. The court’s approach to jurisdiction was based on an analysis of the process of decision-making and its review. Later judgments have doubted whether a ‘tripartite relationship’ is always essential.²²⁹ Since there is no divergence between the substantive grounds of judicial review in English and Scots law, *West* may enable the Scottish courts to apply supervisory jurisdiction to regulatory and similar powers of private organisations, when in English law this would be impeded by the private/public distinction.

In 2013 the Scottish Government commenced a process of consultation on the Courts Reform (Scotland) Bill, which proposed that a time limit of three months for seeking judicial review should be introduced and that a petitioner for review should have to obtain leave to proceed from a judge after the respondent has had a chance to oppose the granting of leave. If enacted, the Scottish judicial review procedure will be broadly the same as in England.

E. Conclusion

If, as we saw in the previous chapter, judicial review is about ensuring standards of fairness and legality, the application of the procedural and remedial rules of judicial review is much less straightforward to summarise. Procedure can involve difficult issues in all areas of the law, but in administrative law access to the courts is surprisingly theoretical. Procedural exclusivity and the exclusion of judicial review by statute are areas upon which books can be (and have been) written.

Much of the conceptual difficulty stems from the piecemeal evolution of administrative law over the last century. The historical background to judicial review as a cause of action in part explains why, as judicial review began to grow in the 1960s and 1970s, much judicial ink was spilt in reconciling old restrictive doctrines with a new and growing desire to hold the executive to account.

One theme that can be extracted is that many of the technical rules are interpreted broadly by the courts so as to ensure good challenges are not lost. The rules of standing and time limits are classic examples of control mechanisms which the courts are willing to adjust as necessary in the circumstances of particular cases.

The discretionary award of remedies is another. The old prerogative writs are now a matter of legal history, but their origins explain the oddities of when they can be used and why, even now, judicial review is unique in that a case can be won but no remedy awarded. The range of remedies has increased under the CPR procedure, but administrative lawyers await the next major remedial development: the grant of damages for breach of administrative law.

²²⁷ E.g. *Moss Empires Ltd v Glasgow Assessor* 1917 SC (HL) 1.

²²⁸ 1992 SLT 636. See W J Wolffe [1992] PL 625; *Stair Encyclopedia*, para 115; Clyde and Edwards, *Judicial Review*, pp 344–7.

²²⁹ See *Naik v Stirling University* above; *McIntosh v Aberdeenshire Council* 1999 SLT 93, 97; and cf *Blair v Lochaber Council* 1995 SLT 407.

CHAPTER 26

Liability of public authorities

In chapters 24 and 25, we examined the law that enables the courts to review the decisions of public authorities on grounds such as ultra vires, error of law and breach of natural justice. We now consider the position of public authorities in relation to civil liability.¹ In principle, public authorities in English law are subject to the same rules of liability in tort and contract as apply to private individuals. There is no separate law of administrative liability for wrongful acts.² However, to maintain public services and perform regulatory functions, public authorities require powers which are not available to private individuals. Many public works, such as motorways and power stations, could not be created unless there was power in the public interest to override private rights that might be affected. Parliament legislates to enable public authorities to intervene in private economic activities through regulation or licensing, and in private and family life in the interests of protecting children, the mentally ill and other vulnerable persons. Such powers are often accompanied by statutory protection against liability.

At several points in this chapter, the position of the Crown will be examined. In the past, important distinctions were drawn between (a) the Crown, including departments of central government, and (b) other public bodies, such as local authorities and statutory corporations. While many of these distinctions have been removed, notably by the Crown Proceedings Act 1947, others remain in being. This chapter deals, in section A, with the liability of public authorities and the Crown in tort and, in section B, with contractual liability. Section C briefly outlines the application of the law of restitution to public authorities, and section D deals with other aspects of the law relating to the Crown, including procedural immunities and privileges and the growing use of closed material procedures.

As with many aspects of public law, the liability of public authorities has been much affected by European law. The liability of EU organs under art 240 TFEU to compensate for serious breaches of EU law that they commit is paralleled by the duty of member states ‘to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible’,³ for example by failure to implement an EU directive. We have already seen the impact of EU law on the supremacy of Parliament that was manifest in the *Factortame* litigation concerning the Merchant Shipping Act 1988, enacted to protect British fishing interests.⁴ Later in the same affair, the House of Lords held, after analysing the decision-making that lay behind the 1988 Act, that the Act was a ‘sufficiently serious infringement’ of EU law to justify the award of compensatory damages.⁵ The

¹ Wade and Forsyth, *Administrative Law*, chs 20, 21; Craig, *Administrative Law*, chs 29, 30; Hogg, Monahan and Wright, *Liability of the Crown*; Harlow, *State Liability – Tort Law and Beyond*; Fairgrieve, *State Liability in Tort*; Fairgrieve, Andenas and Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective*; Kneebone, *Tort Liability of Public Authorities*; Cornford, *Towards a Public Law of Tort*; Lewis, *Judicial Remedies in Public Law*, ch 14.

² As was stressed in Dicey’s account of the ‘rule of law’: ch 4.

³ *Cases C-6/90 and C-9/90, Francovich v Italy* [1991] I-ECR 5357, para 37. Also *Cases C-46/93, Brasserie du Pêcheur SA v Germany* and *C-48/93, R v Transport Secretary, ex p Factortame Ltd* [1996] ECR I-1029; P Craig (1993) 109 LQR 595 and (1997) 113 LQR 67; and C Lewis, in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord*, p 319.

⁴ See ch 6 C.

⁵ *R v Transport Secretary, ex p Factortame Ltd (No 5)* [2000] 1 AC 524.

criteria which led to this decision were derived from EU law, which requires, for a finding that a breach is ‘sufficiently serious’, that a member state has ‘manifestly and gravely disregarded the limits on the exercise of its discretion’. But the procedural aspects of such a claim in damages may be governed by national law, provided that this does not discriminate against EU law and does not prevent individuals from enforcing their European rights.⁶ State liability may arise under EU law even for decisions of the highest national courts.⁷

In respect of human rights, by art 41 ECHR, where a Convention right has been violated and national law does not allow full reparation to be made, the Strasbourg Court ‘shall, if necessary, afford just satisfaction to the injured party’, by requiring the state to pay compensation. We will consider below the manner in which the Human Rights Act 1998 makes it possible to obtain such compensation in national courts.

The impact of the new rules in EU and human rights law is being felt at a time when key principles of the liability of public authorities in the United Kingdom are in a volatile state. In 2004, Lord Steyn made comments on the law on negligence and statutory duties that apply generally to the law of state liability:

This is a subject of great complexity and very much an evolving area of law. No single decision is capable of providing a comprehensive analysis. It is a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary. On the one hand, the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice . . .⁸

The evolving nature of the law is seen in decisions by the highest courts including four that Lord Steyn described as ‘milestone’ decisions.⁹ No more than an outline of the main aspects of the law can be given here.

A. Liability of public authorities and the Crown in tort

Individual liability

In the absence of statutory immunity, every person is liable for wrongful acts that he or she commits and for omissions that give rise to actions in tort at common law or for breach of statutory duty. This applies even if an officer representing the Crown claims to be acting out of executive necessity.

In *Entick v Carrington*¹⁰ the King’s Messengers were held liable in an action of trespass for breaking and entering the plaintiff’s house and seizing his papers, even though they were acting in obedience to a warrant issued by the Secretary of State. This was in law no defence as the Secretary had no legal authority to issue such a warrant.

⁶ See e.g. rejection of the EU law claim in *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1.

⁷ See e.g. *Case C-224/01, Köbler v Austrian Republic* [2004] QB 848. No English case has yet held the State liable for a decision of the English courts. The closest so far has been *Cooper v Attorney General* [2010] EWCA Civ 464, [2011] QB 976.

⁸ *Gorringe v Calderdale Council* [2004] UKHL 15, [2004] 2 All ER 326, para [2].

⁹ *X v Bedfordshire CC* [1995] 2 AC 633; *Stovin v Wise* [1996] AC 923; *Barrett v Enfield Council* [2001] 2 AC 550; and *Phelps v Hillingdon Council* [2001] 2 AC 619.

¹⁰ (1765) 19 St Tr 1030; ch 4 A.

Obedience to orders is not normally a defence whether the orders are those of the Crown, a local authority,¹¹ a company or an individual employer.¹² The principle that superior orders are no defence to an action in tort would, if unqualified, have placed too heavy a burden on many subordinate officials. At common law an officer of the court, such as a sheriff, who executes an order of the court is protected from personal liability unless the order is on its face clearly outside the jurisdiction of the court.¹³ Moreover, it has been found necessary to provide protection for certain classes of official. Thus some statutes exempt officials from being sued in respect of acts done bona fide in the course of duty.¹⁴ The Constables Protection Act 1750 protects constables who act in obedience to the warrant of a magistrate, though the magistrate acted without jurisdiction in issuing the warrant. The Mental Health Act 1983, s 139, affords constables and hospital staff protection against civil and criminal liability in respect of acts such as the compulsory detention of a mental patient, unless the act was done in bad faith or without reasonable care.¹⁵ The liability of individual officials will therefore turn both on the powers which they may exercise and on their privileges and immunities. But no general immunity is enjoyed by officers or servants of the Crown.¹⁶

Vicarious liability of public authorities

The individual liability of public officials was historically important in establishing that public authorities were themselves subject to the law, but individual liability is not today a sufficient basis for the liability of large organisations, whether in the private or public sectors. It is now essential to be able to sue an individual's employer, if only because the employer is a more substantial defendant: a successful claimant wants the certainty of knowing that any damages and costs awarded will in fact be paid.

In cases not involving the Crown, it has long been the law that a public authority is, like any other employer, liable for the wrongful acts of its servants or agents committed in the course of their employment. It was established in 1866 that the liability of a public body whose servants negligently execute their duties is identical with that of a private trading company.

In *Mersey Docks and Harbour Board Trustees v Gibbs*,¹⁷ a ship and its cargo were damaged on entering a dock by reason of a mud bank left negligently at the entrance. The trustees were held liable and appealed to the House of Lords on the ground that they were not a company deriving benefit from the traffic, but a public body of trustees constituted by Parliament for the purpose of maintaining the docks. That purpose involved authority to collect tolls for maintenance and repair of the docks, for paying off capital charges and ultimately for reducing the tolls for the benefit of the public. It was held that these public purposes did not absolve the trustees from the duty to take reasonable care that the docks were in such a state that those who navigated them might do so without danger.

¹¹ *Mill v Hawker* (1875) LR 10 Ex 92.

¹² For the position of the armed forces, see ch 20.

¹³ *The Case of the Marshalsea* (1613) 10 Co Rep 76a.

¹⁴ E.g. Public Health Act 1875, s 265; Financial Services and Markets Act 2000, s 222; Banking Act 2009, s 244.

¹⁵ The leave of the court is required to bring proceedings: s 139(2). That threshold is a low one and is to be interpreted in accordance with the claimant's Convention rights: *DD v Durham County Council* [2011] EWCA Civ 96; *Seal v Chief Constable of South Wales* [2007] UKHL 31, [2007] 4 All ER 177; and *TTM v Hackney London Borough Council* [2011] EWCA Civ 4, [2011] 1 WLR 2873.

¹⁶ The suggestion to the contrary in *R v Transport Secretary, ex p Factorame Ltd* [1990] 2 AC 85, 145 was rightly disapproved in *M v Home Office* [1994] 1 AC 377. And see *D v Home Office* [2005] EWCA Civ 38, [2006] 1 All ER 183.

¹⁷ (1866) LR 1 HL 93 (discussed in Kneebone (note 1 above), ch 2).

In spite of the argument that a corporation should not be liable for a wrongful act, since a wrongful act must be beyond its powers, a corporation is, like any other employer, liable for the torts of its employees acting in the course of their employment. There must be a relationship between the tortfeasor and the party said to be vicariously liable capable of triggering the doctrine, and the tort committed must be connected with that relationship.¹⁸ Where a prisoner is ill-treated by prison officers, the Home Office may be vicariously liable even if those acts amount to misfeasance in public office, when the ill-treatment is a misguided or unauthorised method of performing their duties.¹⁹ An exception to vicarious liability may arise when an official, although appointed and employed by a local authority, carries out functions under the control of a central authority or in the exercise of a distinct public duty imposed by the law.²⁰ There was formerly no vicarious liability in respect of police officers, but the chief constable is now liable for their acts committed in the performance of their functions.²¹

Tort liability of the Crown

Until 1948 there were two main rules which governed the liability of the Crown: (a) the rule of substantive law that the King could do no wrong; (b) the procedural rule derived from feudal principles that the King could not be sued in his own courts. The survival of these rules into modern times meant that before 1948 the Crown could be sued neither in respect of wrongs that had been expressly authorised nor in respect of wrongs such as negligence committed by Crown servants in the course of their employment.²² Nor were government ministers vicariously liable for the staff in their departments, since in law ministers and civil servants are alike servants of the Crown.²³ The law was at last placed on a new basis by the Crown Proceedings Act 1947.

With important exceptions, this Act (which applies only to proceedings by and against the Crown ‘in right of Her Majesty’s Government in the United Kingdom’)²⁴ established the principle that the Crown is subject to the same liabilities in tort as if it were a private person of full age and capacity in respect of (a) torts committed by its servants or agents, (b) the duties which an employer at common law owes to his or her servants or agents, and (c) any breach of the common law duties of an owner or occupier of property (s 2(1)). The Crown is thus vicariously liable for the torts of its servants or agents.

The Crown is also liable for breach of a statutory duty, provided that the statute is one which binds the Crown as well as private persons (s 2(2)), such as the Occupiers’ Liability Act 1984. The Act of 1947 imposes no liability enforceable by action in the case of statutory duties which bind only the Crown or its officers.

The 1947 Act elaborates the principle of Crown liability in some detail. Thus the Crown’s vicarious liability is restricted to the torts of its officers as defined (s 2(6)). This definition requires that the officer shall be (a) appointed directly or indirectly by the Crown and (b) paid

¹⁸ *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2012] 3 WLR 1319.

¹⁹ *Racz v Home Office* [1994] 2 AC 45; and p 708 below.

²⁰ *Stanbury v Exeter Corpn* [1905] 2 KB 838.

²¹ Police Act 1996, s 88; see also Police Reform Act 2002, s 47 (civilian staff); and ch 21 E.

²² See e.g. *Viscount Canterbury v A-G* (1842) 1 Ph 306 (negligence of Crown servants causing Houses of Parliament to burn down).

²³ *Raleigh v Goschen* [1898] 1 Ch 73; *Bainbridge v Postmaster-General* [1906] 1 KB 178. And see *M v Home Office* [1994] 1 AC 377, 408–9.

²⁴ S 40(2)(b), (c). See *Tito v Waddell (No 2)* [1977] Ch 106; *Mutasa v A-G* [1980] QB 114; *R v Foreign Secretary, ex p Indian Assn of Alberta* [1982] QB 892; and *R (Quark Fishing Ltd) v Foreign Secretary* [2005] UKHL 57, [2006] 1 AC 529.

in respect of his duties as an officer of the Crown at the material time wholly out of the Consolidated Fund,²⁵ moneys provided by Parliament or a fund certified by the Treasury. This excludes, for example, the police. There is no vicarious liability for officers acting in a judicial capacity or in execution of judicial process (s 2(5)),²⁶ or for acts or omissions of a Crown servant unless apart from the Act the servant would have been personally liable in tort (s 2(1)). The general law relating to indemnity and contribution applies to the Crown as if it were a private person (s 4). The Act does not authorise proceedings against the Sovereign in her personal capacity (s 40(1)) and does not abolish any prerogative or statutory powers of the Crown, in particular those relating to defence of the realm and the armed forces (s 11(1)).

Under the 1947 Act, there were formerly two exceptions from liability in tort. The first related to the armed forces. By s 10, neither the Crown nor a member of the armed forces was liable in tort in respect of acts causing death or personal injury which were committed by a member of the armed forces while on duty, where (a) the victim was a member of the armed forces on duty at the time or, if not on duty as such, was on any land, premises, ship, aircraft or vehicle being used for purposes of the armed forces and (b) the injury was certified by the Secretary of State as attributable to service for purposes of pension entitlement. This certificate did not guarantee an award of a pension unless the conditions for entitlement were fulfilled.²⁷ There certainly must be a public scheme for compensating members of the armed forces who suffer injury or death during their service. But should this exclude the right to sue for common law damages? In 1987, Parliament legislated to put into suspense s 10 of the 1947 Act.²⁸ Section 10 can be revived if it appears to the Secretary of State necessary or expedient to do so, for example by reason of imminent national danger or for warlike operations outside the United Kingdom. Until it is so revived, and it was not as regards operations in Iraq and Afghanistan, members of the armed forces (and in the event of death, their dependants) may sue fellow members (and the Crown vicariously) in respect of injuries or death arising out of their service. When a soldier sued for personal injury caused during the Gulf operations in 1991 (for which s 10 was not revived), the Court of Appeal held that no duty of care was owed to him by his fellow soldiers during battle conditions, applying the defence of combat immunity on the basis that battlefield decisions are non-justiciable areas for the courts.²⁹ However, the Supreme Court, by a majority, refused to strike out claims brought by relatives of deceased soldiers who died in Iraq, allegedly due to negligent failures in the equipment they were provided. The Court held that combat immunity must be construed narrowly and that it did not extend to matters of planning and preparation long before hostilities began. The Court left open as a question for trial whether it would fair, just and reasonable to impose a duty of care on the Ministry of Defence in such circumstances.³⁰

²⁵ Ch 9 B.

²⁶ See *Jones v Department of Employment* [1989] QB 1 and *Welsh v Chief Constable of Merseyside* [1993] 1 All ER 692. For the position under the Human Rights Act 1998, s 9, see p 708 below. Also *I Olowofoyeku* [1998] PL 444. Cf the different approach in Community law: *Köbler v Austrian Republic* (above, note 7).

²⁷ *Adams v War Office* [1955] 3 All ER 245. On s 10, see also *Pearce v Defence Secretary* [1988] AC 755.

²⁸ Crown Proceedings (Armed Forces) Act 1987; see F C Boyd [1989] PL 237. The 1987 Act was not retrospective: *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163 (Crown's former immunity compatible with art 6(1) ECHR). See also National Audit Office, *Ministry of Defence Compensation Claims* (HC 957, 2002–3).

²⁹ *Mulcahy v Ministry of Defence* [1996] QB 732; and ch 16. On liability for off-duty activities, see *Ministry of Defence v Radclyffe* [2009] EWCA Civ 635.

³⁰ *Smith v Ministry of Defence* [2013] UKSC 41, [2013] 3 WLR 69. The Court also held, unanimously, that the ECHR did extend to actions of and affecting British armed forces serving abroad, following *Al-Skeini v UK* (2011) 53 EHRR 18 and overturning its own earlier judgment in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 AC 1.

The second exception from liability for tort formerly applied to the Post Office when it was a government department, for acts or omissions in relation to postal packets or telephonic communications (s 9). Nor was there any liability in contract.³¹ When the Post Office became a public corporation, the existing limitations on liability for postal and telephone services were continued.³²

Subject to these exceptions, the Crown Proceedings Act assimilated the tortious liabilities of the Crown to those of a private person. However, in many situations involving the potential liability of the government, the analogy of private liability is not directly helpful. Some claims against the Crown have been held to be non-justiciable,³³ but in general the courts seek to apply to governmental action rules derived from, for example, the common law of negligence.³⁴

Statutory authority as a defence

Where acts of a public body interfere with an individual's rights (whether these concern property, contract or liberty), those acts will be unlawful unless legal authority for them exists. Such authority may be found in legislation or in common law. Where Parliament expressly authorises something to be done, it cannot be wrongful to act in accordance with that authority. It will depend on the legislation whether compensation is payable for the rights which Parliament has authorised to be taken away. Construction of public works affecting private rights of property may be subject to detailed rules of compensation in the relevant legislation, but express provision for compensation is not always made. It is then for the court in interpreting the legislation to decide what powers are authorised and whether any compensation is payable. In the process of interpretation, the court will assume that, when discretionary power is given to a public body, there is no intention to interfere with private rights, unless the power is expressed in such a way as to make interference inevitable.

In *Metropolitan Asylum District v Hill*, hospital trustees were empowered by statute to build hospitals in London. A smallpox hospital was built at Hampstead in such a way as to be a nuisance at common law. *Held*, in the absence of express words or necessary implication in the statute authorising the trustees to commit a nuisance, building of the hospital was unlawful. 'Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, . . . the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose.'³⁵

If, however, the exercise of a statutory power or duty necessarily involves injury to private rights, there is no remedy unless the statute provides compensation.³⁶

³¹ *Triefus & Co Ltd v Post Office* [1957] 2 QB 352.

³² Post Office Act 1969, ss 6(5), 29, 30; British Telecommunications Act 1981, s 70. And see Postal Services Act 2000, s 90.

³³ E.g. *Tito v Waddell (No 2)* and *Mutasa v A-G* (note 24 above).

³⁴ See below, pp 703–7.

³⁵ (1881) 6 App Cas 193, 212–13 (Lord Watson).

³⁶ *Hammersmith Rly Co v Brand* (1869) LR 4 HL 171.

In *Allen v Gulf Oil Refining Ltd*, the House of Lords held that a local Act which envisaged the building of an oil refinery at Milford Haven, though it gave the company no express power to construct the refinery and did not define the site, did give authority for construction and use of the refinery. Such authority protected the company against liability for nuisance to neighbouring owners which was the inevitable result of the construction of the refinery, though the Act gave the owners no compensation for the loss of their rights.³⁷

The courts have sometimes placed a heavy onus on the defendant to show that a nuisance that has occurred is an inevitable consequence of the statute. But in *Marcic v Thames Water Utilities Ltd*,³⁸ where a house in London suffered repeated flooding by overflowing sewage, the statutory undertaking responsible for sewerage was not liable to the owner for this serious nuisance. The duties of the defendant were held to be enforceable only by the regulator under the Water Industry Act 1991: despite the malfunctioning of the statutory scheme, the right to sue in nuisance had been taken away by the Act.³⁹

Even where, as in the cases of *Allen* and *Marcic*, the right to sue in nuisance is taken away, this does not relieve a body exercising statutory powers of the duty to use reasonable care to avoid causing unnecessary injury. As an old dictum of Lord Blackburn put it,

... no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently.⁴⁰

This statement must be read in context: it applies only where a statute authorises an act to be done which will necessarily cause some injury to private rights, and where the act is performed carelessly so causing unnecessary injury to those rights.⁴¹ Such additional injury is outside the protection given by the statute. However, if a public authority which merely has a power to act, and not a duty, decides to take action but acts inefficiently, it is not liable unless the inefficiency causes extra damage to an individual: this was so held in the difficult case of *East Suffolk Catchment Board v Kent*, when the use by a river board of an ineffective method of removing flood water from a farmer's land was held to create no liability towards the farmer.⁴² In *Barr v Biffa Waste Services* the Court of Appeal held that claimants who lived near a landfill site, where a statutory permit for tipping 'pre-treated waste' had been issued by the Environment Agency, were entitled to sue the operators in nuisance when the process at the site created seriously unpleasant smells that interfered with the claimants' comfortable enjoyment of their land.⁴³ The court applied established principles of the law of nuisance, and rejected the argument that use of the landfill site was reasonable and that the operators could be liable only if they were shown to be negligent in conduct of the site.

³⁷ [1981] AC 1001.

³⁸ [2003] UKHL 66, [2004] 2 AC 42. The statutory scheme was held to comply with the ECHR.

³⁹ But the Act did not protect Thames Water from being sued for negligence: *Dobson v Thames Water Utilities* [2009] EWCA Civ 28, [2009] 3 All ER 319.

⁴⁰ *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430, 455–6.

⁴¹ *X v Bedfordshire CC* [1995] 2 AC 633, 733.

⁴² [1941] AC 74. And see M J Bowman and S H Bailey [1984] PL 277. Cf *Fellowes v Rother DC* [1983] 1 All ER 513, 522 and *Stovin v Wise* (note 73 below).

⁴³ [2012] EWCA Civ 312, [2012] 3 All ER 380.

Statutory duties⁴⁴

It was at one time the view that anyone harmed by failure to perform a statutory duty could bring an action for damages against the person or body liable to perform it.⁴⁵ This has long since ceased to be the law, since the enormous variety of duties imposed by statute means that there can be no single method of enforcing public duties. Some duties, for example the duty of the Secretary of State for Education to promote the education of the people of England and Wales,⁴⁶ are effectively unenforceable by legal proceedings of any kind.⁴⁷ Some duties are enforceable only by recourse to statutory compensation. Very many duties may, as we have seen, be enforced by a mandatory order obtained by judicial review.⁴⁸ Some statutes provide for a criminal penalty in the event of a breach of duty. Where the statute that creates a duty provides a specific sanction for breach (for example, prosecution) or a remedy for those affected to use, the courts may hold that no other means of enforcing the duty exists.⁴⁹

In some situations, particularly where the statutory duty closely parallels a common law duty (for example, to use care not to cause personal injury) the breach of statutory duty gives rise to a private right of action for damages; such an action is akin to an action for negligence, except that liability depends on breach of the duty itself, not on there being a lack of care.⁵⁰ An action for breach exists if it can be shown by interpreting the statute that the duty was imposed for the protection of a certain class and that the legislature intended to confer on members of that class the benefit of a right of action.⁵¹ It is notoriously difficult to evaluate all the factors that are relevant when a court is deciding whether a statutory duty is enforceable by an action for damages and the statute is silent on the point.⁵² Where a public authority fails to perform a statutory duty imposed upon it, an individual who is adversely affected may in principle seek judicial review. Laying emphasis on the use of judicial review, recent judicial decisions have limited the availability of damages as a remedy for breach of public duties.

In *X (minors) v Bedfordshire Council*,⁵³ the House of Lords considered a group of claims for damages arising from the defective performance by local councils of duties relating to the education and welfare of children. The alleged breaches included the failure of a social service authority to take children into care who were badly in need of protection against abuse; a converse error by social workers in taking a child into care believed to be at risk of sexual abuse, when the identity of her abuser was mistaken; and failures by education authorities to identify the special educational needs of children and to provide appropriate schooling. The councils applied to have these claims struck out as disclosing no cause of action. *Held*, so far as the actions were based on breach of statutory duty, they were disallowed. The duties in question gave rise to no private rights of action; nor were the councils

⁴⁴ Stanton et al., *Statutory Torts*, ch 2; Harding, *Public Duties and Public Law*, ch 7.

⁴⁵ See *Atkinson v Newcastle Waterworks Co* (1877) 2 Ex D 441.

⁴⁶ Education Act 1996, s 10.

⁴⁷ For a discussion of judicial review, see ch 24.

⁴⁸ Ch 25.

⁴⁹ See *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173, 185; *Scally v Southern Health Board* [1992] 1 AC 294. Cf *Marcic v Thames Water Utilities Ltd* (above, note 45) (duties enforceable only by regulator).

⁵⁰ E.g. *Reffell v Surrey CC* [1964] 1 All ER 743.

⁵¹ See *X v Bedfordshire CC* [1995] 2 AC 633, 731.

⁵² See Bennion, *Statutory Interpretation*, Code, s 14 (pp 67–85).

⁵³ [1995] 2 AC 633; see P Cane (1996) 112 LQR 13; L Edwards (1996) 1 Edin LR 115.

under a duty of care in performing them. The education cases were allowed to proceed so far as they were based on the councils' vicarious liability for the professional negligence of teachers and educational psychologists; there was no such vicarious liability for social workers and psychiatrists reporting to the councils on alleged child abuse.

The House of Lords later confirmed that there was no claim for breach of statutory duty against an education authority for failure to diagnose a child's special needs, but that the authority was liable vicariously for the failure of its employee (an educational psychologist) to show the professional skill that could reasonably have been expected.⁵⁴ In a similar welfare context, a homeless person denied temporary housing by a local authority in breach of its duty could enforce the statute by judicial review, but could not recover damages for the breach.⁵⁵

In *Cullen v Chief Constable of the RUC*, the main issue was whether anti-terrorism legislation granting a detained person the right to consult a solicitor conferred a right to sue for damages when the police wrongly prevented a detainee from having access to a solicitor, even though he suffered no direct injury or harm because of this. The Lords held by 3–2 that the aim of the legislation was to create a 'quasi-constitutional' right for the benefit of the public at large, not for the protection of a particular class of individuals: the appropriate remedy was judicial review. In a strong dissenting judgment, Lords Bingham and Steyn were in no doubt that Parliament had intended to create 'a new and remedial provision for the conferment on detainees of a statutory right of access to solicitors'; the statutory language was 'entirely apt to create private law rights'.⁵⁶

It is evident from these and many other decisions⁵⁷ that different policy considerations apply to (a) the public law remedies obtainable by judicial review, and (b) the private law remedy of damages. The interaction between public law concepts and the common law of negligence has caused continuing difficulties in regard to the liability of public authorities, some of which are outlined in the next section.

Public authorities and liability for negligence

Although the Crown Proceedings Act 1947 assimilated the tort liability of the Crown to that of a private person, the duties of government give rise to issues of liability which are not easily resolved by applying legal principles that mainly govern the acts of private persons. Most actions by public authorities stem from legislation. And many disputes as to liability turn directly on the relationship between (a) common law rules on the duty of care; (b) the legislation, which broadly will confer either a duty or a power to act; and (c) the rules of administrative law that apply when judicial review is sought.

⁵⁴ *Phelps v Hillingdon Council* [2001] 2 AC 619.

⁵⁵ *O'Rourke v Camden Council* [1998] AC 188. And see *R Carnwath* [1998] PL 407.

⁵⁶ [2003] UKHL 39, [2004] 2 All ER 237.

⁵⁷ See e.g. *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Elgouzouli-Daf v Commissioner of Metropolitan Police* [1995] QB 335; and *Stovin v Wise* [1996] AC 923.

In *Dorset Yacht Co v Home Office*,⁵⁸ the Home Office was sued for the value of a yacht which had been damaged when seven Borstal boys absconded at night from a Borstal summer camp on an island in Poole harbour. The plaintiffs alleged that the boys were able to abscond because of the negligence of their officers. The Home Office argued that the system of open Borstals would be jeopardised if any liability was imposed on the government for the wrongful acts of those who absconded. The House of Lords held, Lord Dilhorne dissenting, that the Home Office was liable for the negligence of the officers; in the circumstances the officers owed a duty of care to the yacht owners, the damage to the yacht being reasonably foreseeable as the direct consequence of a failure by the officers to take reasonable care.

This decision had broad consequences for the developing law of negligence, but it was based on the finding of negligence by the officers, and it did not extend to the situation in which it was claimed that an executive discretion (for example, to transfer someone to an open prison) had been improperly exercised. Lord Diplock in *Dorset Yacht* suggested that questions of liability for the exercise of discretion were to be settled by applying the public law concept of *ultra vires* rather than the civil law concept of negligence.⁵⁹ This influential suggestion led to an immense amount of litigation, in particular concerning the exercise of discretion by a public authority in deciding whether to use its regulatory powers. One approach taken was to distinguish between (a) decisions that involved policy questions (for instance, use of an authority's resources) and were likely to be unsuitable for judicial determination, and (b) the operational tasks performed by the authority once it decided to use its regulatory powers, a task which would be more suitable for judicial appraisal.⁶⁰ But this distinction between policy questions and operational tasks proved an elusive way of deciding whether a public authority was liable for a particular misfortune.

In 1990, in *Caparo Industries plc v Dickman*,⁶¹ which concerned the duty of care owed by company auditors to potential investors in the company, the Lords adopted a three-part test applying to new situations in which it was sought to establish liability for negligence: (1) whether the harm to the claimant was foreseeable; (2) whether the parties were in a relationship of proximity; and (3) whether it was 'fair, just and reasonable' that the defendant should owe a duty of care to the claimant. This decision confirmed⁶² that 'novel categories of negligence' would develop 'incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care', restrained only by indefinable policy considerations seeking to limit the scope of the duty of care. When criterion (3) is applied to novel claims brought against a public body, judges exercise a broad discretion in assessing the consequences for public policy of holding the body liable.

The courts have restricted the imposition of liability in several contexts, particularly as regards claims for economic loss arising out of regulatory functions⁶³ and claims seeking to

⁵⁸ [1970] AC 1004. And see Booth and Squires, *The Negligence Liability of Public Authorities*.

⁵⁹ [1970] AC 1004, at 1067.

⁶⁰ The application of this principle in *Anns v Merton Council* [1978] AC 728 was for wider reasons held to be wrong in *Murphy v Brentwood Council* [1991] 1 AC 398.

⁶¹ [1990] 2 AC 605.

⁶² Quoting from *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43–4 (Brennan J).

⁶³ *Yuen Kun-yeu v A-G of Hong Kong* [1988] AC 175; *Davis v Radcliffe* [1990] 2 All ER 536. And see H McLean (1988) 8 OJLS 442.

impose a private law duty of care on the public functions of the police.⁶⁴ Inevitably, the outcome of judicial policy-making is uncertain.

In *Stovin v Wise*, a county council as highway authority had statutory power to remove an earth bank that it knew restricted visibility at a dangerous road junction, but it failed to do so. When an accident occurred at the junction, was the council liable for failure to exercise its power? The House of Lords held (by 3–2) that a duty of care to users of the highway to remove the bank arose only if (a) it was ‘irrational’ (in the public law sense) for the power *not* to be used and (b) there were exceptional factors indicating that the policy of the legislation was to confer a right to sue on a person injured when the power was not exercised. The majority held that neither condition was satisfied, adding that it was ‘important, before extending the duty of care owed by public authorities, to consider the cost to the community of the defensive measures which they are likely to take to avoid liability’.⁶⁵ The dissenting judges held that, being aware of the danger, the council was under a common law duty of care towards road users to use its powers to remove the cause of the danger.

As can be seen in the judgments in *Stovin v Wise*, one difficulty in applying the three-part test in *Caparo Industries* was the presumed need in cases against public authorities to reconcile this with the rules of ultra vires. Must the court, when concerned with the careless exercise of statutory functions, decide first that the acts in question were ultra vires, for instance on the ground of *Wednesbury* unreasonableness?⁶⁶ In *X v Bedfordshire Council*,⁶⁷ on a claim that a public authority had been negligent in exercising a statutory discretion, it was held that the first requirement was to show that its decision was ‘outside the ambit of the discretion altogether’: if it was not outside that ambit, the public authority could not be in breach of any duty of care owed to the claimant.

In later decisions, the Lords have taken a different view. *Barrett v Enfield Council* concerned a claim that a social services authority had breached a common law duty of care that it owed to the claimant while he had been in its care as a child. Lord Slynn stated that acts done pursuant to the lawful exercise of discretion may be subject to a duty of care, even if some element of discretion is involved.⁶⁸ Lord Hutton said that, in a case involving personal injuries but not policy issues that the courts were ill-equipped to decide, it was preferable for the court to proceed ‘by applying directly the common law concept of negligence than by applying as a preliminary test the public law concept of *Wednesbury* unreasonableness . . .’⁶⁹ In 2004, when the failure of a highway authority to use its powers was again before the Lords, Lord Steyn commented that the analysis made by Lord Hoffmann in *Stovin* had been qualified by the intervening decisions of the House.⁷⁰

⁶⁴ *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Chief Constable of Hertfordshire v Van Colle* [2008] UKHL 50, [2009] 1 AC 225; *Desmond v Chief Constable of Nottinghamshire* [2011] EWCA Civ 3, [2011] PTSR 1369. But cf *Swinney v Chief Constable of Northumbria* [1997] QB 464 and *Waters v Commissioner of Metropolitan Police* [2000] 4 All ER 934. And see discussion below of the *Osman* litigation.

⁶⁵ [1996] AC 923, 958 (Lord Hoffmann). And see S H Bailey and M J Bowman [2000] CLJ 85, 101–19.

⁶⁶ See ch 24 A.

⁶⁷ Note 53 above.

⁶⁸ [2001] 2 AC 550, 571. This point was confirmed in *Phelps v Hillingdon Council* [2001] 2 AC 619, 653. See: P Craig & D Fairgrieve [1999] PL 626; D Fairgrieve [2002] PL 288.

⁶⁹ [2001] 2 AC 550 at 586.

⁷⁰ *Gorringe v Calderdale Council* [2004] UKHL 14, [2004] 2 All ER 326; T Hickman [2004] CLJ 166; C J S Knight [2007] JR 165.

Judicial reluctance to impose duties of care on public authorities has caused some claimants to have recourse to Strasbourg. In *Osman v Ferguson*, despite strong facts, the Court of Appeal struck out a claim against the police for negligently failing to prevent a fatal attack, holding that the claim was ‘doomed to failure’;⁷¹ the court applied the ruling in *Hill v Chief Constable of West Yorkshire*⁷² that it would be against public policy for the police to be under any liability to the victims of crimes committed by those whom the police failed to apprehend. The Strasbourg court held in 1998 that this decision to strike out *Osman v Ferguson* was in breach of art 6(1) ECHR, since the effect was to give the police a blanket immunity from being sued in respect of their acts and omissions relating to criminal offences.⁷³

This decision at Strasbourg was criticised for having transformed the right to a fair hearing under art 6(1) into an evaluation of the substantive rights that should exist in national law.⁷⁴ Three years later, in *Z v UK*,⁷⁵ a sequel to the Lords’ decision in *X v Bedfordshire Council*, the Strasbourg court changed its position, holding by 12–5 that for an English court to strike out an action did not breach art 6(1) since there would have been a full and fair hearing, argued in law on the basis that all facts were as claimed by the claimants. However, on the evidence in *Z v UK* the court held that for young children to have been left by the local authority to live with cruel and abusive parents for over four years breached their right under art 3 ECHR to be protected against inhuman or degrading treatment; further, the claimants’ right under art 13 ECHR to an effective remedy had been breached by the English legal system. In this serious case, the court ordered the UK government to pay substantial compensation to the claimants.

Despite the Strasbourg court’s volte-face in *Z v UK*, the influence of European human rights law has contributed to a reluctance by the judges to grant public authorities a ‘blanket immunity’ by ruling in an absolute manner that claims against a public authority must be struck out in the absence of any duty of care. In *D v East Berkshire NHS Trust*,⁷⁶ the Lords held that where doctors suspected that children had been abused by their parents, it would not be fair, just and reasonable to impose on the doctors a common law duty of care towards the parents, although they owed such a duty to the children (just as local authorities owed a duty to the children in performing their statutory duties of protection); but it was accepted that there might be exceptional circumstances in which a different conclusion might be justified.⁷⁷ In *Brooks v Metropolitan Police Commissioner*,⁷⁸ where a public inquiry had established that a police investigation into serious racist crimes had been badly conducted, the Lords upheld the rule that in exercising functions of crime prevention and detection, the police owed no duty of care to the victims and witnesses of crime. In a very different context, no duty of care was owed to the owners of a nursing home by a health authority in obtaining a magistrate’s order to close down the home without notice, even though it was established later that the closure was wholly unjustified.⁷⁹

⁷¹ [1993] 4 All ER 344, 354. A 15-year-old boy and his family for months suffered extreme harassment from the boy’s former teacher, culminating when he fired at them, severely injuring the boy and killing his father. The police knew of the harassment and of threats by the assailant before the fatal attack occurred.

⁷² [1989] AC 53 (a case brought by the family of the last victim of the ‘Yorkshire Ripper’).

⁷³ *Osman v UK* (1998) 29 EHRR 245.

⁷⁴ See e.g. C A Gearty (2001) 64 MLR 159.

⁷⁵ (2001) 34 EHRR 3; see C A Gearty (2002) 65 MLR 87. The applicant children complained that the council had delayed for four years before taking them into care, despite extreme circumstances, and that this had caused them serious physical and emotional harm.

⁷⁶ [2005] UKHL 23, [2005] 2 AC 373; S H Bailey (2006) 26 LS 155.

⁷⁷ *Ibid*, at [91] (Lord Nicholls). Lord Bingham, dissenting, refused to strike out the claim without fuller inquiry into the facts. See also *Carty v Croydon Council* [2005] EWCA Civ 19, [2005] 2 All ER 517.

⁷⁸ [2005] UKHL 24, [2005] 2 All ER 489 (a sequel to the killing of Stephen Lawrence).

⁷⁹ *Jain v Trent Health Authority* [2009] UKHL 4, [2009] 1 AC 853.

By contrast with the judges' reluctance to impose a new duty of care on a public body in discharging its statutory functions, some aspects of negligence are readily applied in the public sector. Thus, under *Hedley Byrne & Co v Heller*,⁸⁰ someone who relies to his or her detriment on inaccurate statements made by an official in the course of the latter's duties may have a remedy in negligence for loss suffered: and a local authority was liable when an environmental health officer, acting in an advisory role, negligently required expensive and unnecessary alterations to be made to a farm guesthouse.⁸¹ When a county council was excessively slow to use statutory powers of taking over management of a school that was suffering acute dissension within its governing body, the council was held liable for having caused personal injury (through extreme stress) to the headteacher because of the delay: the council's common law duty of care to the headteacher was held to 'march together with' the proper discharge of its statutory functions.⁸²

Misfeasance in public office

It is a fundamental assumption of the law that those who exercise public functions should do so in good faith and without malicious or spiteful motives. Bad faith must not, of course, be assumed merely because a public body has made a decision that is corrected by judicial review. But where it is shown that a body or official was not acting in good faith, liability in tort may exist.⁸³ Instances of the tort do not often occur, and claimants have what may be the difficult task of proving that named individuals within a public authority acted in bad faith and were not motivated by acceptable reasons.⁸⁴ Unusually, in *Bourgoin SA v Ministry of Agriculture*, it was conceded that the minister knew that he did not have the powers that he purported to exercise: it was held that liability for misfeasance would arise.⁸⁵

The tort arises only from the conduct of a public officer in relation to his or her official functions. Liability depends on the state of mind of the officer and takes two forms:

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 there is no power to do the act complained of (or reckless as to whether there is) and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have the honest belief that his act is lawful.⁸⁶

The tort is founded upon the dishonest conduct of the official and is one of the intentional torts: an omission to act is not sufficient, unless this arose from a dishonest decision not to act. The tort is not actionable unless the claimant can prove that he or she has suffered

⁸⁰ [1964] AC 465.

⁸¹ *Welton v North Cornwall DC* [1997] 1 WLR 570. See also *Harris v Wyre Forest DC* [1990] 1 AC 831 and *T (minor) v Surrey CC* [1994] 4 All ER 577.

⁸² *Connor v Surrey Council* [2010] EWCA Civ 286, [2010] 3 WLR 1302. The judgment of Laws LJ contains a valuable review of the extensive case law since *Dorset Yacht*, note 58 above.

⁸³ See *Roncavelli v Duplessis* (1959) 16 DLR (2d) 689; *David v Abdul Cader* [1963] 3 All ER 579 (malicious refusal of licence) (A W Bradley [1964] CLJ 4); *Micosta SA v Shetland Islands Council* 1986 SLT 193. Also J McBride [1979] CLJ 323, and Moules, *Actions against Public Officials*, ch 5.

⁸⁴ See *Weir v Transport Secretary* [2005] EWHC 2192 (Ch) (claim by shareholders arising from minister's decision to send Railtrack into liquidation).

⁸⁵ [1986] QB 716.

⁸⁶ *Three Rivers Council v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 (Lord Steyn). For a review of the case law, see Clarke J in this case [1996] 3 All ER 558 (and C Hadjiemmanuil [1997] PL 32). The Lords refused by 3–2 to strike out the case: [2003] 2 AC 1, 237. After a prolonged trial, the case collapsed, there being no evidence of dishonesty: [2006] EWHC 816 (Comm).

material damage, including financial loss and physical or mental injury, and it is not enough to show distress, injured feelings or annoyance.⁸⁷ As regards the first form of the tort, targeted malice, it makes no difference whether the official exceeds his or her power or complies with the letter of the power.⁸⁸ It appears that local councillors could be liable for misfeasance if, intending to damage the interests of a particular lessee, they voted for a resolution requiring the council's rights as owner of property to be exercised against the lessee.⁸⁹ Misfeasance in public office was committed when the corporate officer of the House of Commons breached the rules that governed the placing of a contract to provide the windows of a costly new building for the House.⁹⁰ Vicarious liability may arise for misfeasance in office where this is an improper way of performing an officer's duties or is very closely connected with the performance of those duties.⁹¹ Exemplary damages may be payable for misfeasance in public office.⁹²

Tort liability, compensation and the Human Rights Act

It is outside the scope of this book to enumerate all the duties, both positive and negative, deriving from the ECHR that the Human Rights Act (HRA) imposes on public authorities. But in outline we may consider whether the ECHR will strengthen the protection that the law of torts gives to individuals against arbitrary, careless or oppressive acts by public authorities.⁹³

By the HRA, s 6, a public authority must act consistently with Convention rights, except where primary legislation makes this impossible.⁹⁴ As we saw in chapter 24, public authorities that use their powers in a way that infringes Convention rights are acting unlawfully; if they do, their actions are subject to judicial review. Is there also a remedy in tort?

Under art 41 ECHR, the Strasbourg court shall 'if necessary' afford 'just satisfaction' to someone whose rights have been infringed where full reparation has not been paid at the national level.⁹⁵ Under the HRA s 8, a civil court or tribunal with power to award damages has a similar power to award damages to someone whose Convention rights have been infringed if this would be 'just and appropriate' and is necessary to afford 'just satisfaction'; and the court must take account of the practice of the Strasbourg court. Those who hoped that this would open the door to many new claims for compensation have been disappointed. *Anufrijeva v Southwark Council*⁹⁶ concerned breaches of art 8 (right to respect for private and family life) occurring through inefficiency and delay by local authorities and the Home Office. The Court of Appeal held that damages were not recoverable as of right, even where a Convention right had been breached: a balance had to be struck between the interests of the

⁸⁷ *Watkins v Home Secretary* [2006] UKHL 17, [2006] 2 AC 395 (bad faith of prison officers in opening prisoner's confidential legal correspondence: no material damage). A prisoner removed from an open to a secure prison suffers material damage: *Karagozlu v Metropolitan Police Commissioner* [2006] EWCA Civ 1691, [2007] 2 All ER 1055.

⁸⁸ *Three Rivers Council v Bank of England (No 3)* [2003] 2 AC 1, 235 (Lord Millett, citing *Jones v Swansea Council* [1989] 3 All ER 162).

⁸⁹ *Jones v Swansea Council* [1990] 3 All ER 737.

⁹⁰ *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (2000) 67 Con LR 1.

⁹¹ *Racz v Home Office* [1994] 2 AC 45.

⁹² *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122; C J S Knight [2011] JR 49.

⁹³ See Dame Mary Arden [2010] PL 140.

⁹⁴ See ch 14 C.

⁹⁵ See A R Mowbray [1997] PL 647; Law Commission, *Damages under the Human Rights Act 1998* (Cm 4853); J Hartshorne [2004] EHRLR 660; T R Hickman, in Fairgrieve, Andenas and Bell (eds) (above, note 1), ch 2; D Fairgrieve, (the same), ch 4.

⁹⁶ [2003] EWCA Civ 1406, [2004] QB 1124.

claimant and the public as a whole; claimants should seek any damages that might be payable by attaching the request to a claim for judicial review. Even so, the judges were concerned that a claim for compensation if brought by adversary proceedings would probably cost more than the amount of any award.

The Court of Appeal's decision in *Anufrijeva* was influential in *R (TG) v Lambeth Council*,⁹⁷ where the council had acted wrongly in dealing with the claimant under housing legislation (and not under the Children Act 1989) at a time when he was under 18. The court granted judicial review of the council's decision as to TG's current status, but it refused to permit TG to proceed with a claim for compensation based on article 8 ECHR, holding that the Strasbourg case-law did not in general support such a claim when this arose from a state's failure to provide a home or other financial support for the claimant.

In *R (Greenfield) v Home Secretary*,⁹⁸ a convicted prisoner had been required to serve extra days for a drug offence within the prison, and he had not had a fair hearing under art 6(1) ECHR. The House of Lords rejected his claim for compensation, holding there to be no right under the 1998 Act to compensation for every infringement of Convention rights; the power to order compensation was not central to protection of human rights; procedural faults of the kind in Greenfield's case would not attract compensation unless the claimant could show a causal link between the procedure and the actual outcome; and the courts must not follow national scales of damages. Lord Bingham said, 'the 1998 Act is not a tort statute. Its objects are different and broader'; he warned of the 'risk of error if Strasbourg decisions given in relation to one article of the Convention are read across as applicable to another'.⁹⁹

In *Rabone v Pennine Care NHS Trust*, the Supreme Court awarded compensation under the Human Rights Act 1998, s 8, by way of 'just satisfaction' of a claim by parents for breach of article 2 ECHR when their daughter, an informal psychiatric patient considered to be at 'moderate to high' risk of suicide, was released from hospital on home leave (against the wishes of her parents) and hanged herself a day later.¹⁰⁰ In *R (Faulkner) v Justice Secretary*,¹⁰¹ the Supreme Court considered cases involving prisoners who were subject to indeterminate sentences, and whose tariff periods had expired. The consideration of their cases by the Parole Board was delayed because of lack of resources. The Court reiterated that the courts should be guided, following *Greenfield*, primarily by any clear and consistent practice of the European Court of Human Rights and that the amount of any such award should reflect the levels of awards made in Strasbourg in comparable cases brought by applicants from the UK or other countries with a similar cost of living. This echoes the terms of section 8(4) of the HRA. Lord Reed noted that courts should not apply domestic measures of damages. So, in a case where there is no guideline case in Strasbourg, it is necessary for domestic courts to do their best in the light of such guidance as can be gleaned from the Strasbourg decisions in other cases. 'The over-arching duty of the court under section 8(1) is . . . to grant such relief or remedy as it considers just and appropriate; and that duty exists even where no clear or consistent European practice can be discerned.'¹⁰²

Accordingly, a claimant who alleges that her Convention rights have been infringed by a public authority (and nothing more than this) may not sue in tort but must proceed under s 7 HRA; it is then for the court to decide whether a payment by way of 'just satisfaction' should be made. However, the restrictive principles in *Greenfield* will not arise where there has been a breach of Convention rights (for instance, of art 3 ECHR (prohibition of torture)

⁹⁷ [2011] EWCA Civ 526, [2011] 4 All ER 453.

⁹⁸ [2005] UKHL 14, [2005] 2 All ER 240. And see R Clayton [2005] PL 429.

⁹⁹ *R (Greenfield) v Home Secretary* (above), paras [19], [7].

¹⁰⁰ [2012] UKSC 2, [2012] AC 72.

¹⁰¹ [2013] UKSC 23, [2013] 2 WLR 1157.

¹⁰² *R (Faulkner) v Justice Secretary* (above), at [36] (*Lord Reed*).

or of art 5 (right to liberty)) and on the same facts it can be shown that the authority has committed torts in relation to the torture or false imprisonment. In these instances, damages in tort may be recovered and compensation under the 1998 Act is unlikely to be necessary.

When it is claimed that a public authority, either through positive action or an omission to act, has infringed an individual's Convention rights, and where it is not disputed that a duty of care arises in national law, then the courts may be willing to decide the extent of that duty of care by reference to case law under the Convention.¹⁰³ By contrast, where a duty of care of relevant scope is not clearly recognised in national law and where it is uncertain whether the claimant's case would be protected at Strasbourg, a claim may be allowed to proceed in the law of tort and not under the Convention.¹⁰⁴ Another decision by the Lords has been said to be 'an example of a situation in which the court has used a Convention right as a launch pad for a possible development in the future'.¹⁰⁵

When the breach of a Convention right results from a judicial act, an award of damages may be made under the HRA, s 9, only (a) if the act is not done in good faith, or (b) if an award is necessary under art 5(5) ECHR to compensate for unlawful detention. Any award will be made against the Crown, not against the judge.

Other forms of tort liability

Other forms of tort liability may be briefly mentioned. First, public authorities, and particularly the Home Office and prison authorities, are regularly sued for the tort of false imprisonment, where an individual has been detained without legal authority. Secondly, the Privy Council has confirmed that the tort of malicious prosecution extends to the bringing of civil proceedings.¹⁰⁶ At least in theory, a public authority could be liable for bringing proceedings without reasonable or probable cause but with malice, as the Crown has been traditionally so liable for the malicious prosecution of criminal proceedings. Thirdly, the Court of Appeal has confirmed that the tort of abuse of process does not extend to a claim action for pure economic loss allegedly suffered as a result of bringing judicial review proceedings.¹⁰⁷ It was considered that a claimant should not be discouraged from pursuing judicial review proceedings after permission has been given by the court.

It is also relevant to note the development of the remedies available for tortious liability. Ever since the general warrant cases in the 1760s in which exemplary damages were awarded for unlawful search and seizure, the courts have had power to award exemplary damages for oppressive, arbitrary or unconstitutional acts in the exercise of public power.¹⁰⁸ It was formerly considered that the power was limited to certain torts for which exemplary damages had been awarded before 1964,¹⁰⁹ but in 2001, in a case of alleged misfeasance in public office by a police officer, the House of Lords held that this limitation was not justified and that such a rigid rule would limit the future development of the law.¹¹⁰ Juries considering the award of exemplary damages against the police must be directed by the trial judge as to the permissible

¹⁰³ See *Savage v South Essex Partnership NHS Trust* [2008] UKHL 74, [2009] 1 AC 681 (failure by psychiatric hospital to take reasonable operational measures to prevent suicide of patient where a real and immediate risk of that event).

¹⁰⁴ *Mitchell v Glasgow Council* [2009] UKHL 11, [2009] 3 All ER 205.

¹⁰⁵ Arden (note 93 above) at p 152, referring to the speech of Lord Scott in *Ashley v Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 AC 962.

¹⁰⁶ *Cramford Adjusters v Sagacor General Insurance (Cayman) Ltd* [2013] UKPC 17.

¹⁰⁷ *Land Securities Plc v Fladgate Fielder* [2009] EWCA Civ 1402, [2010] Ch 467.

¹⁰⁸ *Wilkes v Wood* (1763) Lofft 1; *Rookes v Barnard* [1964] AC 1129, 1226. And see *Lancashire CC v Municipal Mutual Insurance Ltd* [1997] QB 897.

¹⁰⁹ *AB v South West Water Services Ltd* [1993] QB 507, applying *Broome v Cassell and Co Ltd* [1972] AC 1027.

¹¹⁰ *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122.

range of such awards.¹¹¹ For a particularly egregious example of potential misfeasance one should consider the facts of *Muuse v Secretary*.¹¹² In brief, immigration officials unlawfully detained Muuse; disobeyed an order of the court to release him; made no enquiries about the nationality of Muuse although he repeatedly told them he was Dutch and although the Prison Service held all the relevant documentation to prove this having confiscated it from him; issued an unlawful deportation order to Somalia (a failed state); failed to conduct any investigation into matters raised with them and failed to allow Muuse time to appeal his deportation; failed to revoke the deportation order even after being provided with the documentation showing Dutch nationality, continuing to detain Muuse without any authority; and subjected Muuse to racist remarks. The Court of Appeal upheld an award of exemplary damages of £27,500 for the tort of false *Home* imprisonment.

Tort liability and judicial review

In an era when the use of judicial review has expanded dramatically, as has liability for breach of duties owed in European Union law, the United Kingdom courts have resisted an equivalent expansion in the liability of public bodies to be sued for damages. We have seen that in France both the judicial review of decisions and the power to award compensation for wrongful acts committed by public authorities are entrusted to the administrative courts.¹¹³ Under the French system, rules of public liability have developed which differ from the rules of liability in civil law. In English law, by contrast, public authorities and officials are in principle subject to the same law of civil liability as private persons. Thus a claim in damages against a public authority must be based on an existing tort (including negligence, nuisance, trespass to the person, false imprisonment¹¹⁴ and misfeasance in public office) or on a specific right of action created by statute. Yet the existing categories of tort do not include all instances in which a public body may cause loss to an individual through acts or omissions that as a matter of public law are in some way wrongful.

In particular, English law does not accept that an individual has a right to be indemnified for loss caused by invalid or ultra vires administrative action.¹¹⁵ Although a claimant for judicial review may seek damages or restitution together with quashing, mandatory, declaratory and restraining orders, this has not changed the substantive rules of liability.¹¹⁶ Thus a prisoner may seek judicial review of a decision to put him in solitary confinement for 28 days, but has no right to sue the governor or the Home Office for damages, whether for breach of prison rules or for false imprisonment.¹¹⁷

The Supreme Court's decision in *R (Lumba) (Congo) v Home Secretary* held unanimously that it was unlawful in public law for the Secretary of State to operate an unpublished policy which was inconsistent with published policy, but the court was divided on the consequences of this.¹¹⁸ The majority (six judges) held that the actual detention had been

¹¹¹ *Thompson v Metropolitan Police Commissioner* [1998] QB 498.

¹¹² [2010] EWCA Civ 453.

¹¹³ Ch 21. Brown and Bell, *French Administrative Law*, ch 8. Also Markesinis et al., *Tortious Liability of Statutory Bodies* (comparing English, French and German law).

¹¹⁴ See *R v Governor of Brockhill Prison (No 2)* [2001] 2 AC 19 (damages for detention beyond lawful date of release).

¹¹⁵ *Hoffmann-La Roche v Secretary of State for Trade* [1975] AC 295, 358 (Lord Wilberforce).

¹¹⁶ See ch 25; and see e.g. *Page Motors Ltd v Epsom and Ewell BC* (1982) 80 LGR 337, and *P Cane* [1983] PL 202; *Davy v Spelthorne BC* [1984] AC 262.

¹¹⁷ *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58.

¹¹⁸ [2012] UKSC 19, [2012] AC 245. For discussion of the cases applying *Lumba*, see: C Dobson & A Ruck Keene [2012] PL 628.

unlawful and gave rise to an award of damages. However, three of these judges (Lords Collins, Kerr and Dyson) held that, since the detainees would have been lawfully detained anyway, they had suffered no loss and should recover only nominal damages of £1 each. The other three of the majority judges (Lord Hope, Lord Walker and Lady Hale) held that damages should be awarded of a ‘conventional’ amount that would reflect the importance of the right of liberty and the seriousness of the infringement (payments of £500 or £1000 to each claimant were suggested). A minority of three judges (Lords Phillips, Brown and Rodger) held that, because the claimants would have been lawfully detained in any event, there was no liability for false imprisonment. The judgments in this case included wide-ranging discussion of the principles of public law that applied and of the various forms of damages that are available (i.e. nominal, vindictive, exemplary, conventional). In a case concerning similar facts, *R (Kambadzi) v Home Secretary*,¹¹⁹ the Home Office failed to conduct regular reviews of the detention pending deportation of a Zimbabwean, who had completed a prison sentence for serious offences; the Home Office’s published policy required regular review and said that ‘to be lawful’, detention must conform with the stated policy. By 3–2, the Supreme Court held that the executive’s failure to adhere to its published policy without good reason amounted to an abuse of power that rendered the detention itself unlawful.

When a trader’s licence for a market stall is cancelled in breach of natural justice, he or she may by judicial review recover the licence¹²⁰ but has no right to compensation for the intervening loss of income unless, exceptionally, the market authority acted with malice.¹²¹ It is well established that a public authority’s decision may be invalid, in the sense of being ultra vires, without this giving rise to a right to damages.¹²²

In *Rowling v Takaro Properties Ltd*, a New Zealand Cabinet minister had acted ultra vires in refusing consent to the proposed development of a luxury hotel; this had caused Japanese investors to lose interest in the project. When the minister was sued for damages by the developer, the Judicial Committee held that, even assuming that a duty of care was owed by the minister to the developer, he was not in breach of that duty: his decision had been based on a tenable view of his powers and was neither unreasonable nor negligent.¹²³

In *Jain v Trent Health Authority*,¹²⁴ the claimants’ nursing home was suddenly closed down when, without giving notice to the owners, the registration authority obtained a closing order from a magistrate. Five months later, a tribunal upheld the owners’ appeal and found that the immediate closure of the home was not justified. But by then the business had been ruined. The owners sued the health authority for economic damage caused by negligence. *Held*, the health authority’s powers of registration and inspection were intended to protect the interests of the residents of the homes. The fact that the statutory procedures were insufficient to prevent damage to the owners did not mean that the health authority owed them a duty of care.

¹¹⁹ [2011] UKSC 23, [2011] 1 WLR 1299.

¹²⁰ *R v Barnsley Council, ex p Hook* [1976] 3 All ER 452.

¹²¹ See p 707 above.

¹²² See e.g. *Dunlop v Woolahra Council* [1982] AC 158.

¹²³ [1988] AC 473.

¹²⁴ [2009] UKHL 4, [2009] 1 AC 853.

In matters not covered by EU law or the HRA, those who suffer loss caused by unlawful, unfair or unreasonable decisions by a public authority have a genuine complaint about the state of the law. In some circumstances, where maladministration by central or local government has caused individuals to suffer injustice, they may be able to obtain compensation by complaining to the appropriate Ombudsman; but the authority is not at risk of being sued for damages.¹²⁵ In 1988, the Justice/All Souls committee on administrative law recommended that the law should provide for compensation to be paid to one who sustains loss as a result of acts or decisions that are wrongful or contrary to law or are a result of excessive delay.¹²⁶ Not surprisingly, no government since 1988 has endorsed this proposal.

In 2008, the Law Commission issued a consultation paper, *Administrative Redress: Public Bodies and the Citizen*.¹²⁷ This reviewed the range of remedies available when substandard administration occurs, and argued that radical reform was needed in respect of the remedies obtainable through the courts, since negligence actions against public bodies were ‘uncertain and unprincipled’ and the torts of misfeasance in public office and breach of statutory duty were unsuitable ‘in the modern era’. The particular reform suggested would involve defining the ‘truly public’ functions of public authorities; these would not be subject to the law of negligence and would give rise to compensation only for ‘serious fault’ and on a discretionary basis. This proposal was never very likely to be adopted, and was dropped in 2010.¹²⁸ A more practical step would be a limited reform enabling the Administrative Court on judicial review to grant compensation to an individual who has suffered serious economic loss from an invalid administrative act.¹²⁹

B. Contractual liability¹³⁰

The making of contracts is the means whereby an infinite number of transactions occur in a market economy, and many contracts are made by public authorities. Legislation is the primary means of creating duties and rights in public law, such as the duty to pay taxes or the right to receive free medical services. Often government has a choice to make in deciding whether to rely on legislative commands or contract to achieve a certain goal: thus, to recruit the armed forces, the policy may be to employ a wholly professional army based on recruiting volunteers in return for pay or to compel all persons of a certain age to serve alongside a nucleus of regular soldiers. Legislation is needed both to authorise conscription and to levy taxation to pay for the armed forces, but a significant distinction may be drawn in achieving certain ends between (a) reliance on legislative commands (*imperium*) and (b) use of government’s economic resources (*dominium*).¹³¹

¹²⁵ Ch 29 D; and *R v Knowsley BC, ex p Maguire* (1992) 90 LGR 653. And see M Amos [2000] PL 21.

¹²⁶ *Administrative Justice, Some Necessary Reforms*, ch 11.

¹²⁷ Earlier publications by the Commission were a discussion paper *Monetary Remedies in Public Law* (2004) and a scoping paper, *Remedies against Public Bodies* (2006). See R Bagshaw (2006) 26 LS 4.

¹²⁸ See M Fordham [2009] PL 1 and T Cornford [2009] PL 70.

¹²⁹ Cf Harlow, *State Liability – Tort Law and Beyond*, pp 115–16: proposal for the Administrative Court to have an equitable power to award compensation for administrative fault when abnormal loss or a gross violation of human rights has occurred.

¹³⁰ Street, *Governmental Liability*, ch 3; Mitchell, *The Contracts of Public Authorities*; Turpin, *Government Procurement and Contracts*; Hogg, Monahan and Wright, *Liability of the Crown*, ch 9; Davies, *The Public Law of Government Contracts*.

¹³¹ This distinction is developed by T C Daintith [1979] CLP 41 and (same author) in Jowell and Oliver (eds), *The Changing Constitution* (1994), ch 8.

The government, formerly the monarch, has long met many of its needs by exercising *dominium* and making contracts.¹³² Trends in public policy since 1979 have expanded the purposes for which contracts are used, from the procurement of labour, goods and other assets to the contracts placed by the Home Office for companies to manage prisons and detention centres,¹³³ the authority given by Parliament for ‘contracting out’ statutory functions,¹³⁴ and the privatisation of public utilities.¹³⁵ Sometimes the shell of a contract is used, without legal content, as with the creation of the ‘internal market’ in the NHS in 1990¹³⁶ and the use of ‘framework agreements’ to govern executive agencies.¹³⁷ The ‘private finance initiative’ and public–private partnerships enable new projects to be financed and managed, to a greater or lesser extent, jointly by the public and private sectors.¹³⁸ One commentator has written: ‘The techniques of public administration have been refashioned in the mould of the private commercial sector . . . Contract has replaced command and control as the paradigm of regulation.’¹³⁹ A French lawyer has remarked on the tendency ‘in all major industrialised countries’ to ‘a growing contractualisation of relations between administrative bodies and society, as well as among administrative bodies themselves’.¹⁴⁰

In English law, the contracts of public authorities are in principle subject to the same law that governs contracts between private persons. There is no separate jurisdiction governing administrative contracts, as there is in France.¹⁴¹ Nevertheless, these generalisations must be qualified. First, contracts made on behalf of the Crown are subject to some exceptional rules, which were modified but not necessarily abolished by the Crown Proceedings Act 1947 (below). Apart from these rules, it might appear that the Crown has unlimited power at common law to enter into contracts,¹⁴² but this is subject to statute: where the Crown or ministers have statutory power to take certain action (for instance, managing the prison system) through officials acting under direction from ministers, legislation is needed if power is to be conferred on a private company and exercised by its employees.

Secondly, we have seen that statutory bodies such as local authorities are subject to legal control exercised through the rules of *ultra vires*, as regards the substance of action that they may take and the procedure by which decisions are made. A contract which it is beyond the power of a local authority to make is void and unenforceable.¹⁴³ A contract made by a public authority may be held void on the ground that it seeks to fetter the future use of the authority’s discretionary powers.¹⁴⁴ Thus, where a planning authority in Cheshire agreed with Manchester University to discourage new development within the vicinity of the Jodrell Bank radio telescope, the purported agreement was without legal effect.¹⁴⁵ And the fact that

¹³² See e.g. *The Bankers’ case* (1695) Skin 601. A later monarch, George IV, rented jewels to display in his crown that he could not afford to buy.

¹³³ Criminal Justice Act 1991, ss 84–91, Sch 10; Criminal Justice and Public Order Act 1994, ss 7–15.

¹³⁴ Deregulation and Contracting Out Act 1994, Part II.

¹³⁵ See ch 14.

¹³⁶ See D Longley [1990] PL 527 and J Jacob [1991] PL 255.

¹³⁷ On the role of contracts in government generally, see Harden, *The Contracting State*; Craig, *Administrative Law*, ch 5; Harlow and Rawlings, *Law and Administration*, chs 8, 9.

¹³⁸ See M Freedland [1994] PL 86, [1998] PL 288.

¹³⁹ M Hunt, in Taggart (ed.), *The Province of Administrative Law*, p 21.

¹⁴⁰ J-B Auby [2007] PL 40, 42.

¹⁴¹ Mitchell, *Contracts of Public Authorities*, ch 4; Brown and Bell, *French Administrative Law*, pp 202–11.

¹⁴² See BV Harris (1992) 108 LQR 626, (2007) 123 LQR 225.

¹⁴³ *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257; *Hazell v Hammersmith Council* [1992] 2 AC 1; *Crédit Suisse v Allerdale Council* [1997] QB 306. Although see now: *Charles Terence Estates v Cornwall Council* [2012] EWCA Civ 1439, [2013] 1 WLR 466.

¹⁴⁴ *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623; *Triggs v Staines UDC* [1969] 1 Ch 10; *Dowty Boulton Paul Ltd v Wolverhampton Corpn (No 2)* [1973] Ch 94.

¹⁴⁵ *Stringer v Minister of Housing* [1971] 1 All ER 65.

a local authority has contracted with a company for certain services does not prevent the authority from using a statutory power to make by-laws, even if the by-laws make the future performance of the contract impossible or unprofitable for the contractor.¹⁴⁶ A full account of the making of contracts in local government would examine the effect of a council's standing orders on awarding contracts, public audit, and statutes that impose objectives such as 'best value' in the placing of contracts.¹⁴⁷

An underlying question of great difficulty concerns the use of judicial review as a remedy regarding the contractual decisions of public authorities. It is often uncertain whether there is a 'sufficient public law element' in a dispute to justify use of judicial review. Judicial review should not be used when it is merely claimed that a public body is in breach of contract.¹⁴⁸ But contractual situations may well involve issues as to the abuse of public power, so that judicial review would be appropriate.¹⁴⁹

The economic importance of public procurement contracts has long been recognised in EU law and the European directives on this matter are implemented by delegated legislation within the United Kingdom, creating rights and duties enforceable in the ordinary courts.¹⁵⁰ The public procurement rules require authorities that enter into certain contracts to follow open procedures for the tendering process for contracts above a stated value, to observe certain criteria in awarding the contract, to specify lawful policy objectives, and to state reasons for choosing a particular contractor. If these duties are breached, a company whose tender has not succeeded may sue the authority for damages.¹⁵¹

Contractual liability of the Crown

In English law before 1948, the Crown's immunity from being sued directly in the courts was not confined to liability in tort and extended to all other aspects of civil liability. But it had long been regarded as essential that an individual should be able to obtain judicial redress under a contract made with the Crown or government department. The petition of right was originally a remedy for recovering property from the Crown, but it became available to enforce contractual obligations. The practice was simplified by the Petitions of Right Act 1860. A petition of right lay in respect of any claim arising out of contracts by which the Crown could be bound, but not in respect of claims in tort. It lay also for the recovery of real property, for damages for breach of contract¹⁵² and to recover compensation under a statute.¹⁵³ Before a petition could be heard by the court, it had to be endorsed with the words *fiat justitia* (let right be done) by the Crown, acting on the opinion of the Attorney General. When a petition of right was successful, the judgment took the form of a declaration of the petitioner's rights and, being always observed by the Crown, was as effective as a judgment in an ordinary action.

¹⁴⁶ *William Cory & Son Ltd v City of London* [1951] 2 KB 476. And see text to notes 162–5 below.

¹⁴⁷ See respectively *R v Enfield Council, ex p Unwin (Roydon) Ltd* (1989) 1 Admin LR 51; *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357; and the Local Government Act 1999.

¹⁴⁸ Ch 25 B.

¹⁴⁹ See S H Bailey [2007] PL 444.

¹⁵⁰ See Directives 2004/17/EC and 2004/18/EC of the European Parliament and Council; Public Contracts Regulations 2006 (SI 2006/5) and Utilities Contracts Regulations 2006 (SI 2006/6). And see Arrowsmith, *The Law of Public and Utilities Procurement*.

¹⁵¹ In *Harmon CFEM Facades (UK) Ltd v Corporate Officer, House of Commons* (2000) 67 Con LR 1, 72 Con LR 21, the claimant submitted the lowest tender but was not awarded the contract; it won substantial damages for breaches of duty (including failure to state relevant criteria and unlawful post-tender negotiations) and breach of implied contract.

¹⁵² *Thomas v R* (1874) LR 10 QB 31.

¹⁵³ *A-G v De Keyser's Royal Hotel* [1920] AC 508.

By s 1 of the Crown Proceedings Act 1947, in all cases where a petition of right was formerly required, it is possible to sue the appropriate government department or, where no department is named for the purpose, the Attorney General, by ordinary process either in the High Court or in a county court.

While the Petitions of Right Act 1860 was repealed by the Crown Proceedings Act 1947, it appears to have been kept in being for proceedings in matters of contract or property against the Sovereign personally.¹⁵⁴ The 1947 Act applies only to proceedings against the Crown in right of the government of the United Kingdom, not to claims that arise in respect of the Crown's overseas territories.¹⁵⁵

In Scotland the petition of right procedure had never existed, since it was always possible to sue the Crown in the Court of Session on contractual claims or for the recovery of property.¹⁵⁶ Accordingly, s 1 of the 1947 Act does not apply to Scotland.

In general the ordinary rules of contract apply to the Crown: thus an agent need have only ostensible authority to bind the Crown and there is no rule requiring the actual authority of the Crown.¹⁵⁷ Those who make contracts on behalf of the Crown, as its agents, are in accordance with the general rule not liable personally.¹⁵⁸ Statutory authority is not needed before the Crown can make a contract, but payments due under the Crown's contracts come from money provided by Parliament; if Parliament exceptionally provides that no money is payable to a certain contractor, payments that would otherwise be due may not be enforced.¹⁵⁹ If a contract expressly provides that payments are to be conditional on Parliament appropriating the money, the Crown is not liable if Parliament does not do so. But, in general, 'the prior provision of funds by Parliament is not a condition preliminary to the obligation of the contract'.¹⁶⁰ Payments due under contract are made out of the general appropriation for the class of service to which the contract relates and not from funds specifically appropriated to a particular contract. It is usually accepted that the Crown has full contractual capacity as a matter of common law,¹⁶¹ but this cannot entitle the Crown to make contracts which are contrary to statute. Moreover, there is a rule of law, the exact extent of which it is not easy to determine, that the Crown cannot bind itself so as to fetter its future executive action.

In Rederiaktiebolaget Amphitrite v R, a Swedish shipping company, Sweden being a neutral in the First World War, was aware that neutral ships were liable to be detained in British ports. They obtained an undertaking from the British government that a particular ship, if sent to this country with certain cargo, would not be detained. Accordingly the ship was sent with such a cargo, but the government withdrew the undertaking and refused clearance for the ship. On trial of a petition of right, *held*, the undertaking of the government was not enforceable as the Crown was not competent to make a contract which would have the effect of limiting its power of executive action in the future.¹⁶²

¹⁵⁴ Crown Proceedings Act 1947, s 40(1); *Franklin v A-G* [1974] QB 185, 194.

¹⁵⁵ Before Rhodesia achieved lawful independence as Zimbabwe, difficulties as to Crown proceedings arose over the non-payment of interest to holders of Rhodesian government stock; see *Franklin v A-G* [1974] QB 185; *Franklin v R* [1974] QB 202.

¹⁵⁶ Mitchell, *Constitutional Law*, p 304.

¹⁵⁷ See *A-G for Ceylon v Silva* [1953] AC 461 on the difficulties of establishing ostensible authority in relation to the Crown. Cf *Re Selectmove Ltd* [1995] 2 All ER 531.

¹⁵⁸ *Macbeath v Haldimand* (1786) 1 TR 172; and see *Town Investments Ltd v Department of the Environment* [1978] AC 359.

¹⁵⁹ *Churchward v R* (1865) LR 1 QB 173.

¹⁶⁰ *New South Wales v Bardolph* (1934) 52 CLR 455, 510 (Dixon J); Street, *Governmental Liability*, pp 84–92.

¹⁶¹ See *B V Harris* (1992) 108 LQR 626; cf *M Freedland* [1994] PL 86, 91–5.

¹⁶² [1921] 3 KB 500.

It has been suggested that the defence of executive necessity only ‘avails the Crown where there is an implied term to that effect or that is the true meaning of the contract’;¹⁶³ or again that the defence has no application to ordinary commercial contracts. A preferable view is that the *Amphitrite* case illustrates a general principle that the Crown, or any public authority, cannot be prevented by an existing contract from exercising powers which are vested in it either by statute or common law for the protection of the public interest.¹⁶⁴

In *Commissioners of Crown Lands v Page*, the Crown sued for arrears of rent due under a lease of Crown land that had been assigned to the defendant. The defence was that the land had been requisitioned by a government department and that this constituted eviction by the Crown as landlord. The Court of Appeal held that the arrears were payable. Devlin LJ said: ‘When the Crown, in dealing with one of its subjects, is dealing as if it too were a private person, and is granting leases or buying and selling as ordinary persons do, it is absurd to suppose that it is making any promise about the way in which it will conduct the affairs of the nation.’¹⁶⁵

As we have seen, some problems arise in relation to the contracts of public authorities to which English law provides no certain answer, for instance concerning the power of a public body to decide with whom to contract and whom to remove from its list of approved contractors.¹⁶⁶ This power was used by the Labour government in 1975–78 to require companies who were granted contracts to observe a non-statutory pay policy.¹⁶⁷ This is an example of a government’s ability to achieve public goals without recourse to legislation.¹⁶⁸

We have also seen that where European rules on public procurement apply, the pre-contractual procedures observed by public authorities are controlled, with recourse to the courts if the rules are breached. Where these rules do not apply, the legal regime is uncertain. In one case, the Lord Chancellor’s Department was held to have acted unfairly in awarding a contract, but the process was held not to be subject to judicial review.¹⁶⁹ The courts should, however, uphold fairness and legitimate expectations in this situation. Thus, the National Lottery Commission acted unlawfully in deciding not to award the next licence for the Lottery to the existing licensee (Camelot) but to enter into negotiations with the rival bidder (the People’s Lottery).¹⁷⁰ In Northern Ireland, the right not to be discriminated against on religious grounds was held by the Strasbourg Court to apply to public procurement decisions.¹⁷¹ Control over government contracts is exercised by the Comptroller and Auditor General. Much government practice in placing and administering contracts derives from rulings of the Public Accounts Committee.¹⁷² In view of the numerous government contracts awarded each year, remarkably few disputes arising from them reach the courts. Disputes are resolved

¹⁶³ *Robertson v Minister of Pensions* [1949] 1 KB 227, 237 (Denning J).

¹⁶⁴ Street, *Governmental Liability*, pp 98–9; Mitchell, *Contracts of Public Authorities*, pp 27–32, 52–65.

¹⁶⁵ [1960] 2 QB 274, 292; see also *William Cory & Son Ltd v City of London* (above, note 147).

¹⁶⁶ Turpin, *Government Procurement and Contracts*, ch 4.

¹⁶⁷ G Ganz [1978] PL 333.

¹⁶⁸ T C Daintith [1979] CLP 41.

¹⁶⁹ *R v Lord Chancellor, ex p Hibbit & Saunders* [1993] COD 326 (D Oliver [1993] PL 214). Cf *R v Legal Aid Board, ex p Donn & Co* [1996] 3 All ER 1. Also S Arrowsmith (1990) 106 LQR 277; A Davies (2006) 122 LQR 98.

¹⁷⁰ *R v National Lottery Commission, ex p Camelot Group plc* [2001] EMLR 43.

¹⁷¹ *Tinnelly & Sons Ltd v UK* (1998) 27 EHRR 249.

¹⁷² See, for example, HC 777 (201314), on contracting out public services.

by various forms of consultation, negotiation or arbitration. The Review Board for Government Contracts, established in 1969 under an agreement between the government and the Confederation of British Industry, regularly reviews the profit formula for non-competitive government contracts and it may also examine in relation to a particular contract a complaint that the price paid is not ‘fair and reasonable’. Government contracts are excluded from the jurisdiction of the Parliamentary Ombudsman.¹⁷³

Service under the Crown

Service under the Crown has long been an instance of the special contractual position of the Crown; it is generally held to be part of the prerogative that the Crown employs its servants at its pleasure, whether in the civil service or the armed forces.¹⁷⁴ The Crown formerly claimed that its freedom to dismiss its servants at will was necessary in the public interest and this claim was accepted in the older case law. Thus, in the absence of statutory provision,¹⁷⁵ no Crown servant had a remedy for wrongful dismissal. Even when a colonial servant had been engaged for three years certain, only for the appointment to be terminated prematurely, the court reasoned that it was ‘essential for the public good that it should be capable of being determined at the pleasure of the Crown’.¹⁷⁶

While at common law civil servants lacked tenure of office, in practice they enjoyed a high degree of security. This security depended on convention rather than law, and the collective agreements on conditions of service which were applied to civil servants did not give rise to contractual rights.¹⁷⁷ Indeed, it was for long uncertain whether Crown service was a contractual relationship at all, and it was doubtful whether civil servants could even sue for arrears of pay.¹⁷⁸ Today, most provisions of the Employment Rights Act 1996 apply to civil servants, and they are protected against unfair dismissal.¹⁷⁹ They are also protected against discrimination in relation to their employment.¹⁸⁰

In 1991, a newer look was given to the common law when it was held that civil servants are employed by the Crown under contracts of employment, since the incidents of a contract are present and the civil service pay and conditions code deals in detail with the relationship. Although the code states that the relationship is governed by the prerogative and that civil servants may be dismissed at pleasure, neither the Crown nor civil servants intend the contents of the code to be merely voluntary.¹⁸¹ In many cases the courts have held that an aggrieved civil servant cannot seek judicial review of a dismissal or other action because of the private law nature of the claim.¹⁸² However, where the remedies in the employment tribunal would be insufficient and where significant issues would fall outside the jurisdiction of the tribunal, a judicial review of a dismissal has been allowed to proceed.¹⁸³

¹⁷³ Ch 23 D.

¹⁷⁴ See *CCSU v Minister for the Civil Service* [1985] AC 374 and cf Sir William Wade (1985) 101 LQR 180.

¹⁷⁵ E.g. the rule that judges hold office during good behaviour (ch 13 C), *Gould v Stuart* [1896] AC 575 and *Reilly v R* [1934] AC 176.

¹⁷⁶ *Dunn v R* [1896] 1 QB 116; *G Netheim* [1975] CLJ 253. Cf *Dunn v MacDonald* [1897] 1 QB 401.

¹⁷⁷ *Rodwell v Thomas* [1944] KB 596; cf *CCSU v Minister for the Civil Service* (above).

¹⁷⁸ *Kodeeswaran v A-G of Ceylon* [1970] AC 1111; cf *Cameron v Lord Advocate* 1952 SC 165.

¹⁷⁹ Employment Rights Act 1996, s 191.

¹⁸⁰ Equality Act 2010, s 83(2).

¹⁸¹ *R v Lord Chancellor's Department, ex p Nangle* [1992] 1 All ER 897 (see S Fredman and G Morris [1991] PL 485 and (1991) 107 LQR 298).

¹⁸² For which see text to notes 177–8 above.

¹⁸³ *R (Shoosmith) v Ofsted* [2011] EWCA Civ 642, [2011] ICR 1195 (dismissal of local government employee on instructions of the Secretary of State following a public outcry over the death of Baby P).

The law on Crown service is thus more contractual than it once was. However, some limitations on employment rights are likely to bear more heavily on civil servants than on other employees, such as the rule that employment tribunals may not consider a complaint of unfair dismissal where the dismissal was for reasons related to national security. Moreover, in cases involving Crown employees, special procedures may be adopted by the tribunals in dealing with issues affecting national security.¹⁸⁴

In 2010, by part 1 of the Constitutional Reform and Governance Act, the employment and management of the civil and diplomatic service was placed on a statutory basis, but this will not necessarily have an immediate impact on the matters discussed in this section.

Members of the armed forces have less protection in law than civil servants, and the system of command and discipline stands in the way of assimilating military service to civilian employment. Some statutory employment rights apply to the armed forces.¹⁸⁵ In respect of discrimination on grounds of race, sex, sexual orientation and religion or belief, a member of the forces has a right of recourse to an employment tribunal.¹⁸⁶ They may pursue a complaint by means of the internal redress of complaints procedure.¹⁸⁷ Members of the armed forces, like all other persons, may seek protection for their Convention rights under the Human Rights Act 1998,¹⁸⁸ although the extent of their rights may be affected by their duties. Police officers are not Crown servants, being officers of the peace. They have no right to join a trade union and cannot complain of unfair dismissal.¹⁸⁹ They do, however, have protection against discrimination.¹⁹⁰

C. Restitution and public authorities¹⁹¹

A claim for restitution may now be included in a claim for judicial review.¹⁹² The law of restitution was applied by the House of Lords in resolving a fundamental question as to the obligations of public authorities in *Woolwich Building Society v Inland Revenue Commissioners (No 2)*.¹⁹³ Nearly £57 million in tax had been paid under protest by the society under regulations which were held to be ultra vires.¹⁹⁴ The House held by 3–2 that there was a general restitutionary principle by which money paid pursuant to an ultra vires demand by a public authority was recoverable as of right, not at the discretion of the authority. This, said the majority, was required both by common justice and by the principle in the Bill of Rights that taxes should not be levied without the authority of Parliament.¹⁹⁵ Among the questions left open by Lord Goff's speech was whether the same principle applies if taxes are levied

¹⁸⁴ Employment Rights Act 1996, ss 10, 193; Employment Relations Act 1999, Sch 8. See *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452 (and discussion below).

¹⁸⁵ Employment Rights Act 1996, s 192, amended by Armed Forces Act 1996, s 26.

¹⁸⁶ Equality Act 2010, s 83(3), subject to certain exceptions in para 4 of Schedule 9.

¹⁸⁷ Armed Forces (Redress of Individual Grievances) Regulations 2007 (SI 2007/3353), and see *Crosbie v Secretary of State for Defence* [2011] EWHC 879 (Admin).

¹⁸⁸ Cf *R v Ministry of Defence, ex p Smith* [1996] QB 517; and *Smith v UK* (2000) 29 EHRR 493.

¹⁸⁹ Employment Relations Act 1996, s 200.

¹⁹⁰ Equality Act 2010, s 42.

¹⁹¹ Williams, *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EU*; P B H Birks [1980] CLP 191; J Adler (2002) 22 LS 165; G Virgo [2006] JR 370; A Burrows, in Burrows (ed), *Essays on the Law of Restitution*.

¹⁹² Senior Courts Act 1981, s 31(4).

¹⁹³ [1993] AC 70. See P B H Birks [1992] PL 580; J Beatson (1993) 109 LQR 401.

¹⁹⁴ *R v IRC, ex p Woolwich Building Society* [1991] 4 All ER 92.

¹⁹⁵ See ch 1 B.

wrongly because the tax inspector misconstrued a statute or regulation. On this point Lord Goff commented that ‘it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under Community law’.¹⁹⁶ The House of Lords subsequently confirmed that an individual may seek restitution of monies paid under a mistake of fact or law.¹⁹⁷ In *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* the Supreme Court restated the principle in *Woolwich* in the context of a complicated case concerning the compatibility of UK tax statutes with EU law.¹⁹⁸ On this issue, holding that it was not necessary to show that a demand had been made, Lord Walker said: ‘We should restate the *Woolwich* principle to cover all sums paid to a public authority (and sufficiently causally connected with) an apparent statutory authority to pay tax which (in fact and in law) is not lawfully due.’¹⁹⁹

The law of restitution works both ways. Where a public authority has made ultra vires payments to private parties, it is entitled to seek to recover them.²⁰⁰ Such a claim is subject only to the defence of change of position, i.e. where the innocent receiver of the money unlawfully paid out has changed his position by spending the money. In *R (Child Poverty Action Group) v Work and Pensions Secretary*, it was held that the Secretary of State had no power based on the common law of restitution to recover any payments of social security benefit that were found to have been overpaid; the reason for this was that the social security legislation was intended to provide an exclusive scheme for recovering over-payments of benefit, and statutory changes in that scheme had not revived the common law in this area of social provision.²⁰¹

D. The Crown in litigation: privileges and immunities

As we have already seen,²⁰² ‘the Crown’ is a convenient term in law for the collectivity that now comprises the monarch in her governmental capacity, ministers, civil servants and the armed forces. Lord Templeman said in 1993: ‘The expression “the Crown” has two meanings, namely the monarch and the executive.’²⁰³ When the monarch governed in person, royal officials properly benefited from the monarch’s immunities and privileges. But despite the ending of personal government, the institutions of central government continued to benefit from Crown status. The shield of the Crown extended to what was described as the general government of the country or ‘the province of government’,²⁰⁴ but not to local authorities or to other public corporations. Notwithstanding the Crown Proceedings Act 1947, for several reasons it may be necessary to know whether a public authority has Crown status.²⁰⁵ It is very common for an Act which creates a new public body to state whether and to what extent it

¹⁹⁶ [1993] AC 70, at 177; and Goff and Jones, *The Law of Unjust Enrichment*, ch 22.

¹⁹⁷ *Kleimwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *Deutsche Morgan Grenfell plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558.

¹⁹⁸ [2012] UKSC 19, [2012] AC 245.

¹⁹⁹ [2012] UKSC 19, [2012] AC 245 at [79].

²⁰⁰ *Auckland Harbour Board v R* [1924] AC 318; *Charles Terence Estates v Cornwall Council* [2011] EWHC 2542 (QB), [2012] PTSR 790; Goff and Jones, *The Law of Unjust Enrichment*, ch 23.

²⁰¹ [2010] UKSC 54, [2011] 2 AC 15.

²⁰² Ch 10, text at notes 3–7. And see in Sunkin and Payne (eds), *The Nature of the Crown*, ch 2 (Sir W Wade) and ch 3 (M Loughlin).

²⁰³ *M v Home Office* [1994] 1 AC 377, 395.

²⁰⁴ *Mersey Docks Trustees v Cameron* (1861) 11 HLC 443, 508; *BBC v Johns* [1965] Ch 32.

²⁰⁵ E.g. liability to taxation and the criminal law; whether staff are Crown servants (*R v Barrett* [1976] 3 All ER 895). And see ch 12.

should enjoy Crown status,²⁰⁶ but this does not always happen. Whether because of express legislation or judicial interpretation, a public agency may be regarded as having Crown status for some purposes, but not for others.

As we have seen, under the 1947 Act the Crown may be sued for breach of statutory duty. But nothing in the Act affects ‘any presumption relating to the extent to which the Crown is bound by an Act of Parliament’ (s 40(2)(f)). The rule that Acts do not bind the Crown, that is, that the Crown’s rights and interests are not prejudiced by legislation unless a statute so enacts by express words or by necessary implication, significantly limits governmental liability for breach of statutory duty. It is by this rule, for example, that Crown property is in law exempt from taxation and much environmental legislation. This immunity of central government from regulation that applies to private persons goes much further than is justifiable. In 1947, the Privy Council took a strict view of the test of ‘necessary implication’, holding that in the absence of express words the Crown is bound by a statute only if the purpose of the statute would be ‘wholly frustrated’ if the Crown were not bound.²⁰⁷ In 1989, in *Lord Advocate v Dumbarton Council*, the House of Lords for the first time considered the legal basis of Crown immunity. The Court of Session had held that in some instances (for example, where its property was not affected) the Crown could be bound by town planning and highways legislation. Reversing this decision, the House held that the Crown is not bound by any statutory provision ‘unless there can somehow be gathered from the terms of the relevant Act an intention to that effect’.²⁰⁸ For an Act to bind the Crown it is sufficient for it to be shown that if the Act did not do so its purpose would be frustrated in a material respect, not that its purpose would be wholly frustrated. It is good legislative practice for new Acts to state expressly whether and to what extent they apply to the Crown. Where an Act does not apply to the Crown or its servants acting in the course of duty, a Crown servant is not liable criminally if he or she disregards the statute.²⁰⁹ But these rules do not prevent the Crown deriving benefits from legislation. Even though the Crown is not named in an Act, the Crown may take advantage of rights conferred by the Act.²¹⁰

Procedure

Where the Act of 1947 enables proceedings to be brought against the Crown in English courts, whether in tort or contract or for the recovery of property, in principle the normal procedure of litigation applies. The action is brought against the appropriate department, the Minister for the Civil Service being responsible for publishing a list of departments and naming the solicitor for each department to accept process on its behalf; in cases not covered by the list, the Attorney General may be made defendant. The trial follows that of an ordinary civil action, but differences arise in respect of remedies and enforcement. The most important is that in place of an injunction or a decree of specific performance, the court makes an order declaring the rights of the parties (s 21(1)); and no injunction may be granted against an officer of the Crown if the effect ‘would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown’ (s 21(2)).

²⁰⁶ See e.g. Parliamentary Standards Act 2009, Sch 1, para 9 (Independent Parliamentary Standards Authority not to be regarded as servant or agent of Crown).

²⁰⁷ *Province of Bombay v Municipal Corp'n of Bombay* [1947] AC 58 and *Madras Electric Supply Co Ltd v Boarland* [1955] AC 667.

²⁰⁸ [1990] 2 AC 580, 604 (ch 10 D and J Wolffe [1990] PL 14). Contrast *Bropho v State of Western Australia* (1990) 171 CLR 1 (and S Kneebone [1991] PL 361).

²⁰⁹ *Cooper v Hawkins* [1904] 2 KB 164. See now Road Traffic Regulation Act 1984, s 130. On the Crown’s ‘axiomatic’ immunity in criminal law, M Sunkin [2003] PL 716; M Andenas and D Fairgrieve [2003] PL 730.

²¹⁰ Crown Proceedings Act 1947, s 31.

The court may grant injunctive relief where necessary to protect rights under Community law.²¹¹ The House of Lords held in *M v Home Office*, applying ss 23(2) and 38(2) of the 1947 Act, that the restrictions on injunctive relief do not apply to applications for judicial review, which are not ‘proceedings against the Crown’ for the purposes of the 1947 Act.²¹² It was also held in *M v Home Office* that s 21(2) of the 1947 Act does not prevent injunctive relief being granted against officers of the Crown (including ministers) who have personally committed or authorised a tort and applies only in respect of duties laid on the Crown itself. As Lord Woolf said, ‘it is only in those situations where prior to the Act no injunctive relief could be obtained that s 21 prevents an injunction being granted’.²¹³ But he added that declaratory relief against officers of the Crown should normally be the appropriate remedy.

Other provisions maintaining the special position of the Crown include the rule that judgment against a department cannot be enforced by the ordinary methods of levying execution or attachment; the department is required by the Act to pay the amount certified to be due as damages and costs (s 25);²¹⁴ and that there can be no order for restitution of property, but the court may declare the claimant entitled as against the Crown (s 21(1)).

An action for a declaration may be brought against the Crown without claiming other relief, for example where a wrong is threatened,²¹⁵ but not to determine hypothetical questions which may never arise, for example, as to whether there is a contingent liability to a tax.²¹⁶

In civil litigation, when the claimant seeks an interim injunction against the defendant to maintain the status quo pending the final decision, the court grants such a request only if the claimant gives an undertaking as to damages, so that the defendant’s loss may be made good if the action ultimately fails. When the Crown is seeking to assert rights of property or contract, the Crown may be expected to give such an undertaking. But when the Crown takes proceedings to enforce the law, an undertaking as to damages is generally not appropriate.²¹⁷

In Scotland, which has a distinct system of civil procedure, actions in respect of British or United Kingdom departments (like the Ministry of Defence or HM Revenue and Customs) may be brought against the Advocate General for Scotland, an office created by the Scotland Act 1998; in respect of departments of the devolved Scottish Administration, actions are brought against the Lord Advocate.²¹⁸ Actions may be raised by and against the Crown in either the Court of Session or the sheriff court. So far as remedies against the Crown are concerned, the decision in *M v Home Office* did not in terms extend to Scotland, given that separate provision applying to Scottish civil procedure had been made in the Crown Proceedings Act 1947. In *Davidson v Scottish Ministers*²¹⁹ the House of Lords had to decide whether the Court of Session had power to grant interim or final interdicts against the Crown in cases brought by way of judicial review, or whether s 21(1)(a) of the 1947 Act, which appeared to rule this out, applied only to proceedings against the Crown to enforce private rights. Overruling earlier Scottish authority to the contrary, the Lords held that the 1947

²¹¹ *Case C-213/89, R v Transport Secretary, ex p Factortame Ltd (No 2)* [1991] 1 AC 603; ch 6 D.

²¹² [1994] 1 AC 377; S Sedley, in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord*, pp 253–66; T Cornford, in Sunkin and Payne (eds), *The Nature of the Crown*, ch 9.

²¹³ [1994] 1 AC 377, 413, disapproving *Merricks v Heathcoat-Amory* [1955] Ch 567; and see H W R Wade (1991) 107 LQR 4.

²¹⁴ Cf *Gairy v A-G of Grenada* [2001] UKPC 30, [2002] 1 AC 167 (rule of no coercive relief against Crown yields to G’s constitutional right not to be deprived of property without compensation).

²¹⁵ *Dyson v A-G* [1912] 1 Ch 158.

²¹⁶ *Argosam Finance Co v Oxby* [1965] Ch 390.

²¹⁷ *Hoffmann-La Roche & Co v Trade Secretary* [1975] AC 295 (enforcement of price control for drugs). And see *Kirklees Council v Wickes Building Supplies Ltd* [1993] AC 227.

²¹⁸ Crown Suits (Scotland) Act 1857 as amended by the Scotland Act 1998, Sch 8, para 2.

²¹⁹ [2005] UKHL 74, 2005 SLT 110, overruling *McDonald v Secretary of State for Scotland* 1994 SLT 692.

Act had never been intended to prevent the Scottish courts granting interim or final interdicts against the Crown in proceedings (analogous to judicial review) that invoked the ‘supervisory jurisdiction’ in relation to acts of the Crown or its officers. In broad terms, this confirmed that the benefit of the principle in *M v Home Office* could extend to Scotland. When the devolved prison service in Scotland broke an undertaking it had given to the court not to open certain mail being received by a prisoner, the Lords held that in relation to contempt of court, ministers and civil servants in the Scottish government are in the same position as their counterparts in Whitehall.²²⁰

Non-disclosure of evidence: public interest immunity

Disclosure of documents in civil litigation (formerly termed discovery) is a procedure by which a party may inspect all documents in the possession or control of an opponent which relate to the matters in dispute. By s 28 of the 1947 Act, the court may order discovery against the Crown and may require the Crown to answer interrogatories, that is, written questions to obtain information from the other party on material facts. But the Act expressly preserves the existing rule of law (formerly known as ‘Crown privilege’) that the Crown may refuse to disclose any document or to answer any question on the ground that this would be injurious to the public interest; the Act even protects the Crown from disclosing the mere existence of a document on the same ground. Public interest immunity (which became known as PII in the wake of the Matrix Churchill trial in 1992 discussed below) is not restricted to proceedings in which the Crown is a party and may apply also to civil proceedings between private individuals. Although PII is important for the police, its main function is as a means of keeping secret information held by central government. Vital defence and security interests must be protected against the harmful exposure of information in judicial proceedings. But who should decide in a particular situation what must not be disclosed? It is not surprising that ministers and officials may be tempted to exaggerate the harm that would be done by disclosing information they wish to keep secret. But even if they were always to resist the temptation, they are not in a position to assess the harm to the system of justice if the court is barred from seeing relevant information. That being so, the courts have a vital role to play in balancing the need for secrecy against the demands made by the law makes. This role of the courts saw a remarkable development over the second half of the 20th century, and the challenge to the system of justice continues today.

1. The leading cases

We can start at the height of the Second World War with the decision in *Duncan v Cammell Laird & Co.*²²¹

Early in 1939 a new submarine sank while on trial with the loss of 99 lives, including civilian workmen. Many families of those who died brought actions in negligence against the company which had built the submarine under contract with the Admiralty. In a test action, the company objected to producing documents relating to the design of the submarine. The First Lord of the Admiralty directed the company not to produce the documents on the ground of Crown privilege, since disclosure would be injurious to national defence. *Held* (House of Lords) the documents should not be disclosed. Although a validly taken objection

²²⁰ See *Beggs v Scottish Ministers* [2007] UKHL 3, [2007] 1 WLR 455.

²²¹ [1942] AC 624. For the subsequent history, see J Jacob [1993] PL 121.

to disclosure was conclusive, and should be taken by the minister himself, the decision ruling out such documents was that of the judge. In deciding whether it was his duty to object, a minister should withhold production only where the public interest would be harmed, for example, where disclosure would be injurious to national defence or to good diplomatic relations, 'or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service'.²²²

On this basis, documents might be withheld either because the *contents* of those documents must be kept secret (as in *Duncan's* case itself) or on the much wider ground that they belonged to a *class* of document which must be treated as confidential, for example civil service memoranda and minutes, to guarantee candour of communication on public matters within government. Thereafter, the practice developed of withholding documents simply on the minister's assertion that they belonged to a class of documents which it was necessary to withhold 'in the public interest for the proper functioning of the public service'.²²³ It seemed that the courts could not overrule the minister's objection if taken in correct form.

In 1968, in a landmark decision, the Lords overruled an objection by the Home Secretary to production of certain police reports.

In *Conway v Rimmer*²²⁴ a former probationary constable, C, sued a police superintendent for malicious prosecution after an incident of a missing electric torch had led to C being acquitted of theft and then dismissed from the police. The Home Secretary claimed privilege for (a) probationary reports on C and (b) the defendant's report on the investigation into the incident. He certified that these were confidential reports within a class of documents production of which would be injurious to the public interest. *Held*, the court has jurisdiction to order the production of documents for which immunity is claimed. The court will give full weight to a minister's view, but this need not prevail if the relevant considerations are such that the judges have the experience to weigh them.

The House of Lords thus established that it is for the courts to hold the balance in the contest between secrecy and disclosure. It opened the way for further decisions on issues that included (a) the use as evidence of material which is subject to constraints of confidentiality; (b) disclosure of documents relating to the formulation of government policy; (c) the grounds which must be shown before the court will inspect documents; and (d) the use of public interest immunity in criminal proceedings.

The fact that documents are regarded as confidential by their authors is no reason why they should as a class be immune from disclosure on grounds of public interest. Where a government department holds material supplied in confidence by companies regarding commercial activities, the court's decision on disclosure will depend on an assessment of factors such as the reasons for disclosure and the harm that disclosure might cause to the public interest.²²⁵ In *Science Research Council v Nassé*,²²⁶ the House of Lords held that on an employee's

²²² [1942] AC 624, 642.

²²³ See *Ellis v Home Office* [1953] 2 QB 135 and *Broome v Broome* [1955] P 190 for the harsh operation of the rule; and J E S Simon [1955] CLJ 62.

²²⁴ [1968] AC 910; D H Clark (1969) 32 MLR 142.

²²⁵ Compare *Crompton Amusement Machines Ltd v Commissioners of Customs and Excise* [1974] AC 405 and *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133.

²²⁶ [1980] AC 1028.

complaint of unlawful discrimination, no question of public interest immunity (PII) could arise in respect of confidential reports on other employees held by the employer. Lord Scarman stated that PII was restricted ‘to what must be kept secret for the protection of government at the highest levels and in the truly sensitive areas of executive responsibility’.²²⁷

In *Conway v Rimmer*, Lord Reid had said that Cabinet minutes and documents concerned with policy-making were protected against disclosure, as the inner working of government should not be exposed to ill-informed and biased criticism.²²⁸ In *Burmah Oil Co Ltd v Bank of England*,²²⁹ the issue arose of whether such high-level documents were always protected from disclosure.

In 1975 Burmah Oil had with government approval agreed to sell its holdings in BP stock to the Bank of England as part of an arrangement protecting the company from liquidation. Later the company sued to have the sale set aside as unconscionable and inequitable. It wished to see documents held by the bank, including (a) minutes of meetings attended by ministers and (b) communications between senior civil servants on policy matters. The Crown contended that it was ‘necessary for the proper functioning of the public service’ that the documents be withheld. The House of Lords *held* that the Crown’s claim of immunity was not conclusive. If it was likely (or reasonably probable) that the documents contained matter that was material to the issues in the case, the court might inspect them to determine where the balance lay between the competing public interests. Having inspected the documents, the Lords ordered that they be not produced since they did not contain material necessary for disposing fairly of the case.

In *Burmah Oil*, the judges had moved far beyond the position in *Conway v Rimmer*, accepting that there might be circumstances in which a high-level governmental interest must give way before the interests of justice. Even Cabinet papers are not immune from disclosure in an exceptional case where the interests of justice so require.²³⁰

The assessment of PII cannot sensibly be done without sight of the documents in issue. Yet, in *Air Canada v Trade Secretary*²³¹ the House of Lords upheld the Secretary of State’s claim for immunity and refused to inspect the documents. The majority held that for a court to exercise the power of inspection, it was not sufficient that the documents *might* contain information relevant to the issues in dispute; the party seeking access to the documents must show that it was *reasonably probable* that the documents were likely to help his or her case. A speculative belief to this effect was not enough. This decision was a reminder that even in judicial review proceedings, the court does not have a power at will to inspect all relevant documents held within government.

Although PII arose in the context of civil litigation, immunity from disclosure extends to criminal proceedings, albeit in a different form.²³² Plainly the public interest in keeping

²²⁷ *Ibid*, at 1088.

²²⁸ [1968] AC 910, 952; see also Lord Upjohn at 993.

²²⁹ [1980] AC 1090; D G T Williams [1980] CLJ 1.

²³⁰ As in the Australian case of *Sankey v Whitlam* (1978) 21 ALR 505. See also *Air Canada v Trade Secretary* [1983] 2 AC 394, 432 (Lord Fraser); I G Eagles [1980] PL 263. See now the qualified exemption from disclosure for Ministerial communications, including Cabinet papers, where the public interest does not favour disclosure: Freedom of Information Act 2000, s 35.

²³¹ [1983] 2 AC 394; Lord Mackay (1983) 2 CJK 337 and T R S Allan (1985) 101 LQR 200.

²³² *R v Ward* [1993] 2 All ER 577, *R v Davis* [1993] 2 All ER 643. And see *Rome v UK* (2000) 8 BHRC 325. The present rules on disclosure in criminal procedure are outside the scope of this work; but see *R v H* [2004] UKHL 3, [2004] 2 AC 134.

material secret can be damaged by disclosure wherever it occurs, but the public interest in the administration of justice is at its strongest when, if evidence is withheld from production in a criminal trial, this may prevent the accused from establishing a defence.²³³

In November 1992, the trial of three Matrix Churchill executives for the unlawful export of arms to Iraq brought these issues to public notice. Before the trial, four ministers had signed PII certificates withholding documents that concerned whether the defendants' purpose in exporting machinery to Iraq was known to the security services and thus to the government. PII was claimed on 'class' grounds that included protecting the functioning of government and maintaining the secrecy of intelligence operations. Having inspected the documents, the trial judge ordered disclosure, and the trial collapsed.²³⁴ Sir Richard Scott's inquiry into 'arms for Iraq' made a penetrating study of the use of PII certificates in the case.²³⁵ Among his criticisms were that 'class' claims for PII had been made which ought to have had no place in a criminal trial, that the claims extended to documents 'of which no more could be said than that they were confidential', and that inadequate and misleading advice had been given to ministers when they were asked to sign PII certificates.²³⁶ This included advice that in effect left ministers with no option but to claim immunity on a class basis, even if the public interest did not require such a claim to be made. This view of the law was corrected in *R v Chief Constable of West Midlands Police, ex p Wiley*, where the Lords held that documents which are relevant to litigation *should* be produced unless disclosure would cause substantial harm. 'A rubber stamp approach to public interest immunity by the holder of a document is neither necessary nor appropriate.'²³⁷ It is now settled that when ministers have claimed PII for evidence in civil litigation, it is for the judge to whom such a claim is made to study the evidence and decide whether the public interest in keeping the material secret is outweighed by the interests of justice.²³⁸

2. The development of public interest immunity into a closed material procedure

The law has come a very long way since *Duncan v Cammell Laird* distinguished between 'contents' and 'class' as a basis for withholding documents in the public interest. But the potential for tension between executive secrecy and open justice has intensified since the September 2001 attacks, as the effects of the 'war against terror' have impacted upon basic human rights.

One indication of this is the increasing use of procedure whereby the executive appoints special advocates to 'represent' an individual when the court is dealing with secret material that cannot be disclosed to the individual. This is known as a 'closed material procedure', or CMP. Special advocates were authorised by the Special Immigration Appeals Commission Act 1997 for certain immigration appeals, but the model was applied without statutory authority by the Parole Board.²³⁹ In exceptional cases, the criminal courts accept the use of

²³³ Non-disclosure by the prosecution, with the judge's approval, of relevant evidence by reason of PII may cause a trial to be unfair in breach of art 6(1) ECHR: see *Edwards and Lewis v UK* (2003) 15 BHRC 189 (evidence re entrapment), distinguishing *Jasper v UK* (2000) 30 EHRR 441.

²³⁴ See A W Bradley [1992] PL 514, A T H Smith [1993] CLJ 1, I Leigh [1993] PL 630. On the Scott report, see [1996] PL 357–507; also I Leigh and L Lustgarten (1996) 59 MLR 695.

²³⁵ In the Scott report (HC 115, 1995–6), see on PII vol III, chs G.10–15 and G.18; vol IV, ch K.6. Also R Scott [1996] PL 427; Tomkins, *The Constitution after Scott*, ch 5; I Leigh, in Thompson and Ridley (eds), *Under the Scott-light*, pp 55–70.

²³⁶ Scott report, para G18.104.

²³⁷ [1995] 1 AC 274, 281 (Lord Templeman). And see *Savage v Chief Constable of Hampshire* [1997] 2 All ER 631.

²³⁸ In *Somerville v Scottish Ministers* [2007] 1 UKHL 44, [2007] 1 WLR 2734, the Lords reminded the Scottish courts that this was the duty of the judge at first instance.

²³⁹ *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738.

specially appointed advocates to make submissions to the judge about the material to be protected, on condition that no information is passed to the defendant or the defendant's representatives.²⁴⁰ The issue of a PII certificate in judicial review proceedings is not in itself a reason for the appointment of a special advocate to deal with material that cannot be disclosed to the claimant, since it is primarily for the judge to decide where the balance of interests may lie.²⁴¹ The use of special advocates does not necessarily ensure that the individual has a fair hearing that satisfies art 6(1) ECHR.²⁴²

Another repercussion of the 'war on terror' on the protection of human rights is seen in *R (Binyam Mohamed) v Foreign Secretary*.²⁴³

A former detainee at Guantanamo Bay sought judicial review of a refusal by the Foreign Secretary to provide information relevant to his trial on terrorist charges in the USA. After protracted hearings over material withheld by the Foreign Secretary, and after dealing with much of this material in closed proceedings, the Divisional Court decided to include in its published judgment seven brief paragraphs confirming that the claimant had suffered, at the least, cruel, inhuman and degrading treatment at the hands of the US authorities. The Foreign Secretary argued that publication of the court's conclusions would prejudice co-operation between the British and US security services. The Court of Appeal held that the claim to PII was not justified in the context of the litigation: the paragraphs did not reveal information that would be of interest to a terrorist or harmful to national security, and the information was already in the public domain. The argument to censor the published judgment engaged 'concepts of democratic accountability and, ultimately, the rule of law itself'.²⁴⁴

That case formed part of a complex history of litigation brought by former detainees at Guantanamo Bay in which they sought damages from the UK government for illegal acts that they claimed occurred when they were detained, and during their rendition, interrogation and detention in American custody. To resist a further set of these claims, and arguing that it was impractical to go through the PII process, the government urged the court to order a 'closed material procedure' by which sensitive security material in its possession could be made known to special advocates, appointed to act for the claimants, so that part of the defence case would not be revealed to the claimants or to their lawyers. The central issue of principle came to the Supreme Court. In *Al Rawi v Security Service*,²⁴⁵ nine judges were unanimous that the courts have no power simply to replace the normal process of PII with a closed material procedure. A majority of six judges further held that after the PII process has been completed, the court has no power at common law to introduce a closed material

²⁴⁰ See *R v H* [2004] UKHL 3, [2004] 2 AC 134, [10]–[39].

²⁴¹ *Murungaru v Home Secretary* [2008] EWCA Civ 1015; *Home Secretary v AHK* [2009] EWCA Civ 287, [2009] 1 WLR 2049.

²⁴² *Home Secretary v AF (No 3)* [2009] UKHL 28, [2009] 3 WLR 74, applying *A v UK* (2009) 49 EHRR 625. For an illuminating commentary by a special advocate, see: M Chamberlain (2009) CJQ 314 and 448. See p 557 above.

²⁴³ [2010] EWCA Civ 65 and [2010] EWCA Civ 158, [2011] QB 218.

²⁴⁴ *Ibid*, [56]. For stringent judicial criticism of failings by the Ministry of Defence in regard to PII certificates, see *Al-Smeady v Defence Secretary* [2009] EWHC 1687 (Admin) and [2009] EWHC 2387 (Admin), [2010] HRLR 2.

²⁴⁵ [2011] UKSC 34, [2012] 1 AC 531; M Chamberlain [2011] CJQ 360; J Ip (2012) 75 MLR 606. The decision has not stopped the courts adopting a 'confidentiality ring' procedure, only permitting disclosure to the claimant's lawyers and not the claimant himself: *R (Mohammed) v Secretary of State for Defence* [2012] EWHC 3454 (Admin); [2013] 2 All ER 897.

procedure, appointing special advocates and so on, since this would be a radical departure from the principles of open and natural justice, and would deny parties their common law right to a fair trial. In the majority view, existing exceptions to the principle that justice must be done in open court (for instance, to protect the interests of a child or in intellectual property law to keep secret a commercial interest) did not justify introducing a controversial new rule in all civil litigation. Such a fundamental change in civil procedure, if it were to be made, must be made by Parliament. A minority of three judges (Lord Mance, Lord Clarke and Lady Hale) were less categorical than the majority, holding that in some circumstances the court may have power to order a closed material procedure where difficulties remain after the PII process has been completed.

Alongside *Al Rawi*, the Supreme Court also decided *Home Office v Tariq*.²⁴⁶ The Employment Tribunals Act 1996 authorises the Secretary of State to make regulations authorising employment tribunals to adopt a closed material procedure if the interests of national security so require. Tariq, an immigration officer who had been suspended on security grounds, challenged an order applying closed material to his claim against the Home Office for discrimination on grounds of race and religion, relying on the ECHR and on EU law. By 8–1, the Supreme Court upheld the closed material procedure in employment cases, holding that the system contains sufficient safeguards to protect the claimant’s interests. In dissent, Lord Kerr held that withholding of information from a claimant is a breach of the common law right to a fair trial, and also a breach of the right to a fair trial under article 6(1) ECHR.²⁴⁷

The Supreme Court had to return to the issue of CMPs in *Bank Mellat v HM Treasury (No.1)* where it held – against the context of an asset freezing regime under the Counter-Terrorism Act 2008 which permitted a CMP to be adopted – by a majority of six to three that the Supreme Court could itself adopt a CMP on an appeal.²⁴⁸ The Court nonetheless made it very clear that it was extremely unhappy about requests to use a CMP and the use of a CMP had, in that case, been wholly unnecessary. Lord Neuberger also set out clear guidance to be adopted by any court considering using a CMP and issuing a judgment which was partially closed, or secret.²⁴⁹

The Supreme Court’s decision in *Al Rawi* that the courts had no power to introduce a closed material procedure in civil proceedings caused the government to introduce legislation to give the courts that novel power.²⁵⁰ The resulting Bill met very strong criticism, particularly in the House of Lords²⁵¹ and some limitations on the government’s original proposals were adopted. Part 2 of the Justice and Security Act 2013 authorises the High Court, Court of Session and higher courts in the course of civil proceedings to decide (on the application of the Secretary of State, any party to the proceedings, or of its own motion) that ‘closed material procedure’ (CMP) may be followed. Such procedure applies where ‘sensitive material’ (defined as ‘material the disclosure of which would be damaging to the interests of national security’, s 6(11)) would otherwise require to be disclosed (or withheld) by the party in question and where ‘it is in the interests of the fair and effective administration of justice’ that the procedure should apply (s 6(5)). Before applying to the court, the Secretary of State

²⁴⁶ [2011] UKSC 35, [2012] 1 AC 452.

²⁴⁷ Lord Kerr considered to be anomalous the decision of the Strasbourg court in *Kennedy v UK* (2011) 52 EHRR 4 which, in a case of suspected telephone tapping brought under the Regulation of Investigatory Powers Act 2000, held that Kennedy had no absolute right to see all relevant evidence and that the UK legislation did not breach articles 6(1) and 8 ECHR.

²⁴⁸ [2013] UKSC 38, [2013] 3 WLR 179.

²⁴⁹ [2013] UKSC 38, [2013] 3 WLR 179 at [68]–[74].

²⁵⁰ See the Green Paper, *Justice and Security* (Cm 8194, 2011); and observations by the Joint Committee on Human Rights (24th report, HL 286, HC 1777, 2010–12).

²⁵¹ House of Lords Constitution Committee, *Justice and Security Bill* (3rd report, HL 18, 2012–13). See too: M Chamberlain [2012] CJC 424; M Fordham [2012] JR 187; T Otty [2012] EHRLR 267.

must have considered whether a claim for public interest immunity (PII) should be made (s 6(7)). The decision of the court authorising CMP must be kept under review by the court and may be revoked if the ‘fair and effective administration of justice’ no longer requires it (s 7(3)). Before the court authorises CMP, a ‘special advocate’ must be appointed by a law officer of the Crown to represent the interests of the party adversely affected by the CMP (s 9(1)): the litigant and his or her regular legal representatives cannot be informed of the material in question. When CMP is authorised by the court, proceedings involving the sensitive material take place in strict secrecy but in the presence of the special advocate; the eventual judgment of the court will need to be in two parts, one an open judgment covering matters dealt with in open court, and the other a secret judgment that cannot be published or disclosed to the litigant, and can be seen only by the Secretary of State and the special advocates. It remains to be seen whether the structure for decision-making contained in the Act will enable the courts to make decisions independently of the executive on matters that may have a bearing on national security, but may also (as with rendition and prolonged detention in Guantanamo Bay) have a drastic effect on the individual’s rights and liberties and on the due process of law.

E. Conclusion

Judicial review is a branch of law which applies only to public authorities. In other areas of the law, so it was traditionally said, the Crown (or other public authorities) had no special or particular protection beyond that of any other litigant. As we have seen in this chapter, that was never true and it is certainly not true now.

The status of an individual party as a public authority has a series of effects. It may mean that they are subject to torts which do not apply to private individuals (misfeasance in public office, breach of the Human Rights Act 1998). It may mean that particular types of proceedings cannot be brought at all because of the Crown Proceedings Act 1947. It may mean that in particular cases information can be withheld on public interest immunity grounds, or the claimant is excluded from large sections of the proceedings altogether by the application of a closed material procedure.

Even in ‘ordinary’ cases of breaches of obligations – tort, contract, restitution – the fact that the defendant is a public authority means that the law may react differently. Imposing a new duty of care on a public authority in negligence has given rise to a contradictory and evolving body of case law; the freedom of public bodies to act in the public interest has meant that they may escape contractual obligations more readily; and large sections of the law of restitution have been developed in the context of recovery of overpaid tax revenue.

As a result, it must not be forgotten that administrative law is more than just judicial review. Judicial review is only one way in which the State may be held to account, and it is only one branch of law in which the involvement of public authorities as a party to litigation means that special considerations or rules may apply.

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