Administrative Justice:
Central Issues in UK and European Administrative Law

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PREFACE

In writing this book we have kept in mind our aim of providing a concise account of the main issues which presently characterise our system of administrative justice. The book is intended as a text for undergraduates taking a modular course in administrative law and indeed its origins lie in our own experience of teaching and adapting such a course here at Sheffield. Inevitably we owe a considerable debt to past and present colleagues whose work has formed the basis of much of our thinking in this text. In particular, we should like to thank Douglas Lewis, Tony Prosser, Ian Harden and Cosmo Graham, not only for letting us draw on their writings, but also for their advice and encouragement over a number of years. Our teaching of public law has also drawn heavily on the work of Paul Craig and his influence is also gratefully acknowledged.

We hope that the book will prove useful in identifying and elucidating the key issues in administrative law. We do not seek to provide a detailed or definitive account of administrative justice and there are some aspects which inevitably fall outside the scope of this text. Our intention has been to provide both an introduction to the subject and also a framework for students who are trying to grapple with what is now a massive subject in a short modular course. We hope, too, that students will see it as a guide for their own further reading, and thinking, about administrative justice.

Diane Longley
and Rhoda James
Sheffield
December 1998

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CHAPTER 1

THE JUSTICE ISSUE: THE RELATIONSHIP BETWEEN THE CONSTITUTION, LAW AND JUSTICE

INTRODUCTION

Administrative justice is part and parcel of the common, though frequently unarticulated, understandings and expectations inherent in the constitutional fabric woven from the weft and warp of our political and legal systems. Put quite simply, it is a fundamental principle that government – at all levels and in all its manifestations – should act justly in its dealings with the public. Of course, this is a classic example of 'more easily said than done'. Not only are the *means* to attain administrative justice problematic, but the concept of justice itself is ambiguous and often contested.

The road to administrative justice is a challenging one, the challenge being how to ensure, in the modern and complex society that is ours, that the actions and decisions of our public bodies and institutions are just? How can administrative justice be achieved? Through what mechanisms? What is required to establish a system able to deal justly with the hard policy choices and trade-offs that inevitably have to be made in the selection of priorities, the allocation of resources and the availability of public services? Consequently, whether from a conceptual, procedural or substantive perspective, administrative justice presents one of the most central and vexed issues in the field of public law today.

Putting aside this conundrum for the moment, it has become widely recognised by constitutional commentators that our present, traditional democratic processes for delivering administrative justice, although supplemented and improved in recent years, fall far short of meeting demands for machinery that can respond effectively to the complexities of modern government. Yet, despite this recognition, public law is, in many ways, still struggling to come to terms with this failure of its conventional forms to overcome the crises of accountability and legitimacy that have been arising in our public institutions.

Where traditional means of securing fundamental principles prove inadequate, it would be natural to expect that renewed consideration would be given to other more effective and possibly more innovative ways of perfecting arrangements for their realisation in order to revitalise first principles, to optimise opportunities for effective scrutiny and input into administrative processes. But, rather than looking at emergent problems in the round, we have frequently taken a characteristically inarticulate, if not disorderly approach to such matters. As a result, the reticent, pragmatic and piecemeal solutions adopted so far have failed to develop a system in which expectations of administrative justice are matched consistently in practice.

However, notwithstanding the difficulties and the many questions, it is possible to set out the basic elements of a system pertaining to deliver administrative justice. A just system is one which would enable the dealings between government and the governed to be conducted in an accountable and fair manner. It would be a flexible system, one which would facilitate the exposure of both strengths and weaknesses in the provision and delivery of public services and able to build on the former and repair the latter. From such a perspective, administrative justice can be seen to travel hand in hand with fairness in the negotiation of social relationships. The focus of concern is not only those decisions which affect the individual, but also collective considerations.

Clearly, from such a standpoint, administrative justice has both *ex ante and ex post* elements. Decisions not only need to be justified and open to challenge *after* they have been taken, but machinery must be provided to allow involvement of relevant parties in the policy processes *prior* to the taking of decisions, particularly before the stage is reached where investment in time and resources means that there is little chance of policy directions and drift being considered revocable.

The provision of effective processes, *ex post* for the redress of grievances *and ex ante* for participation in decision making, help to ensure the development of legitimate and accountable government that can meet the needs of administrative justice. Throughout the chapters that follow, both these aspects will be discussed, present mechanisms for their realisation will be evaluated, and possibilities for future developments will be considered.

THE ROLE OF LAW AND LAWYERS

Administrative law was something that institutional writers virtually ignored for decades after it had become part of the working of the British constitutional system. Much of the responsibility for this must be laid at the door of Dicey and the long prevalent attitude that there was no need for a developed system of public law.[1] For their part, lawyers have been rather slow to appreciate the impact that political and administrative changes have made on the legal system and on society. The paucity of theoretical thinking and its detrimental effect on the development of our public law is well documented.[2] To some extent, this paucity remains today. As we shall see,

1 Dicey, *Introduction to the Study of the Law of the Constitution*, 1959, and see Dicey, 'The development of administrative law in England' (1915) 31 LQR 148.

2 Prosser, 'Towards a critical public law' (1982) 9 JLS 1; Harden and Lewis, *The Noble Lie: the Rule of Law and the British Constitution*, 1986; Loughlin, *Public Law and Political Theory*, 1992.

whilst there are some notable exceptions,[3] the impact of the profound changes brought about by deregulation, privatisation, contracting out and the like are only just beginning to be more widely recognised, let alone evaluated, by lawyers working in the administrative field.

The slow response of lawyers has, perhaps, been surprising, as one of the key functions of law in any society is to provide a framework for the conduct of public affairs. Law is traditionally one of the major means by which institutions, such as those that provide health care, education or welfare benefits, are established, defined and structured.[4] As statutory frameworks are, for the most part, enabling legislation which merely outlines policy objectives and leaves detail of service provision to the exercise of delegated discretionary powers, law is continually being made and interpreted within public institutions as policy choices and decisions are taken and put into practice.

Although discretionary powers are, without doubt, a necessary feature of modern government, enabling public bodies to cope with changing circumstances with a required degree of flexibility, our concept and principles of administrative justice require that such powers are neither abused, nor exercised unfairly. Procedures and processes for accountability and legitimacy help ensure that arbitrary decisions are eliminated as far as possible, and that policy is made only for reasons that are properly related to the intended objectives of the grant of discretionary power.

As a means of achieving public ends by shaping social processes, it should be apparent that law has both constraining and facilitating qualities. What has been under-emphasised for far too long is an understanding of law, not just as a means of achieving public goals and social objectives, but also as a means to promote and ensure accountability and legitimacy – principles that are fundamental to our notions of administrative justice and that form the cornerstone of constitutional protections and human rights – throughout the processes of public decision making.

Thus, a fundamental role of law is to provide the 'blue print' to legitimate action. Traditionally, law has essentially set out the bounds of the scope or *quantity* of public power, but it must also be concerned with the *quality* of public power, operating as a quality control mechanism on public policy, its implementation and its operation, whatever its institutional form.

Thus, administrative decisions should be made within a framework of principle rather than one of pragmatism.[5] Expectations of administrative

3 Birkinshaw, Harden and Lewis, *Government by Moonlight: the Hybrid Parts of the State*, 1990; Harden, T*he Contracting State*, 1992; Ogus, *Regulation, Legal Form and Economic Theory*, 1994; Leyland and Woods (eds), *Administrative Law facing the Future: Old Constraints and New Horizons*, 1997.

4 Cotterall and Bercusson, 'Law, democracy and social justice' (1988) 15 JLS 1.

5 Bamforth, 'Reform of public law: pragmatism or principle?' (1995) 58 MLR 722.

justice can only be fulfilled by a system which generates a state of affairs that seeks to ensure the legitimacy of public decision making through the provision of procedures for an adequate level of public participation in decision making processes, as well as for the redress of grievances where citizens wish to contest decisions taken on their behalf.

The main pursuit for public lawyers is to assist in the development of mechanisms that are able to infuse these broad and far-reaching expectations of justice into the organisation of our public institutions. It is only through properly responsive processes of accountability and legitimacy that a clear picture of public action, or inaction, and decision making can emerge, that defects can be made apparent and the changing patterns of alliances between interested parties highlighted. Only then can the opportunity be provided for different views and interests to be brought to bear in practice and ultimately facilitate change that more nearly meets the basic principles of administrative justice.

OPENNESS

A word should be perhaps be said at this point about the need for openness – or, to put it in its more modern idiom, transparency – as a central prerequisite for genuine administrative justice, for without it there can be little genuine participation in decision making or redress for arbitrary decisions on the part of the public. Consequently, openness should embrace decision making from macro policy setting through to its implementation, its affect on individuals and the monitoring or review of its operation.

A commitment to openness is of prime importance in order to counter any tendency there might be, on whomsoever's part, to control or distort the output of information or access to it. Such a tendency may not only prevent matters being the subject of proper debate, but may also deter issues coming to the fore or being conceded as part of the agenda. Either restriction reduces the capacity for reasoned decisions to be made. Further, openness facilitates challenge to both the decision making process and to decisions themselves by exposing any procedural or substantive grounds for concern. Where transparency is truly sovereign, justice – or otherwise, as the case may be – can be seen to be done.

However, it is important to note that a commitment to openness needs to go beyond a basic provision for access to information. In the clamour for freedom of information, it is often forgotten that the *type* of information generated is of crucial importance. In order to be effective, openness requires the devising of mechanisms for the actual generation of information and its utilisation in a *form* and of a *kind* of use to a wider audience than is often currently the case. Only where this is the case can the scope of options and

proper discussion of them be widened and genuine transparency be said to be fully operative.

The same commitment also implies an obligation on the part of decision makers to give explanations and justifications for their activities. The articulation of reasons for action or inaction is beneficial to justice in a number of ways. It not only assists the development of standards and principles, but encourages more care and deliberation on the purposes of action by decision makers, as well as providing a basis for criticism and facilitating challenge to decisions which appear arbitrary.[6]

Many of the matters raised above will be discussed in detail throughout the following chapters. But before the impact and implementation of principles of administrative justice are examined in our system of government, some consideration needs to be given to the context in which they are now operating and the changes which have been taking place in recent years within our public services.

THE MANAGEMENT OF GOVERNMENT BUSINESS

To varying degrees, and in a number of differing ways, government functions have been undergoing a process of reassessment and restructuring. This public sector reform, of a kind that is now almost universally referred to as new public management (NPM), has been proceeding quite rapidly. These changes have by no means been unique to Britain and tend to display a fairly similar pattern throughout a number of countries, in that the role of government has been redefined in various ways at both central and local levels.

The central tenets of the new approach are the driving downwards of responsibility for decision making; the separation of policy making structures from service delivery systems; the increasing use of the private sector for the funding and delivery of public services,[7] either in part or as a whole; the setting of performance targets and service indicators; and a greater emphasis on the quality of services delivered to the citizen in their capacity as a consumer.[8] Allied to this has been the extension of contract as the vehicle which underpins the delivery of many public services and the development of quasi-markets within the public sector.[9]

6 Galligan, 'Judicial review and the textbook writers' (1992) 12 OJLS 2.

7 For a public law perspective on the use of the private sector in the provision of public services, see Freedland, 'Public law and private finance – placing the private finance initiative in a public law frame' [1998] PL 288.

8 Lewis, 'Responsibility in government: the strange case of the United Kingdom' [1995] 1 EPL 3.

9 Harden, *The Contracting State*, 1992, and Freedland, 'Government by contract' [1994] PL 86.

The momentum towards pro-competitive, market mimicking strategies of recent times was seen as the optimum means of containing costs and increasing efficiency, as well as improving quality and consumer choice. It was believed that these moves would stimulate the development of economic incentives and organisational capabilities that would underline and in time limit unnecessary elements of public services and foster a more innovative delivery of those that remain.[10]

In Britain, the origins of NPM date from the early 1980s and the Financial Management Initiative (FMI), which sought to tighten accountability for public sector expenditure throughout public services. In the late 1980s, the perceived weaknesses of the FMI led to the more thorough reorganisation of government departments, beginning with the initiation of what was termed the Next Steps programme. Through Next Steps, there has been a devolution of government department functions to a wide variety of agencies, ostensibly outside direct ministerial control. This has been supplemented by the privatisation of some civil service tasks and the adoption of market testing and contracting out strategies, as well as the implementation of NPM to a greater or lesser degree throughout our public services.[11] One of the main problems has been the emphasis latterly in our public institutions on efficiency, especially economic efficiency. Whilst accountability for expenditure is, of course, necessary and desirable, a misconception appears to have arisen that the wider, fundamental requirements of public accountability are either irrelevant or are, at a minimum, a constraint on its attainment. As a result, the nature of public accountability has become too narrowly focused. It is clear, therefore, that all the activities encompassed by new public management have implications for the effectiveness of our structures for administrative justice.

A word about the philosophy, or at least the rhetorical justification, which underpinned many of these recent changes would be timely here. Emphasis was given to the need to attain 'value for money' in all aspects of government concerns. This was coupled with a focus on the development of a greater degree of 'user choice'.[12] This is, of course, all to the good. Far more open and user responsive government and public services have long been advocated and are part of the essence of administrative justice.

But, when examined, the 'sound bites' of enhanced choice in recent public sector reform have tended to be more apparent than real as explanations of the means by which, or to what degree, that choice may be exercised. Certainly, in Britain, many of the arrangements for the realisation of 'user' choice are such that a shift has evolved that has marginalised collective

10 Osborne and Gaebler, *Reinventing Government*, 1992.

11 See, in particular, the Deregulation and Contracting Out Act 1994.

12 Much of health and education service reforms were predicated on enhanced choice and local decision making.

avenues for participation in decision making and has instead tended to emphasise an individual, more consumerist perspective. This latter approach, of course, fits well with the common formula of NPM, which has tended to emphasise individual rights and responsibility, espouse the reduction of the role of the State and exhort markets and competition for the provision of public services. However, in practice, the realities of the exercise of choice may differ from the promises made at the inception of the reforms. This is certainly true within health and education, where both individual and collective choice have, arguably, taken a battering.[13]

Undoubtedly, the advantages of some market mimicking and competitive practices have perhaps been overlooked for far too long in the field of government and public services, which were often ineffective and unresponsive to those who had need of them. But the question is whether the initiatives that have been put in place have addressed fully the extent of *the nature of choice* within the public arena and the relationship between choice and the broader undertakings of social or public policy in the light of administrative justice.

THE NATURE OF CHOICE

It has been cogently argued[14] that, as a concept, choice has a fruitful depth of meaning which is able to encompass the whole bundle of human rights necessary for the freedom and well being of individuals in society. Central to those human rights is autonomy, or freedom of expression. For example, the Universal Declaration of Human Rights states that everyone has the right to freedom of thought, conscience and to freedom of opinion and expression.[15] The European Convention on Human Rights and Fundamental Freedoms also reflects these declarations.[16]

Choice resounds with all the connotations of autonomy and freedom of expression that are endemic to both individual and social action. Because of its spectrum of meaning and its multi-layered properties, aspects of choice are able to be plundered selectively. This has certainly been the case in relation to recent public sector reforms, where choice has been elevated, but only in a narrow individualist sense, in the ideology of the political right.

But, if, as we and others argue, choice is the generic embodiment of the core of human rights, freedom to choose, to express ourselves, its instantiation logically extends far beyond any restricted, individualist expression in the

13 Longley, *Health Care Constitutions*, 1996; Feintuck, *Accountability and Choice in Schooling*, 1994.

14 Lewis, *Choice and the Legal Order: Rising above Politics*, 1996.

15 Arts 18 and 19.

16 Arts 9 and 10.

economic market place into the social and political arena. After all, all individuals have to make their choices in social settings where such decisions are affecting others and where collective responsibilities and entitlements necessarily operate.[17] It is the concept of choice that is at the root of claims for participation and consultation, it is that which enables autonomy to be expressed at different levels and in a whole range of different areas. Choice is the concept that fuses together the division of functions that have *generally* been attributed to the market with those that have been attributed to the field of politics. Once this is accepted, choice can be seen as naturally encapsulating channels for both individual *and* collegiate expression.

It is here that the constitutional dimension and the relationship between human rights, law and politics becomes apparent. In essence, a constitution is a collection of principles which gives credence to the fact that, at the most fundamental level, there are certain conditions which must prevail and be actively pursued in order to allow citizens freedom of expression, to further their well being; in other words, to enable them to flourish. The constitution and the process of constitutional discussion should be a stabilising force, a backdrop against which all social policy and administrative activity revolves, is negotiated and resolved.

The role of the constitution is thus to secure and guarantee human rights and to reinforce the principles of debate about the exercise of choice in the taking of decisions in the political and social field. On a practical level, this requires governance circumscribed by law. Whereas the role of the constitution is to guarantee core values and principles, the function of government, naturally subordinate to the constitution, is to facilitate discussion of what options are to be taken with regard to those core principles. In this sense, government and those emanations which exercise functions on its behalf, whether public or private,[18] are constitutional agents with constitutional duties and which must, consequently, act in accordance with constitutional principles.

The actual structures for making choices and taking decisions are matters of political debate. Whilst they should strive to be optimal, no particular institutional arrangement or method of operation is prescribed. Once the constitution is accepted as the base from which everything else flows, political discussion will consider the extent and form of choice and the levels at which these might most effectively occur, as this may be different for different policy areas.

Choice, of course, also implies a diversity of options from which to choose. Where limited resources constrain options, as they often do in the policy arena, accountability and justice require that citizens have an opportunity to

17 Gewirth, *Community of Rights*, 1996.

18 See the discussion on the division of public and private below, Chapter 6.

have a say in decisions about those limitations, or at the very least have limitations, and the reasons for them, made explicit.

At the heart of these developments, the real issue that is being grappled with is the 'art of governance', the search for the means of sharing public power which might lead to an efficient but *just* allocation of finite resources. The 'art of governance' requires that there is sensitivity to the needs of various and different constituencies of interest. This means more than a superficial and cursory glance at accountability and participation in public decision making, but the maximum possible impact of any particular voice. Choosing or participation in decision making needs to be promoted at the lowest level possible that it can occur most effectively. Thus, the aim of *collective* choice is to facilitate as far as possible *individual* choice. This, in effect, is the logical extension of the principle of subsidiarity.

It has recently been fashionable to argue that the power of the State is on the wane; the 'contracting' or the 'rolling back' of the State has been referred to frequently. But on the contrary, all that has happened is that the State has altered its shape. In fact, the conduct of government business is never likely to diminish in modern society. The forms of governance might change and become more complex, but the need for management of public matters is in all likelihood bound to increase through the introduction of new and varying ways of channelling government functions, the concerns, interests and the diversity of public organisations, their interdependence and networks of influence. The need for adaptive mechanisms for the control of public activities and complementary, appropriate processes for accountability and legitimacy of decision taking and the choices made are, therefore, in all probability even stronger.

It is important to note that public sector reform and the changing shape of government has been carried out in Britain without any reference to a tailor made constitution. The government initiated the transformation under terms and conditions set down by politicians who were unconstrained by constitutional principles or administrative law values. Consequently, in Britain, it might be difficult to identify the first principles of administrative justice and it is perhaps much harder to search for and pinpoint the elements and measures of accountability and legitimacy than it was 20 years ago. But, as we stated at the outset, they do exist, they are there, embedded in the fabric of our system. However, it is precisely because they are unclear and unwritten that these sentiments and understandings can be treated in a more cavalier manner than would be the case if they were actually expressed as part of a coherent constitutional document.

There is, of course, one constitutional document – the Treaty of Rome, amended by the Single European Act, the Maastricht and the Amsterdam Treaties, all of which obtrude increasingly into our domestic law as more and more areas are gathered into the European fold. The pervasive influence of European law and institutions is manifest and continental jurisprudence is

having a profound effect. But, this just adds one more dimension to the search. Another dimension which is likely to have a substantial impact is the incorporation of the European Convention on Human Rights into our domestic law. Both these dimensions will be discussed further shortly.

To summarise this rather theoretical section, the recent changing sphere of public services has exposed more clearly the gaps in accountability and legitimacy of governmental activity. We do not yet have in our possession the kind of constitutional apparatus which can intercede effectively in this area. Challenge to administrative action, either prospectively or retrospectively, is very much a hit and miss affair, and public lawyers have to search for the public interest points of entry in order to question the actions and decisions of government and administration.

THE HISTORICAL BACKGROUND AND THE ROLE OF THE COURTS

The issues discussed above are reflected in the operation and role of the courts, which have struggled to adopt a consistent and principled approach to the difficulties. Let us go back for a while into history, to consider why the courts might have found it difficult to adapt to changing circumstances.

It is often forgotten that England itself was originally a number of separate kingdoms which were unified only with the arrival, in 1066, of William the Conqueror, who introduced the feudal system. William cemented and bolted England together through the system of real property or land use.

Under the feudal system, the king held title to the land and parcelled it out to nobles in exchange for services rendered – usually military assistance against internal and external protagonists. Nobles likewise passed down parcels of their land in return for agricultural services. The king also allocated powers to adjudicate over disputes, which became the first important system of public law. There was a central King's Court, and various subsidiary courts.[19] The central King's Court decided any dispute involving an allegation of force or property. This was carried out, not under any statutory authority, but under the king's inherent jurisdiction, the common law jurisdiction. Order 53 of the Rules of the Supreme Court, the way by which much public action is challenged, which relates to judicial review, is a successor to this.

But, successive kings were seen to abuse their power and in 1688, the Bill of Rights was enacted to curb the power of the monarchy. England, however, was peculiar and perhaps even unfortunate in that its political revolution occurred earlier than in other European countries, and it was not as deeply disruptive of social reorganisation as in the rest of Europe. For the most part,

19 Their names persist today – Barons Court, Earls Court, etc.

governmental structures were changed as little as possible, so that the ruling classes could rely on a claim of governing by tradition.

Part of that tradition was, of course, the legacy of the *common* law; one unified law which regulated the activities of both private citizens and the government in the *same* courts. The other fundamental element of the 17th century settlement was the *legislative supremacy of Parliament* and the establishment of an independent judiciary; the idea being that Parliament made the law and judges interpreted it. These factors greatly affected our system of public law. In particular:

(a) the reliance on the idea of a unified common law prevented the development of a separate system of administrative law;

(b) the concept of the legislative supremacy of Parliament placed regulation of government activity squarely within the machinery of Parliament and had a profound effect on the role of the courts, restricting judicial review of administrative action to *legality* in a narrow and technical manner.

Consequently, in its essentials, our constitution is the result of an accumulation of the legal principles developed incrementally from judicial decisions. Statute law, apart from those initial historic texts of the late 16th and early 17th centuries, has had a minimal role, and to some extent has been treated with more than a little scepticism.

By way of contrast, in France, the ruling groups insisted on a clean break, rather than relying on the continuation of traditional forms of government. They developed new forms of political theory based on natural right and they also saw the functions and relationships of the State as separate from those of individuals. As a result, judicial and administrative functions were proclaimed to be distinct from one another and the ordinary courts were forbidden to review administrative action. This eventually led to the establishment of the Conseil d'Etat and a separate body of administrative law.

The steady development of the common law continued through the 16th and 17th centuries, when England became a trading nation and the courts had to take on disputes about commercial activities, to the 19th and 20th century, when the social and economic landscape began to change dramatically. At this time, Britain became an urban rather than a rural society, bringing with it all the problems, stress and disease caused by poor living conditions and urbanisation. This was a time of great public works; the introduction of sewage treatment, the building of canals and railways, and so on. It was to this focus on development that the courts had to adapt.

In order to regulate the chaos of early industrial and urban development, obligations were imposed on factory owners in relation to safety, boards and commissions were set up to oversee the growth of the railways and the building of the docks and other enterprises. As a consequence, there was a rapid increase in the amount of delegated and discretionary powers given to public authorities and the increasing element of public intrusion multiplied

opportunities for disputes to arise between the individual and the State and between public authorities themselves.

The propertied classes viewed the proliferation of public authorities as an unwelcome invasion of individual liberty and began to challenge administrative decisions in the courts. Others, such as workers, began to demand protection for breaches of increasing amounts of legislation such as the Factory Acts. The courts, for their part, adapted and refined their inherent common law jurisdiction. In order to restrain the increasing power of public bodies, judges who were supportive of these causes began to develop and establish many of the principles now familiar to modern public law. The concept that emerged and within which these principles still operate was that of *ultra vires*, or acting outside one's power.[20]

For example, in *Cooper v Wandsworth* (1863),[21] the court held that a builder, who had failed to give notice of his intention to build, with the result that Wandsworth Board of Works had ordered him to pull down a house he owned, was entitled to a hearing before the decision was taken. As Sir Stephen Sedley has commented, this extension of natural justice was made not on the ground that Parliament must have intended some form of hearing and had simply failed to say so, but on the ground that where a statute was silent, it fell to the common law to make up for the omission.[22]

Historically, however, judicial control of government activity in English law has met with two main problems which can be seen to have reverberated throughout the case law as our administrative system struggled to develop. First, the traditional remedies (certiorari, mandamus and prohibition) were more suited to review of subordinate courts, for which they were designed, than the control of general administration. This meant that review was sometimes limited to bodies exercising judicial functions or operating in a manner similar to the courts. Consequently, the development of fair procedures and natural justice was also confined to contexts similar to criminal or civil adjudication; processes which are, themselves, frequently inappropriate to administrative activity.

Secondly, the primary objective of the common law courts has traditionally been the protection of private rights. This meant that both the remedies available and their scope were best suited to disputes where litigants tended to have equality of power. Administrative disputes, on the contrary, often centre around a formulation of public interest and disputes involve the State and the individual or group on unequal terms. For example, the administration generally has better access to information and other necessary resources. In effect, the courts in England have had to *operate for public law*

20 A concept borrowed from company law.

21 (1893) 14 CB (NS) 180.

22 Sedley, 'The common law and the Constitution', in *The Making and Remaking of the British Constitution'* (1997) Radcliffe Lectures.

purposes through private law forms. This can be clearly seen in *Wandsworth v Cooper*, mentioned above.

The result was that public law remained underdeveloped and largely unsystematic, failing to have any real dynamic role in the system that was handed down from the 17th century settlement. As the activities of the State, the extent of administrative discretion, and the potential for conflict expanded rapidly through to present times, we are left with a form of judicial review unsuited to the proper supervision of modern developments. There remain vitally important gaps in the extent to which government activity is subjected to judicial monitoring, particularly in relation to policy making and expenditure. Because of the lack of a clear understanding of the nature and purpose of judicial review and no independent constitutional formulation of the judicial role, the courts have vacillated between quietism and interventionism.

We shall see throughout the following chapters that not only have the courts largely failed to respond in a principled way to the increase and scale of government functions, but they have yet to chart effectively the changing scene of public decision making through quasi-government and quasi-non-government bodies or the structures and processes of the latest approach to public management.

Too often, judgments have failed to be based on standards that transcend the particular case. Consequently, the law is complex and often contradictory. Further, the judiciary are prone to shape and distort logical and conceptual reasoning to reach a result that is really justified on other grounds. This means that the approach to public law is perhaps different from that in other areas of law. Because it may not be possible to extract any clear principles from the case law, we have to look to fundamental constitutional assumptions, the core values of administrative justice, and view cases in the light of their political and social context. Against this perspective, cases are best seen as a resource for prediction of future decisions or as a persuasive tool, rather than any precedent.

Despite the perceived difficulties, rather than any comprehensive overhaul of the system, dissatisfaction with the legitimacy of and accountability for government activity has led to a number of ad hoc measures being taken over the years. Since the early 20th century, a large number of tribunals have been set up. A number of principles of review were developed in these, but only sporadically; in fact, some tribunals were left virtually uncontrolled until the Franks Report made a number of recommendations in 1957. These are now enacted in the Tribunals and Inquiries Act 1992. Another development has been the provision of appeal to the relevant minister in some areas, such as after a public planning inquiry. But again, there has been no regular pattern or rational basis for the allocation of one function or another.

Since the late 1960s, a number of major reforms concerned with accountability for administrative activity have come from outside the courts, most notably the establishment of the Parliamentary, Local and Health Service

Ombudsmen and more latterly, the Citizen's Charter initiative. There has also been an increase in internal complaints mechanisms and codes of conduct for public services.

Proposals for reform of the courts have come from Justice,[23] an organisation set up to monitor and propose reforms of the law and from the Law Commission. There have also been a number of important procedural changes, all of which will be discussed later.

BACK TO THE FUTURE

What of more recent years and the future? For some time, it has been clear that we need to take a fresh look at the quality of legislative power and its mediation to the people. Essentially, there need to be put in place clear standards for public service decision making and government activity. Potentially, the courts have an important part to play in the setting of those standards and in ensuring that they are maintained by public bodies. In effect, the ultimate role of the courts is to act as a quality control mechanism for administrative decision making.

Traditionally, the courts have preferred not to entertain issues which they have perceived as merely hypothetical or academic. But, writing extra-judicially, Sir John Laws has suggested that the courts should be prepared to execute their role in a proactive as well as a reactive manner and that the scope of judicial review should be extended to advisory opinions.[24] He considers that, where a public authority has a duty to act, the public interest may require, in some situations, that a legal question concerning the fulfilment of that duty be established in advance. In principle, there is no reason why a minister or local authority should not approach the court *before* making regulations or bylaws to ask for an advisory opinion as to their putative validity. This would 'nip bad laws in the bud' and overall save time, expense, inconvenience and uncertainty. Laws considers that such an extension of the scope of judicial review would support, rather than undermine, the principle of sovereignty of Parliament. Currently, Parliament is too weak to fulfil the purpose of the 1688 Bill of Rights, which was the control of the executive in the name of the people.

In the recent past, a number of attempts were made to use the courts and litigation reactively as a resource for social change; in particular, to improve the quality of welfare administration and underwrite 'second order rights'.[25]

23 Justice-All Souls, *Administrative Justice: Some Proposals for Reform,* 1984.

24 Laws, 'Judicial remedies and the constitution' (1994) 57 MLR 213.

25 Prosser, 'Test cases for the poor: legal techniques in the politics of social welfare' (1983) CPAG.

Following major success in the USA with test cases in welfare law, there was considerable optimism that the same strategy could be used to bring about similar changes in England. What was sought was not the resolution of individual cases designed to change points of law in isolation, but a series of cases tied in with other forms of action. But a number of factors related to the differences in structure and role between the legal systems of the USA and England inhibited success here:

(a) We have no written constitution limiting legislative competence. In the USA this provides the basis for extensive judicial intervention in public policy, including social security and health. Of particular importance are the due process and equal protection clauses. In the USA, the development of rights can be a progressive interest attracting constitutional protection. In Britain, the nearest comparison until the Human Rights Act 1998 was the European Convention on Human Rights and some aspects of European Community law;

(b) There are procedural difficulties in public law actions in England. English courts are not particularly adept at handling complicated issues of fact. Unlike the USA, we have no 'substantial evidence rule' by which the courts weigh the balance of evidence. United States reviewing courts are far more experienced and skilled in addressing the social consequences of decisions and issues of wider public rights. Devices such as the Brandeis and Amicus Brief allow more sophisticated debate to take place;

(c) The law relating to standing and the circumstances in which a group may take action on behalf of others has been subject to some uncertainty in England;

(d) In the USA, remedies tend to be more effective. In England, if legislation does not provide for appeal, the most common remedy is certiorari, which has the effect of quashing the decision, leaving it up to the public authority concerned to take the decision again in line with the principles articulated by the court. But there is little supervision of this and a major problem has been ensuring that judicial decisions are implemented in practice. In the USA, some attempt has been made to ensure compliance with the decision of the court by the specification of standards, the implementation of which may be overseen by another body;

(e) In England, there has been a problem of government response to adverse decisions, as there are a number of ways in which the administration can evade the impact of a court decision it does not like. Techniques include simply ignoring the court decision until a further action is brought to compel implementation, or the law may be changed to restore the legality of the policy held to be unlawful.

Thus, legal challenge cannot, in itself, transcend inequalities of political power. There are institutional and procedural disadvantages in Britain which can act to limit the capacity of the courts to act as a means of laying down

general principles, and there are limitations in our constitutional system on the use of legal techniques to bring about social change if opposed by government; but this is not to say that legal challenges of this nature should be regarded as unimportant or ineffectual. They can, and do, provide resources which can be used in campaigning for better accountability and more enforceable rights. Legal challenge can contribute to increased public awareness, brings issues into the open and can put the onus on the administration to make policy decisions more openly.

THE EUROPEAN DIMENSION

Both European Community law and the European Convention on Human Rights and Fundamental Freedoms (ECHR) have affected our public law and have considerable potential for further impact, particularly with the incoming incorporation of the latter into our domestic law. Individuals derive rights from EC law by way of the treaties and other legislation and from the European Court of Justice (ECJ), which may form the basis of a challenge to discretionary decisions or government action inconsistent with them. Furthermore, the principles of proportionality, equality, certainty and a number of procedural rights, developed by the ECJ, must be applied by domestic courts of Member States in cases subject to the areas covered by EC law.

Although the European Community is not formally bound by the decisions of the European Court of Human Rights, the ECJ has increasingly referred to the provisions of the ECHR. In some situations, this has already provided the ECHR with a peremptory force in our domestic courts which it would otherwise have lacked.

There has also been a growing number of members of the judiciary concerned to protect the fundamental freedoms of the public against encroachments which the government of the day may persuade the legislature to adopt. Before the introduction of *Rights Brought Home*,[26] Sir John Laws, for example, argued that the ECHR could be used by the courts as a guiding principle in deciding judicial review cases, without incorporation and without recourse to legislative change; simply by the usual method adopted by the common law, namely incremental decision making.

He commented that not even opponents to incorporation objected to the fundamental rights contained within the ECHR. Indeed, such rights are essential to the development and maintenance of democracy. Laws, however, drew a distinction between the ECHR as a *legal instrument* and the contents of the ECHR as *a series of propositions* which largely represented values which

26 *Rights Brought Home: The Human Rights Bill*, Cmnd 3872, 1997, London: HMSO.

were already inherent in our law. Whilst judges were unable to incorporate the ECHR, they could take account of its principles, in developing the common law, as a source of public policy in areas where the common law is uncertain.

It has always been for the judges to discern and develop principles which enable the courts to protect individuals from arbitrary power. Development and change in many areas has been brought about by the courts taking account of evolving social and moral concepts and the demands of society. They have also frequently taken account of foreign legal texts and decisions of other jurisdictions and the ECHR should be a legitimate aid in establishing what the policy of common law should be. In effect, this argument confirms that the proper role of the courts is the development of substantive principles of law.

Yet, in the last 20 years, there has been a marked contrast between the vigorous growth in *procedural* review and the relatively static position of *substantive* review under the *Wednesbury* approach. Adopting the principles of the ECHR might assist the courts in developing substantive principles. Laws went on to suggest that the greater the incursion into the fundamental rights of the citizen that a public body proposes, then the greater the justification required for that action.

Thus, the standards applied by the courts would vary according to the subject matter and the *kind* of interest at stake. This would *refine* substantive review and *Wednesbury* principles, which are currently a rather imperfect and inappropriate mechanism for the development of standards for administrative activity. Many discretionary decisions, especially those involving fundamental rights, are beyond the blunt instrument of *Wednesbury* because they are concerned with the way in which the decision maker has ordered priorities and attributed importance to the factors of the situation. This is why principles of substantive review need to be better evolved and refined. As Laws points out, such a process would not in any way compromise constitutional propriety, as the courts already adopt a differential approach. In support of this, he cites cases involving threats to the right to life or freedom of expression.[27] Adverse decisions affecting such fundamental rights require distinct and positive justification in the public interest to escape judicial scrutiny. Laws' motive in making these proposals is 'an interest of arriving at a settled jurisprudence whose moral and intellectual claims are at least the equal of constitutions where rights are enshrined in written primary norms'. In essence, he seeks to redress the balance between the administration and the citizen through the courts.

However, although in a recent decision, *Ex p Smith*,[28] this approach was to some extent reiterated, it was clearly subject to other considerations. The case

27 See, in particular, *Ex p Brind* (1991) and *R v Cambridge HA ex p B* [1995] 2 All ER 129.

28 *R v Ministry of Defence ex p Smith* [1996] 1 All ER 257.

concerned the effect of human rights on the availability of judicial review and government policy. In 1994, the Ministry of Defence adopted a policy which prohibited homosexual men and women from serving in the armed forces. The four plaintiffs had all consequently been administratively discharged. They sought judicial review contending that this was a breach of the ECHR and EC principles on equal treatment and that the policy was irrational in the light of changing public attitudes and moral standards. They also argued that the threshold of the reasonableness test should be lowered where there was a human rights dimension.

The Court of Appeal confirmed that the more substantial the interference with human rights, the more the courts could require by way of justification before it was satisfied that the decision was reasonable. However:

(a) *the greater the policy content* of the decision and *the more remote the subject matter of a decision from ordinary judicial experience*, the more hesitant the court would be in holding a decision irrational;

(b) the obligation to secure compliance with the ECHR was not one which was enforceable in domestic courts; the relevance of the Convention was as a background to irrationality.

On the substantive issue, it was held that there was nothing in either the EC Treaty or equal treatment directives to suggest that it was intended to cover discrimination on grounds of sexual orientation. Further, the threshold of irrationality was high and, on the facts, had not been crossed.

The forthcoming incorporation of the ECHR[29] is both interesting and important.

As Lord Irvine has noted,[30] the Human Rights Act will bring about a more distinctly moral approach to decisions and decision making by producing a major shift to a positive rights based system in which 'a citizen's right is asserted as a positive entitlement expressed in clear and principled terms'. Exceptions to these rights may only be on the grounds of public interest and must be just and reasonable. He contrasts this with the common law approach, which has traditionally been the protection of individual liberties only in the context of negative rights, which gave little protection against misuse of power by the State or against the activities of public bodies. He argues that this will have a profound effect on the way in which the courts deal with substantive rights, leading to more principled, rather than pragmatic judgments.

As has been the case with the principles of European Community law, Lord Irvine believes that the effects of incorporation will reach beyond the

29 *Rights Brought Home: The Human Rights Bill,* Cmnd 3872, 1997, London: HMSO

30 Irvine, 'The development of human rights in Britain' [1998] PL 224.

application of that generated by the ECHR, including the application of *Wednesbury* to non-Convention cases and a discernible continuation of the present shift from form to substance.

On the other hand, writing at the same time as Lord Irvine, Sir John Laws warns of the limitations of an over-indulgence in rights as a foundation for society stating that 'a society whose values are defined by reference to individual rights is by that very fact already impoverished'. It detracts from the need for individuals in society to be other regarding. Thus, whilst procedural rights are generally indefeasible, few substantive rights are unqualified. He argues that incorporation may be an 'important and salutary constraint in the development of our municipal human rights jurisprudence' and regards the ECHR as no more than an 'extra arsenal in the law's armoury against injustice and the abuse of power'.[31]

As we have noted, Laws is a pronounced activist and champion of the promotion of human rights through the flexibility of the common law,[32] previously arguing that it is open to the courts to implement the principles of the ECHR through the accepted incremental decision making processes of the common law, with the justification that these principles embody values which are already inherent in the existing jurisprudence of this country; as they would be of any advanced democracy. This is an interesting and attractive proposal, in that it seems to offer a remedy for the existing deficiencies of substantive review. Importantly, it makes clear that there is a legitimate role for the courts in requiring decision makers to justify the priorities which they have set. To refuse to accept this role, on the grounds that such an inquiry would take the court to the merits of a decision, allows the *decision maker* the liberty to accord a high or low importance to the fundamental right in question which, as Laws says, cannot be right.[33] This, of course, begs the question as to what is a sufficient justification in any one case. Laws suggested that the modification of *Wednesbury* will continue, but that the incremental approach of the common law 'presents the best and only opportunity' to envelop the jurisprudence of the European Court of Human Rights. The implementation of the Human Rights Act will, as mentioned, leave the courts no choice but to embrace this jurisprudence in some part.

The opportunity identified by Laws was not be grasped fully, as illustrated by the case of *R v Cambridge HA ex p B*,[34] where judicial review was sought of the health authority's decision not to fund an extra-contractual referral. This case highlights the dilemmas the courts meet in challenges to

31 Laws, 'The limitations of human rights' [1998] PL 256

32 See *R v Cambridge HA ex p B* [1995] 2 All ER 129, and Laws, 'Is the High Court the guardian of fundamental constitutional rights?' [1993] PL 59.

33 *Ibid*, Laws, p 74.

34 [1995] 2 All ER 129.

policy decisions, and throws into sharp relief unresolved questions of accountability for what have been termed 'tragic choices'.[35]

Judicial review of health care decisions comes infrequently before the English courts and has met with little success on the part of applicants.[36] Any challenge is bound to present the judiciary with a difficult task, as such decisions invariably involve a perplexing interaction of fiscal, managerial, professional and public elements of resource allocation, in situations of substantial uncertainty. The different approaches adopted in the High Court and the Court of Appeal in the instant case also pointed to a dichotomy in the courts' perceptions of their role in relation to public decision making.

Since diagnosis of non-Hodgkin's lymphoma with common acute lymphoblastic leukaemia in 1990, B had undergone two courses of chemotherapy, including total body irradiation, and an allogenic bone marrow transplant. In 1995, she suffered a further relapse and the doctors treating her were of the opinion that no further remedial treatment could usefully be administered and recommended palliative care only for the remaining weeks of her life.

B's father obtained second opinions from a number of experts, both in the USA and the UK, who expressed the view that it might be reasonable to give B further chemotherapy. In particular, a notable expert in the field suggested a particular combination of drugs which would not involve excessive additional cardiotoxicity. This was regarded as a high risk strategy, but the hope was that a complete remission might be achieved so that a second bone marrow transplant could then be contemplated. Whilst this expert's hospital was willing to carry out the treatment, there was no prospect of a bed being available for a number of weeks.

In the light of the urgency of the situation and the reluctance of B's own doctors to undertake further treatment, her father was advised to seek it from the private sector. After consideration of Department of Health guidelines on the funding of unproven treatment and examination of correspondence from the various experts concerned, Cambridge Health Authority wrote to B's father stating that it was unlikely that they would authorise further intensive chemotherapy, but would keep under review any clinical advice they might receive.

At this stage, B's father consulted a private practitioner, who expressed the view that there was a 10–20% chance of complete remission if she were given a further course of chemotherapy and a similar chance of success if the bone marrow transplant stage were reached. The cost of chemotherapy was estimated to be £15,000 and the cost of transplant an additional £60,000. B's

35 Peters, 'Tragic choices: administrative rule making and policy choice', in Chapman (ed), *Ethics in Public Service*, 1993, pp 43–57.

36 See Longley, 'Diagnostic dilemmas: accountability in the National Health Service' [1990] PL 527, and Newdick, *Who Shall We Treat*, 1995, Oxford: Clarendon, Chapter 4.

father's request to the health authority to allocate the necessary funds was refused, and he applied for judicial review of the decision.

In the High Court, Laws J, granting an order of certiorari, based his judgment principally on the proposition that, where a public body enjoyed a discretion whose exercise might infringe a fundamental human right, such as the right to life, it should not be permitted to perpetrate any such infringement unless it could show substantial objective justification for doing so on public interest grounds.

This represented a fusion of theory and practice, since he was attempting in this case to utilise the approach to substantive review, mentioned above, which he has advocated extra-judicially.[37] *Ex p B* provided a particularly difficult set of circumstances in which to demonstrate this. His initial argument was straightforward. The rights embodied in the ECHR, including the right to life, could be 'vindicated as sharing with other principles the substance of English common law', which allowed the ECHR to be deployed by judges 'not as a statutory text but as persuasive legal authority to resolve outstanding uncertainties in common law'. Here, he relied on *dicta* of Lord Bridge in *Ex p Bugdaycay* and *Ex p Brind*[38] which he said 'pointed the way to a developing feature of domestic jurisprudence relating to fundamental rights which should be regarded as having a secure home in the common law'.

While the exercise of discretion by Cambridge Health Authority was clearly circumscribed by *Wednesbury* unreasonableness, he doubted whether the 'crude *Wednesbury* bludgeon' was the 'decisive touchstone for the legality' of the decision since the 'fundamental right to life was engaged in the present case'.[39]

Accordingly, he judged that the first two questions for him to decide in this case were whether the respondent authority had taken a decision which interfered with the applicant's right to life and, if they had, whether they had offered a substantial public interest justification for doing so. Having answered the first in the affirmative, he then considered the second question and concluded that the reasons presented by the authority for refusal of treatment did *not* amount to a substantial justification for depriving B of her chance to life.

The authority had contended, somewhat speciously, that there had been no positive act to violate the applicant's right to life, all they had done was to arrive at a decision about the use of public funds. Laws J disposed of that argument, holding that there was no difference in principle between acts or omissions as regards the obligations of a public body. Secondly, the authority

37 *Op cit*, Laws, fn 32, p 59.

38 *Bugdaycay v Secretary of State for the Home Dept* [1987] 1 All ER 940; *Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720.

39 *R v Cambridge HA ex p B* (1995) *The Times*, 15 March (QBD).

argued that the decision had been taken because further treatment would not be in B's best interests because, *inter alia*, of the suffering involved. Here, Laws J stated that medical expertise was relevant to the chances of success and the objective disadvantages of the treatment, but not to the best interests of the girl. This was a personal question which the patient would decide in the light of medical advice. Since B was only 10 years old, he considered that she could not, herself, make an informed decision: that should be for her father. In the judge's view, the decision of the authority did not take adequate account of the views of B's father, since it seemed to him that the doctor making the funding decision took into account only medical opinions as to the child's best interests, with no regard for the father's views on the matter. This reason could not, therefore, amount to a substantial justification of depriving B of her chance of life. On this point, he also added that the authority's decision would have fallen on relevancy grounds: failing to take into account the relevant views of B's father.

The authority further contended that the treatment would be an ineffective use of resources because, *inter alia*, the referral budget was finite and the needs of other present and future patients had to be borne in mind. Here, the judge made the interesting point that 'merely to point to the fact that resources were finite told one nothing about the wisdom or the legality of a decision'. There was no evidence before the court as to the respondents' budget. In his view:

> ... where the question was whether the life of a girl aged 10 might be saved by however slim a chance the responsible authority had to do more than toll the bell of tight resources.

What they were required to do was 'to explain the priorities that had led them to decline to fund the treatment'. In the view of Laws J, they had not adequately done so. Refusing an order for mandamus, but granting certiorari, he added that the right course of action was for the authority to re-take the decision in the light of his judgment.

Within a matter of hours, the case was before the Court of Appeal where the decision of Laws J was overturned. Sir Thomas Bingham MR, with whom the other judges concurred, found that Laws J had failed to recognise the realities of the situation.The doctor whose responsibility it was to make decisions on extra-contractual referrals on behalf of the authority had at all times been as aware as he could have been of the concerns and wishes of B's family. He had not failed to take account of relevant considerations, as the actions he had taken prior to coming to his decision were clearly demonstrated to be a response to pressure from B's father to procure further treatment.

The main finding of the Court of Appeal, however, centred on criticism of Laws J's references to the utilisation of health authority funds and his requirement that they justify their allocation. The Master of the Rolls held that

> ... it would be totally unrealistic to require the authority to come to court with its accounts and seek to demonstrate that if this treatment were to be provided

> for B then there would be a patient, C, who would have to go without treatment. No major authority could run its financial affairs in a way which would permit such a demonstration.

Accordingly, his Lordship found it impossible to fault the decision making process of the health authority and (whilst sympathising greatly with the dilemma of B and her family) felt bound to comment that any attempt to involve the court in 'a field of activity where it is not fitted to make any decision favourable to the patient' was misguided.

In arguing for a substantial objective justification, Laws J was attempting to subject the health authority's decision to a kind of 'hard look' scrutiny. The Court of Appeal drew back from that. The Master of the Rolls emphasised that the function of the court in a case of this kind is to rule upon the lawfulness of decisions; but, in limiting the scope of the 'lawfulness' inquiry, he may not have adequately acknowledged the distinction between substantive review and review on the merits:

> Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this authority can be fairly criticised for not advancing before the court.

It may be that the Court of Appeal felt that the health authority *had* provided sufficient evidence for reaching the decision to which it had come. If that were the case, it would have been preferable to have acknowledged that explicitly, rather than taking a restricted view of the court's role. Lord Bridge in *Brind* had said that where Parliament has entrusted a decision maker with a discretion then that decision maker has the 'primary judgment as to whether the particular competing public interest justifies the particular restriction imposed', but that the court was 'entitled to exercise a secondary judgment by asking whether (a decision maker) could reasonably make that primary judgment'. There is a clear distinction to be drawn between second-guessing the decision maker as to the merits and requiring the decision maker to demonstrate to the court that the decision is substantively reasonable or justifiable.

Furthermore, in calling for the health authority to do more than 'toll the bell of tight resources' Laws J was implicitly requiring the giving of reasons. Again, this was an aspect which was not adequately addressed in the Court of Appeal, which is disappointing given the recent significant moves in the direction of reasons and fairness. Lord Mustill, in *Doody*,[40] for example, considering the general background against which the requirements of fairness must now be assessed said:

40 *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92.

> I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon 'transparency', in the making of administrative decisions.

In effect, the judgment of the Court of Appeal did little to move substantive review in this area on from the earlier cases of *Ex p Collier* and *Ex p Walker*, which had been notable only for their lack of perceptive analysis and the ritual invocation of *Wednesbury* principles.[41] Those cases served only to ratify the opacity of decision making and, in essence, not only gave health authorities a free hand to allocate resources as they chose, but also weakened the potential role of the courts.

The nub of the problem lies in the particular kind of choices which have to be made in health care and the inadequacy of the principles which the courts currently employ to deal with any challenges. 'Tragic choices' are inherently ethical in nature, based on matters of value rather than fact, and operating in a field of palpable uncertainty. Because values are involved, there may be a number of reasonable policy alternatives which the public authority may adopt from any given set of circumstances. However, evidence based medicine is in its infancy, and the criteria used in coming to a decision – for example, issues of risk, chances of recovery, costs and benefits – are difficult to ascertain and subject to a number of interpretations. Consequently, such criteria often carry unarticulated values which not only shape priorities, but actually influence the perception of problems and the feasibility of solutions. Inevitably, in this process trade-offs occur, which may have the effect of downgrading or marginalising more fundamental concerns such as fairness. Unless this is recognised, the court is rendered impotent as a check on decision making or as guidance givers on policy criteria.

Laws J has recognised that the most important cases involving discretionary decisions:

> ... are not usually about simple irrationality, or a failure to call attention to relevant matters. They are much more likely to be concerned with the way in which the decision maker has ordered his priorities; the very essence of discretionary decision making consists, surely, in the attribution of relative importance to the factors in the case.[42]

Both he and Peters have also noted that substantive legal requirements are less stringent and less developed than those regarding procedural matters.[43] The past emphasis on procedures combined with the reluctance of the courts to develop substantive principles has left public authorities with too wide a discretion (not to mention the burden) regarding the values to be considered

41 *R v Central Birmingham HA ex p Collier* (1988) (unreported), CA and *R v Central Birmingham HA ex p Walker* (1987) *The Independent*, 25 November.

42 *Op cit*, Laws, fn 32, p 73.

43 *Op cit*, Laws, fn 32, p 63, and *op cit*, Peters, fn 35, pp 51–52.

and adopted in decision making. Yet, where a decision results in the possibility that someone might lose their life, the very minimum requirement is that the processes by which the decision has been made are fair and the 'evidence' is not selected to suit unarticulated agendas or values. In other words, trade-offs must be explicit and justified.

It is not being argued here that the right to life is absolute, nor, for that matter, was Sir John Laws. Rather, that where funding is limited, everyone has an equal right to be considered. Indeed, where the rights of one affect the rights of another, justification for the abrogation of one individual's fundamental right must surely require a demonstration that the rights of other individuals have been taken into account.

Rationing and prioritising is an integral part of the function of a health authority, as it is of any other body which delivers public services; but by highlighting the essentially moral nature of choices inherent in much public administration, the quality of decision making may be improved.[44] The courts have a part to play in structuring decision making and ensuring that the policy choice made, *even if* reasonable, is explained and justified. The public interest in fairness requires the severing of reasons from the shackles of *Wednesbury* reasonableness where fundamental rights are threatened. This requires not only that all relevant factors are taken into account, *but also* that they are subjected to a rigorous and open analysis before a conclusion is reached.

It is not a case of judges interfering with decisions, but of refining the decision making process, and consequently reducing any sense of unfairness and ultimately recourse to litigation. The difficulties inherent in devising principles for this approach are certainly great, but should not be regarded as an insurmountable obstacle by the courts.[45] The task for the courts here points directly to our notions of democracy and the control of State power. Writing more recently[46] on fundamental rights and democracy, Sir John Laws has asserted the moral basis which lies at the heart of our principles of substantive review:

> These principles are not morally colourless – far from it. They constitute ethical ideals as to the virtuous conduct of the State's affairs. It is essential ... to recognise the moral force of the basis on which control of public power is effected by the unelected judges.[47]

The question remains whether other judges are prepared to grapple with the task and adopt rigorous standards of scrutiny, or whether they will remain

44 See, generally, *op cit*, Peters, fn 35.

45 There is, for example, no reason why the courts should not sanction the use of 'Brandeis' briefs.

46 Laws, 'Law and democracy' [1995] PL 72.

47 *Ibid*, p 80.

content to rely on the unsatisfactory *Wednesbury* test in ruling on issues of legality when faced with a challenge to the substance of complex decisions.

It should, therefore, be considered here that neither the ECHR nor its incorporation into our domestic law is a likely panacea for failures in administrative justice, although it may be possible to argue that, under the Human Rights Act 1998, the non-justiciability of decisions concerning the allocation of scarce resources, as illustrated by *Ex p B*, may no longer be tenable. However, given the degree of discretion, or margin of appreciation, allowed by human rights jurisprudence regarding the allocation of resources, it is unlikely that the result of any case would be any different, but the decision making process may be rendered more transparent and the role of law more coherent.[48] The possible effects of the incorporation of the ECHR in our domestic law will be discussed further in Part II.

48 See, in particular, O'Sullivan, 'The allocation of scarce resources and the right to life under the European Convention on Human Rights' [1998] PL 389. Note, also, *R v Derbyshire HA ex p Fisher* (1997) *The Times*, 2 September and *R v Sefton MBC ex p Help the Aged* [1997] 4 All ER 532.

CHAPTER 2

THE CITIZEN'S CHARTER AND SERVICE FIRST INITIATIVES: A REAL FIRECRACKER OR A DAMP SQUIB?

Constitutional and administrative reform can appear in a number of guises. The Citizen's Charter initiative has been one of the most recent mechanisms devised for holding government more accountable. The Charter initiative, which was launched in the UK in 1991[1] as a 10 year programme, aims to make public services more answerable to their users and to raise overall quality. Its programme has coincided with a time of considerable change in the way the public sector has been expected to go about its business; primarily the introduction of Next Steps agencies and the development of new public management (NPM), mentioned in the previous chapter.

It should be made clear at the outset that, in the traditional sense, the use of the word 'charter' is something of a misnomer. There has been no 'Magna Carta' style single document which has delivered a new *constitutional* contract between government and the people. The 'Charter' is rather a programme or series of related government policies which, as indicated, were aimed at lending support to the reforms wrought in public administration and services. Whilst principally concerned with ensuring quality in services, the Charter initiative has also sought to find a role for service users within these wider changes.[2]

In the uncertain climate of change, public administration can appear even more remote, unresponsive and arbitrary in the way it makes decisions on matters that can literally affect the fundamental freedoms and/or livelihood of citizens. In addition, many of the activities of public bodies operate within a framework of complex rules and regulations that can tax even those with acknowledged expertise in the field. The Charter programme is intended to cut through this. Against the background of complexity and uncertainty the Charter initiative has been important in the promotion of accountability and legitimacy necessary for administrative justice throughout all manner of public services.

Charters have become evident everywhere. All government departments, agencies and public services have been expected to participate in the programme. Amongst many others, charters cover the National Health Service, education, the courts, police, prison and emergency services, and transport, tax and benefit services. Charters also straddle the public and private sectors, being produced by the privatised gas, electricity and water

1 *The Citizen's Charter: Raising the Standard*, Cm 1599, 1991, London: HMSO.

2 Bynoe, *Beyond the Citizen's Charter*: *New Directions for Social Rights*, 1996.

utilities and the financial services and banking industry. They have also infected overseas jurisdictions.[3]

However, a number of criticisms can be made. The main thrust of the initiative was, arguably, to further a particular view of the role of the public sector in the delivery of services, as a result of which the concept of *citizen* in the Charter was initially quite specific: it was conflated with that of consumer. In general, most charters have been issued without any systematic public consultation[4] and there was no reappraisal or development of wider political, social and economic *rights*. The term Citizen's Charter was itself to some extent hijacked to support the particular underlying philosophy of the then government:

> ... the novelty of the Citizen's Charter programme lies not so much in the policies it enunciates, as in the language in which these are couched and the ideological shift which it seeks, by that language, to bring about.[5]

Despite the rhetoric of rights and the mixing within the Charter programme of new and pre-existing provisions, it did not imply the conferment of any *legal* entitlement. Although there are common features, the different charter documents display considerable variety in content, length and practicability. Fundamentally, they tend to focus on the rights and responsibilities of service users as individual consumers, rather than facilitating or promoting any broader notions of citizenship. Consequently, the status of the Charter documents has been uncertain.

CHARTER THEMES

A number of interconnected themes run through the Charter initiative, namely, quality and standards, choice and value.[6] These provide the basis for general *principles of public service* which are a declaration of what every citizen might expect from public services. These principles include:

(a) *standards* of performance which are explicit, published, and prominently displayed;

(b) better *accessibility* to public services;

(c) greater *openness* about how services are run, how much they cost and who carries responsibility. Full and accurate information should be given about

3 See, eg, the French Charte des Services Publics, 1992.

4 Eg, research into the Patient's Charter has shown that users had different priorities to those set out in the Charter. The Charter had focused on a mechanistic view of health care; the more treatment the better, whereas most users would settle for less, but better, treatment. See Hogg, 'Beyond the Patient's Charter: working with users' (1994) Health Rights.

5 Barron, 'The Citizen's Charter programme' (1992) 55 MLR 535.

6 Cabinet Office memo to the Treasury and Civil Service Committee, 1994.

the services provided, targets to be met, together with audited information about results achieved. This should be in comparable form wherever possible;

(d) those affected by services are to be *consulted* 'regularly and systematically' to inform decisions about what should be provided, and management will be expected to demonstrate that user views have been taken into account in setting standards;

(e) well publicised and readily available internal procedures for the *redress* of grievances and codes of practice for handling complaints.

The principles and initiative of the Charter were welcomed; as the Government itself stated at the time of the Charter launch, 'quality does not happen by accident, improvement requires reform, innovation and tough decisions'. The Charter adopted a number of techniques to achieve quality control across the wide range of services and activities involved, for example, the use of contract compliance and the monitoring of complaints from consumers. But there were major questions as to how quality might be ascertained and how it might be ensured. From the outset, the mechanisms for improving the administrative process were rather vague and based largely on political objectives instead of clear sighted improvements.[7]

No new independent institutions were created to promote or monitor compliance with the Charter, although the Audit Commission has been involved in setting performance indicators and validating data collection methods. A small Citizen's Charter Unit was established, however, within the Office of Public Service. This had the role of co-ordinating Charter policy throughout government departments and promoting its use beyond government. The unit was also given the task of managing Charter Mark awards, whereby public services and utilities which are considered to have achieved excellent standards of improvement or innovation in quality may apply for recognition under the scheme. The Charter Mark is automatically reviewed after three years, when holders must reapply for it to be continued. Ministers may initiate an earlier review if it becomes clear that standards are no longer being maintained.[8]

COMPLAINTS AND REDRESS

It will have been noted that one of the basic principles of the Charter programme is the requirement for public bodies to establish internal

7 Walsh, 'Quality and public services' (1991) 69 Public Admin 503.

8 In 1995, British Gas was forced to relinquish its Charter Mark award because of well publicised falling service standards. This pre-empted the government acting on an earlier threat to withdraw it.

procedures for handling complaints. A Citizen's Charter complaints task force was set up in 1993 with a two year brief to undertake a review of public service complaints systems. The aim was to try to ensure that these operated within charter principles. The task force produced a set of criteria and a checklist of an effective complaints system which formed the framework for the review. Along with its final report in 1995, the task force published a good practice guide for use by public services.

The task force visited both public and private sector organisations, reviewed over 60 public service complaints systems, reviewed complaints handling literature and commissioned research into users' views. As might have been expected with little initial guidance evident, they found an enormous range and variety of practices throughout the public services. Whilst there were some clear examples of effective systems, they concluded that there was still 'some way to go before all public services can be said to operate wholly effective complaints systems'. They recommended, amongst other things, that the Citizen's Charter Unit should take the lead in providing guidance on public service complaints procedures which reflected Charter principles of effective redress. As far as possible, there was a need for complaints procedures to be consistent across the spectrum of public services. In addition, the scope of financial compensation and the powers of different public services to offer it needed to be clarified.

The task force also recommended that policy makers examine the effectiveness of communications with service deliverers to ensure that they heard about policy and service delivery complaints. All public bodies providing a service directly to the public were expected to establish an external review mechanism appropriate to their circumstances of existing complaints handling arrangements. Public services were given two years to comply with this audit, which was to include evaluation of progress against the good practice guidelines.

The Charter was initially regarded by some as being a weak attempt to deflect criticism away from the failures of government and public services. But at the very least, the programme has brought out into the open the need for improvements to be made in public service management and accountability. There is also evidence that its effects have moved into areas not previously considered when the idea was first mooted. The Citizen's Charter has become slowly enmeshed in the Next Steps programme and the evolution of NPM. In so doing, it has acted as a catalyst for further development towards what was heralded as a new way of governing.[9]

In 1997, the House of Commons Public Services Committee published a comprehensive report[10] on the first five years of the Charter programme. The

9 Lewis, 'The Citizen's Charter and Next Steps: a new way of governing?' (1993) 64 Political Quarterly 3.

10 Third Report, *The Citizen's Charter*, HC 78-1 (1997).

report made over 30 recommendations, including better evaluation of the programme (with a focus on outcomes for users, as well as management) and better consultation with users. The Committee also reiterated many of the comments made earlier by the complaints task force, recommending more independent complaints procedures and greater clarity on the redress that was actually available through the many different charters.

That being said, the Charter appears to have had potentially far-reaching effects on the public's perception about complaints and their resolution. It has certainly raised expectations and incrementally this may have a wider effect on procedures for the resolution of grievances than was originally intended. However, in this respect, as the Public Services Committee found, there are a number of serious shortcomings that need to be addressed, not least consideration of the overlap of the Charter functions with those of the ombudsmen. This is particularly important if the latter are ever to be invested with powers similar those enjoyed by their overseas counterparts.

Although the Charter has clearly been a step in the right direction, the overall tenor has primarily been one of individual 'rights' and an emphasis on the individualisation of choice. There has been a very evident lack of any extension of collective participation. The principle of consultation has had a tendency to amount to no more than a requirement to conduct 'customer surveys' and has been unlikely to involve any consideration of policy matters. Unless improvements are readily made to participative processes, much of the public is likely to continue to be remote or even entirely absent from crucial decisions on the actual supply and delivery of services. The involvement of the public in the planning and evaluation of services takes commitment and resources, to which little forethought was given.

Arguably, it required that a hard look be taken at the constitution and accountability of our public institutions to ensure that the full potential of the Charter initiative was not to be lost and was instrumental in teasing out the issues that go to the heart of government. The aim should be to build on the initiative's strengths, to ensure effective public services and improve public service management and accountability. It was suggested that the Charter initiative should be based on principles of fair treatment for those seeking or using public services; entitlement to a service where practicable and appropriate; improved citizen and user participation; greater openness by service providers; more effective accountability through audit and inspection to complement democratic accountability; and co-operation from users. These stand in marked contrast to the more narrow market/consumer perspective from which the original Charter was derived.[11] The aim would be to promote fairness and honest dealing as much as efficiency and to emphasise the importance of rights and responsibilities as much as managerial and

11 *Op cit*, Bynoe, fn 2.

administrative reforms. These principles would, of course, need to be reinforced and supported by a number of changes in law and public administration, in order to provide an effective constitutional framework for a more genuine Citizen's Charter.

WHERE NOW?

In June 1997, the newly elected Labour Government announced its intention to relaunch the Citizen's Charter as part of its desire to modernise and improve government. It stated that it wanted the new Charter programme to focus on the needs and wishes of those who both *use* and *deliver* public services on a daily basis. To this end, the Government issued a consultation document, indicating key areas for discussion: what the coverage of the Charter should be, how standards can be raised, improvement in consultation and involvement of users and others, and improvements in the Charter Mark scheme.

Responses to that consultation exercise made it clear that, whilst the Charter concept was widely supported and had made a major contribution to the improvement and change of culture of public services in the 1990s, progress was patchy, services remained complex and unco-ordinated and standards were often vague and missed the issues most important to users. The project was 'essentially managerial and top down rather than citizen driven'.[12] All this was regarded as inappropriate to modern democratic government.

A year later, the Cabinet Office published *Service First: the New Charter Programme*, which forms an integral part of the broader *Better Government* initiative.[13] The Government has adopted what it refers to as 'a tough new approach to driving up the quality of public services'. *Service First* sets out an eight point action plan, which includes a new audit team to monitor the quality of a cross-section of charters, extended principles, a review of all existing and the establishment of some new national charters, detailed guidelines for improving the quality and consistency of national and local initiatives, ministerial workshops, a more rigorous, revamped Charter Mark programme and a better deal for older people.[14]

Key themes include commitments to try to ensure that public services:

(a) work in partnership with one another and take a more co-ordinated approach, including the development of best practice quality networks;

12 Lewis, *Evidence to the Public Service Committee,* 1997, Memo 16.

13 *Better Government,* forthcoming, London: HMSO.

14 This latter programme, along with Passport 50+, has been drawn up in co-operation with local authorities and the voluntary sector.

(b) are responsive to the needs of users and involve front line staff in the development of services;

(c) make services more accessible through, for example, extended opening hours, use of plain language and new technology, making provision for those with special needs;

(d) shift the emphasis from 'value for money' to 'more effective use of resources';

(e) treat everyone fairly in line with the Government's commitment to a more just society;

(f) innovate and continuously strive to improve services.

The agenda is supported also by the launch of the *People's Panel* to research the public's views on improving services and the adoption of legislation on freedom of information[15] to underpin the right to more open government and improve access to information on the performance of public services. The programme applies to all those providing public services, whether delivered directly or through contractors.

Within central government, six new standards have been adopted, referred to as the Whitehall standards, in an attempt to improve the quality of services emanating from there. These will be reviewed in 1999.

One of the issues addressed in the new Government's consultation was that of the kinds of redress for complaints that should be available under charters. There was general agreement that users should be encouraged to make suggestions and comments as well as complaints, and that providers should view such feedback positively. Many respondents to the consultation exercise considered that a range of redress options, from an apology to financial recompense, should be available, although the latter needed to be balanced against the constraints on taxpayers' money. But, there was general agreement that users needed to know what remedies were available to them and that organisations must publish this information.

As a result, the new complaints handling guide is intended to encourage public services to welcome complaints and suggestions and to use the information to improve services. It contains examples of how best to let users know how to make complaints and of how service providers can publicise to staff the lessons to be learned from complaints. The guide advises public services to make clear the range of remedies available and discusses the scope for financial compensation. On the other side of the coin, as part of the proposed freedom of information legislation, it will be made a statutory requirement for public services to publicise their complaints processes.

It seems that the original charter initiative has been given a new impetus and that the views of users and those working closely with them have been listened to.

15 FOI White Paper. There is also a new website (www.servicefirst.gov.uk).

The real question is whether the Service First programme will enable the delivery of a better deal for the public and fulfil the opportunity to empower them as citizens, or whether it will merely continue to reinforce the public as 'customer' with very limited capacity to influence policy decisions. Much depends on the quality of the mechanisms and procedures eventually developed to give substance to the Service First principles and the significance attached to those procedures by those responsible for their implementation and monitoring. These are the factors which will influence whether or not the charters turn out to be a mere breeze or a gale through the corridors of our public institutions.

INTERNAL COMPLAINTS PROCEDURES

We have already mentioned that it is a requirement of the original Citizen's Charter and its relaunched programme that public bodies should develop and improve their internal procedures for redress of complaints. We here consider two systems for the redress of grievances to illustrate that the setting up of complaints procedures needs careful forethought and monitoring in order to evolve effectively. The first scheme, which has recently been overhauled, relates to complaints about the provision of health services, and the second deals with complaints against social services provision for children in need and was established under the Children Act 1989.

The National Health Service strives to provide a high quality, integrated service, organised around the health needs of individual patients, rather than the convenience of the system or institution.[16] It has been long been recognised that the attainment of these objectives rests partly in listening to and learning from patients' complaints. As far back as the early 1970s, the Davies Committee[17] on hospital complaints criticised complaints mechanisms for being too internal and based on general principles which were inconsistently applied. Despite the enactment of a Hospital Complaints Procedure Act in 1985, little was actually done to counter the problems highlighted by Davies.

More recently, these difficulties have been accentuated by patients becoming less deferential and more ready to challenge the decisions of medical practitioners and health service management. This may in part be due to the particular focus given to consumers in the more market oriented public services as well as the Citizen's Charter initiative which, as we have already

16 *The National Health Service: a Service with Ambitions,* Cmnd 3425, 1996, London: HMSO. See, also, *The Citizen's Charter – Five Years On,* 1996, London: HMSO, which sets out new NHS commitments.

17 *The Report of the Committee on Hospital Complaints Procedures,* DHSS and Welsh Office, 1973, London: HMSO.

mentioned, has raised expectations. The greater readiness of patients to question the activities of those who deliver health care may also have been fuelled by the number of well publicised, high profile cases of service failure in recent times.[18] For whatever reasons, spiralling complaints and overwhelming criticism that the NHS complaints system was fragmented, confusing, cumbersome and slow,[19] and evidently unsuited to the reformed, pro-competitive NHS, led to a new review which reported in 1994.[20] The remit of the committee (the Wilson Committee) was to review current complaints procedures and consider the costs and benefits of possible alternatives. The Committee's responsibility was also to try to ensure that any new complaints process would be effective from the perspective of both health service users and providers.

The review was wide ranging and included complaints relating to family health services, hospital and community health care. It also included consideration of a small, but increasing proportion of complaints from patients receiving NHS care from the independent sector, whether through private or voluntary provision, although the Committee recommendations did not relate to private patients directly. Terms of reference also excluded consideration of litigation and professional disciplinary matters, although Wilson commented on the importance of the relationship between complaints processes and these latter two areas.[21]

The findings of the Wilson Committee supported many of the prior criticisms, concluding that there was too great a variety of procedures and points of entry into complaints mechanisms across the spectrum of health services. There were arbitrary distinctions made between clinical and non-clinical complaints; complainants were subject to a lack of openness and access to information, and procedures lacked sufficient independence. Too little importance was also attached to the monitoring of complaints and there was a lack of awareness of the benefits that this could bring amongst health service management.

These shortcomings militated against the provision of good health service complaints procedures, which were identified as complainant satisfaction and redress, fairness to the parties involved, improvements in quality and the avoidance of litigation. The Committee set out a number of principles to which procedures ought to subscribe: responsiveness, quality enhancement, cost effectiveness, accessibility, impartiality, simplicity, speed, confidentiality and accountability.[22] Wilson, quite correctly, also recognised that, by themselves, principles were insufficient to form procedures and went on to

18 Eg, *R v Cambridge HA ex p B* [1995] 2 All ER 129.

19 Eg, *Complaints Do Matter*, 1993, National Association of Health Authorities and Trusts.

20 *Being Heard: the Report of a Review Committee on NHS Complaints Procedures*, 1994.

21 *Ibid*, paras 2.2, 2.3.

22 *Ibid*, Pt VI.

suggest how these could be developed into the particular features of an effective complaints system in the NHS.[23]

However, it should be noted that many of the recommendations made by Wilson were not especially innovative. A number were either already a requirement under the Hospital Complaints Procedure Act 1985 and subsequent Department of Health guidance. Others were in the process of being established by management initiative at the time the Committee reported, albeit with varying degrees of success and spasmodic commitment on the part of health service personnel. A number of Wilson's suggestions also reiterated past concerns scattered through the annual reports and epitomes of the Health Service Ombudsman.[24]

The main recommendation was that all complaints processes, throughout the range of NHS services, should follow a similar format. There was to be a two stage procedure. The main focus of the first stage was on effective handling *internally*, within the organisation where the complaint arose. The purpose of the second stage was to offer a more formal degree of scrutiny for complaints not adequately resolved at the prior internal level. At this stage, which was to be used sparingly, the complaint would be screened and either passed back to the health service provider for further consideration, or be put before a panel with a lay majority, but with access to specialist advice where appropriate. Wilson also endorsed recommendations made by the Select Committee on the Parliamentary Commissioner for Administration[25] to extend the jurisdiction of the Health Service Ombudsman in relation to family health services (GPs, dentists and opticians) and suggested that the Government review the restrictions on investigation of clinical complaints which were then outside the Ombudsman's remit.

On the whole, the Government accepted the principal recommendations with a number of minor amendments, and guidance issued in March 1996, along with statutory directions, set out the ground rules for the new system. These took into account negotiations with NHS personnel, concerns raised in briefing sessions on the new system and the literature produced by the Citizen's Charter Unit on effective complaints handling.[26] The new procedures, which the Government claimed 'cut through the old, labyrinthine system which served only further to try the patience of the minority of NHS patients who had cause for complaint', came into effect on 1 April 1996 under the banner of *Listening* – to the concerns of patients and their relatives; *Acting*

23 *Being Heard: the Report of a Review Committee on NHS Complaints Procedures,* 1994, Pt VII, para 174 and Pt VII.

24 Amongst recurrent themes in the Health Service Ombudsman reports have been poor record keeping, inadequate explanations of procedures, and the need for training staff in dealing with complaints.

25 Now replaced by the Select Committee on Public Administration.

26 Eg, *Effective Complaints Systems: Principles and Check Lists,* Citizen's Charter Complaints Task Force, 1993, London: HMSO, and *Complaints Handling in the Public Sector*, 1995, London: HMSO.

– positively to put matters right when they have clearly gone wrong; *Improving* – the quality of service which the NHS provides by learning the lessons from complaints.

The NHS complaints procedure now has two elements, local resolution and independent review. The emphasis, however, is on 'local resolution' of complaints by those providing services. Trusts and family health service practitioners must try to resolve grievances informally and speedily. The aim is to satisfy the complainant in as conciliatory a way as possible. It is intended that the process should demonstrate the highest standards in respect of the initial handling of a complaint, its investigation and/or conciliation and the final response. Once this level has been exhausted, patients who are not satisfied may then request a further review of their case, which may involve the setting up of an independent review panel (IRP).

The decision to convene such a panel is taken by a non-executive member of the relevant NHS trust or, in cases involving family health care services, the relevant health authority. These three member panels have a majority of lay members and include, where hospital services are involved, a health authority representative. Where complaints concern clinical judgment, independent clinical advisers (clinical assessors) may be consulted. However, it is expected that the IRP process will be invoked only rarely, as it is to be regarded as the exception rather than the norm.

The Health Service Ombudsman remains 'the last port of call' at the apex of the system. Legislation was enacted that extends the Ombudsman's jurisdiction to include matters of clinical judgment and family health services previously outside his remit.[27] Patients may refer complaints to the Ombudsman if they remain dissatisfied with the response from the two previous stages, either because they are unhappy with a decision not to convene an IRP or are dissatisfied with the result of a panel once it has drawn its conclusions. The Ombudsman may normally only investigate a grievance if NHS procedures have been exhausted, but there is a discretion to intervene sooner if it would be unreasonable to expect a complainant to invoke or exhaust these.[28]

Remaining concerns

Obviously, no system can be expected to be implemented without teething problems, but these can generally be rectified as the new procedures become established. More importantly, there remain a worrying number of other, more fundamental shortfalls which, though evident in the previous system,

27 Health Service Commissioners (Amendment) Act 1996.

28 *Ibid*, s 5.

have failed to be addressed adequately or have been overlooked in the new process.

First, let us consider the problems of local resolution. There is a great deal of discretion in how procedures at this level may be operated. Whilst some degree of flexibility is desirable because the process has to function effectively in a number of different circumstances and settings, too much flexibility can lead to inconsistency. One of the main concerns about the previous system was that there had been considerable variation in the interpretation of procedural requirements and guidance. But changes made at this level appear to have been more cosmetic rather than real. In practice, old patterns of dealing with complaints are persisting and there certainly has been no revolution, if a little evolution. Whilst good examples of procedures and attitudes can be found within individual trusts and authorities, early evaluation of the first six months of the new scheme suggested that unequal, and therefore inequitable, access to complaints procedures remained.[29]

Data released with *Acting on Complaints* indicated that there was also an alarming degree of variation in the number of clinical judgment complaints that were investigated by professional peer review. The former Health Service Ombudsman commented that the way in which discretion to hold such reviews was exercised was not always explained and was unsatisfactory. He went on to admit that this meant that there was unfairness inherent in the system.[30]

In many respects, family or primary care complaints procedures have been affected most by the changes introduced in April 1996. All family health practitioners must establish and publicise practice-based local resolution procedures. Previously, complaints about family health services were closely allied to disciplinary matters and procedures were primarily designed to determine whether or not there had been a breach of contract. This has now ceased, and disciplinary matters are considered after the conclusion of the complaints process rather than in parallel. Health authorities may now instigate disciplinary proceedings if it is considered to be an appropriate course of action in the light of the report of an IRP. However, this may prove more beneficial to family health practitioners than to complainants, as diversity and inconsistencies in procedures are likely to multiply.

The independent review stage has been criticised for a lack of true independence.[31] The role of screening unsatisfactorily resolved complaints after local resolution and convening an IRP has been given to non-executive directors of trusts and health authorities. This could, in some circumstances, give rise to a conflict of interest, particularly in respect of a complaint about

29 Higgins, *Working Hard to Please,* 1996.

30 Reid, 'Reid all about it' (1995) Health Service Journal, 13 April, p 9.

31 *Health Perspectives: the New NHS Complaints Procedures,* 1996.

service provision or purchasing policy which the non-executive member may well have contributed to.

Further, as is clear from the guidance and training documentation, the task of convening is far from straightforward and places a considerable degree of responsibility, and perhaps too heavy a burden, on the non-executive member. The setting up of an IRP is not automatic, it relies on the judgment of the convener in consultation with a lay chair and, if necessary, relevant clinical advisers. A convener has to judge when circumstances make a panel appropriate and the guidance leaves a wide element of discretion. To some extent, as is indicated below, the convener is expected to have some insight into the minds of complainants. The convening of a panel is to be seen as inappropriate when:

(a) the local resolution process has resulted in all practical action being taken and the panel could add no further value to the process; or further action such as conciliation is practicable and appropriate;

(b) legal proceedings have begun, or there is a clear intention of a legal claim. This does not mean to say that a letter or complaint registered by a solicitor or legal representative is necessarily indicative of legal action. The content of the complaint and the complainant's intentions are the most important matters NOT the vehicle by which it was registered;

(c) there is a *prima facie* case for a disciplinary investigation.

The convener also has the added responsibility of setting the terms of reference of the IRP – those elements of the complaint that the panel is to investigate – based on the complainant's statement of complaint. These terms may themselves be a cause of complaint if the complainant disagrees. If this situation arises, the convener may refer the complaint to the Health Service Ombudsman.

Once convened, the panel is free to decide on the actual process of considering the complaint, bearing in mind general rules of conduct set out in directions and guidance. However, the process should be 'informal and flexible, not confrontational, adversarial, legalistic or tribunal-like'. Once again, there is a great deal of room for the adoption of a variety of procedures, which can give rise to uncertainty and inconsistency. In addition, the panel is regarded as 'a committee of the health authority or trust'. Even when acting with the best of intentions, there may an inherent bias towards the 'home' institution.

The chairperson of the panel has the responsibility of writing a report of the hearing, which may be circulated to the parties in a draft form before being finalised. Reports are confidential and the implementation of any recommendations are at the discretion of the health authority or trust. The panel may recommend financial compensation as a possible remedy, but may not suggest a figure. The panel is not allowed to make any recommendations relating to disciplinary matters.

Though confidential, panel reports have no special protection. As the training information makes clear, once a report is in the complainant's hands they can do with it what they wish. It states:

> They could certainly have it published, but *in practice are unlikely to compromise their own confidentiality by doing so.* They could also attempt to use it in a court case, but it would have very limited application, if any, in a negligence claim, since it will not deal with the key issues of negligence and causation.[32]

This is somewhat naive on the part of the Department of Health, as past experience has indicated. In Wales, as Wilson noted,[33] complaints procedures not dissimilar to those now operating nationwide have provided ample opportunities for potential litigants to 'fish' for evidence.

There are two further issues of some general concern, one regarding the nature of complaints, the other purchasing policy. Whilst many complaints about the provision of health services are straightforward, a substantial and increasing number are not. Indeed, complaints relating to health may have no clear boundaries and involve health, community care and social service provision requiring complex and convoluted investigation. Yet the Government failed to address the reality of this multi-agency factor. This may have been more than an oversight. Rather, it may have been more of a reluctance to consider the necessary radical rethink that the multi-agency element would inevitably entail.[34]

Even complaints relating to more than one provider *within* the NHS are likely to cause difficulty for the complainant, as it is 'not possible to pursue through independent review a mixed complaint relating to the actions of two NHS providers'. Where a complainant does wish to proceed with such related complaints, the conveners involved 'are advised to liaise with each other to ensure that each aspect of the complaint is full considered'.[35] This raises all kinds of questions regarding the actions to be taken by conveners in this situation, for which there has been little guidance.[36]

The failure to consider the increasing multi-agency and multifaceted nature of many episodes of ill health, and the fact that complaints regularly arise about the lack of co-ordination between the various organisations involved, merely serve to highlight the inadequacies of the recent, supposedly unified, simplified, and easily accessible system.

Following reforms to the structure of the NHS and provision of health services, general practitioners have played a key role in purchasing health

32 *Independent Review: training and information pack*, Append 1, para 6.

33 *Ibid*, para 37.

34 Wilson believed that it would be helpful to re-examine these separate complaints procedures in the light of the Committee's recommendations for the NHS. *Ibid*, para 28.

35 EL (95) 121, para 4.11.

36 Christensen, 'Complaints procedures in the NHS: all change' (1996) 2(3) Medical Law International 247.

care on behalf of the local population. The only centrally laid down procedure for complaints arising out of purchasing decisions has related to appeals against a decision by a health authority to refuse to fund treatment as an extra-contractual referral (ECR) – care or treatment not covered by annual contracts with health service providers. ECRs have to be considered by the relevant Director of Public Health. Where a funding refusal is confirmed, the only avenue open to a complainant is judicial review. One of the most publicised cases involving an ECR was that of *Ex p B* against Cambridge and Huntingdon Health Authority,[37] but there have been numerous similar grievances which have not come to court relating to the refusal of different health authorities to fund particular drugs or treatment regimes.[38]

Such matters concern some of the most crucial and emotive complaints with which the NHS has to deal. Wilson recognised that issues of resource allocation and placing of contracts for health care required special handling to ensure that proper consideration is given and that concerns are not dismissed solely on the basis that the complainant's views challenge resource allocation policy. The Committee also recommended that, where these complaints could not be resolved by local resolution, the Health Service Ombudsman should be asked to investigate and comment on the decision making processes.[39] The Ombudsman's jurisdiction duly includes investigation of purchasing decisions, as long as they are taken with maladministration. This is all well and good, but many complaints that are dealt with on an individual basis have at their heart a purchasing or policy issue. Unless the NHS and the Government clarify how complaints are to be consistently and comprehensively monitored and evaluated, a good deal of information useful to health service management and the public alike is likely to be lost and ultimately, service quality will suffer.

To its credit, the Department of Health has agreed to fund a two year evaluation of the difficulties being encountered daily in complaints mechanisms by complainants and respondents alike and it is to be hoped that this will lead to a reconsideration of the issues discussed above, which go to the heart of administrative justice.

Complaints under the Children Act 1989

In contrast to the situation regarding health service complaints procedures, the need for inter-agency co-operation has been recognised in relation to

37 See discussion above, Chapter 1, and James and Longley, 'Judicial review and tragic choices' [1995] PL 357.

38 These frequently involve expensive, non-standard new drugs for treatment, for example, of Alzheimer's disease or multiple sclerosis.

39 *Being Heard: the Report of a Review Committee on NHS Complaints Procedures*, 1994, paras 273–77.

children who come to the notice of local authority social services. It is a statutory requirement under s 26(3) of the Children Act 1989 that local authorities establish complaints procedures in relation to the provision of services for children and those caring for them under Part III of the Act. The Act is supplemented by the Representations Procedure (Children) Regulations 1991, which set out the way in which grievance procedures should operate, and other guidance documents.[40]

Complaints may be made about: 'Day care, services to support children within their family home, accommodation of a child or the handling of a child's case. The processes involved in decision making or the denial of a service must also be covered by the responsible authority's arrangements.'[41] It is also recommended that the complaints procedures are extended to child protection matters where more than one agency is likely to be involved.[42]

There are three possible stages to the complaints procedure. There is first an informal stage, where an attempt is to be made at resolving issues as closely as possible to the point where they arose before a second, formal stage in which the social services department must investigate, and respond to the complaint within 28 days.[43] Where a complainant remains dissatisfied with the response given at the formal stage, a review hearing by a panel consisting of three members, at least one of whom must be independent, may be requested. Again, there are time limits imposed by the regulations. The complainant must notify the local authority of an intention to proceed to the third phase within 28 days of the outcome of the prior formal stage and the panel must then convene within 28 days of receipt of that notification.[44]

Concern has been expressed about all three stages. Reflecting criticism of the lack of consistency of local resolution in the NHS, the Social Services Inspectorate (SSI) found, in its review of six social service departments,[45] not only considerable variation between local authorities, but also within branches of the same authority. In some instances, the lack of time limits for this informal stage and the emphasis placed on it in guidance was used as a tactic to delay and discourage complainants from moving on to the formal level. These findings are reiterated in a comprehensive study carried out by

40 *The Children Act 1989: Guidance and Regulations*, Vol 3, 1991, and *The Right to Complain – Practice Guidance on Complaints in Social Services Departments*, 1991, Department of Health/Social Services Inspectorate.

41 *Ibid, The Right to Complain*, para 10.8.

42 *Ibid, The Right to Complain*, para 10.10; and see *Working Together under the Children Act 1989: A Guide to Arrangements for Inter-Agency Co-operation for the Protection of Children from Abuse*, 1991.

43 1991 Regulations, reg 6.

44 *Ibid*, reg 8(2) and 8(4).

45 *SSI Inspection of Complaints Procedures in Local Authority Social Services Departments: Third Overview Report*, 1996, Department of Health.

Williams and Jordan.[46] However, even where time limits do operate, a high percentage of local authorities consistently fail to meet them, leading to dissatisfaction. Furthermore, Williams and Jordan found that it is common practice for social service departments to negotiate with the complainant to waive the time limit and to conclude the investigation within a 'reasonable time', the latter being almost indefinable.

A complainant who is dissatisfied with the formal investigation may request the convening of a panel consisting of three members, one of whom should be independent. However, Williams questions the reality of this independence, as reg 8(5) of the 1991 Regulations allows the same person to be appointed at the formal stage and to sit as a member of the panel at the third stage. Such a person will, consequently, have already formed views about the complaint.[47] Panel decisions are not legally binding, and any recommendations made to a local authority may, in theory at least, be disregarded, either in whole or in part. That being said, Williams points out that case law has strengthened the position of panel recommendations. What remains problematic is the scope of recommendations, as some matters may fall outside the ambit of the complaints procedure.[48] Much depends on the particular local authority's procedure, as does the power to decide whether to award compensation, both elements tending to inconsistency. She concludes that although the Children Act complaints system was set up some time ago, there is little knowledge of its operation, despite the requirement that each local authority produce an annual report and guidance issued on monitoring and the use of the information so gleaned as a quality control mechanism.

Where there are problems inherent in complaints systems, complainants may attempt to turn to the courts or one of the ombudsmen. Depending on the nature of the complaint, these other forms of redress may be less than appropriate. For judicial review, the applicant has to show procedural or substantive *ultra vires* and for the ombudsman, maladministration leading to injustice. The strengths and shortcomings of these will be discussed in the following chapters.

46 Williams and Jordan, *The Children Act Complaints Procedures: A Study of Six Local Authority Areas*, 1996.

47 Williams, *'R v Birmingham CC ex p A* – an unsuitable case for judicial review?' (1998) 10 Child and Fam LQ 1.

48 *Ibid*, p 9.

CHAPTER 3

OMBUDSMEN

In many ways, ombudsmen can be judged as one of the few success stories in our system of administrative justice. This kind of informal dispute resolution mechanism is of some significance, particularly in terms of the number of individual disputes which are settled or grievances resolved. In practical terms, many more people will take a complaint to an ombudsman than will possibly be able to go to court through judicial review and, in this country, we have the most extensive system of individual ombudsman schemes in the world. This is largely because private companies adopted the ombudsman institution on a self-regulatory basis.

Currently, the term 'ombudsman' covers a wide spectrum, from grievance handling to dispute resolution: the public sector ombudsmen at one end of the spectrum, and the private ombudsmen at the other. The latter are real alternatives to the courts, in that they can look at the merits of cases which come before them and can make binding awards, two distinguishing features which mark them out from the public sector ombudsmen. The classification into public or private is, however, too crude because the term now also encompasses a kind of hybrid like the Pensions Ombudsman and the new Financial Services Ombudsman, both set up by public law, but with jurisdiction over private sector organisations.

THE PUBLIC SECTOR

For the purposes of this book, the ombudsmen who deal with complaints about public administration are our principal, though not exclusive, concern. In this country, ombudsmen originated in the public sector, imported from Scandinavia and introduced as a result of concerns about the ability of public institutions to respond to and handle grievances about their activities.[1]

1 Seneviratne, *Ombudsmen in the Public Sector*, 1994; Lewis and Birkinshaw, *When Citizens Complain: Reforming Justice and Administration,* 1993.

The Parliamentary Commissioner for Administration (PCA) – the Parliamentary Ombudsman (PO)[2]

The PCA, or PO,[3] was the first ombudsman to be introduced in this country, established by the Parliamentary Commissioner Act 1967. The function of the PO is to investigate complaints made by members of the public against the administration of government departments and other authorities now listed in Sched 1 of the Parliamentary and Health Service Commissioners Act 1987. There are over 80 institutions listed, but inclusion is patchy and can be confusing. For example, some non-departmental public bodies, including the Sports Council and the Commission for Racial Equality, are subject to the PO's jurisdiction, but some other important bodies, such as the Independent Television Commission and the Civil Aviation Authority, are not.

The task of the PO is not only to provide a convenient political solution to administrative disputes and to encourage public bodies to comply with the requirements of the law, but to try to promote and maintain acceptable standards of good administration in dealing with citizens. The extent to which the public sector ombudsmen have grasped this nettle of encouraging standards of good practice has varied over the years, with the PO being the least proactive in this regard.

As far as the handling of individual grievances is concerned, the PO is empowered to investigate complaints of injustice sustained as a result of maladministration. Maladministration is not defined in the Act and it has been left to each ombudsman to determine the scope. The term was originally held to include 'bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness, and so on', a list known as the 'Crossman catalogue', since it was given by the then Leader of the House, Richard Crossman, during parliamentary debate on the Bill which became the 1967 Act. Maladministration had its origins in the Justice Report of 1961,[4] which had originally proposed the setting up of the office. In 1977, however, in a further report, *Our Fettered Ombudsman*, Justice suggested that 'maladministration' should be replaced by a provision empowering the Ombudsman to investigate 'unreasonable, unjust, or oppressive action' by government departments.

This would be more in line with the New Zealand Ombudsman, who can report on decisions which are unreasonable, unjust, oppressive, or improperly discriminatory, or even 'wrong'. Some holders of the post of PO have not

2 See website: www.ombudsman.org.uk

3 The Select Committee on the PCA endorsed the name Parliamentary Ombudsman rather than PCA on the grounds that it might increase public awareness of his office, and has recommended that the relevant statutes be amended. *The Powers, Work and Jurisdiction of the Ombudsman*, First Report of the Select Committee on the PCA, 1993–94, HC 33-1.

4 Justice Report, *The Citizen and the Administration*, 1961.

interpreted their role as broadly as those in some other jurisdictions. In Canada, for example, everything done by governmental authorities in the implementation of government policy has been held to be included by the Canadian Supreme Court. That said, William Reid, PO until 1997, did do much to refine and extend the scope of maladministration while at the same time keeping to the view that to have a strict definition would tend to limit its scope and work to the disadvantage of individual complainants where their justified grievance failed to fit a given definition. Reid preferred to give additional examples of maladministration to supplement the Crossman catalogue. Included within these were: unwillingness to treat the complainant as a person with rights; refusal to answer reasonable questions; knowingly giving advice which is misleading or inadequate; showing bias whether because of colour, sex or any other grounds; and failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment. (This latter ground featured in the Channel Tunnel Rail Link case, which is discussed below, p 51.) The Select Committee on the PCA endorsed this further clarification.[5]

The PO also has responsibility for investigating complaints about breaches of the Code of Practice on Access to Government Information.

There is often a significant overlap in subject matter between the jurisdiction of the PO and issues which can come before the court for judicial review. While the Ombudsman is excluded from investigating complaints where the individual has a remedy at law, he has a discretion to take on such cases if satisfied that, in the particular circumstances, it is not reasonable to expect the individual to have pursued a remedy in court. In practice, this means that, while the PO would expect a complainant to take their case to a tribunal or appeal procedure where one exists, successive Ombudsmen have been prepared to take on cases where, nominally at least, there might be a remedy through judicial review.

The PO is himself open to judicial review and there have been a few cases which have clarified the scope of his powers.[6] The most recent case, *Ex p Balchin*,[7] concerned the first successful action for judicial review of a report issued by the PCA. This complaint concerned the actions of the Department of Transport in relation to planning blight because of a road proposal affecting the complainants' home. It was a complaint rejected by the PO but, in the High Court, Sedley J held that the Ombudsman had failed to have regard to a relevant consideration in reaching his decision and therefore had acted unlawfully – the Ombudsman had to exercise his powers according to normal public law principles. But, while Sedley J held for the applicants on that

5 *Maladministration and Redress,* First Report of the Select Committee on the PCA, 1994–95, HC 112.

6 See, eg, *R v PCA ex p Dyer* [1994] All ER 375.

7 25 October 1996, Lexis.

ground, he clearly reserved for the Ombudsman the prerogative of deciding on the facts whether or not there had been maladministration:

> So far as a court of judicial review is concerned, the question is not how maladministration should be defined but whether the [Ombudsman's] decision is within the range of meaning which the English language and the statutory purpose together make possible. For the rest, the question whether any given set of facts amounts to maladministration – or by parity of reasoning, to injustice – is for the Ombudsman alone.

He therefore directed that the Ombudsman should take another look at a particular aspect of the complaint; the court did not take the decision for him.

The Select Committee scrutinises the Annual Reports of the PO, the Health Service Ombudsman, and the PO for Northern Ireland (all of which are laid before both Houses of Parliament) and matters in connection therewith. Until July 1997, the Committee was the Select Committee on the PCA. In July 1997, however, the new Government extended its remit beyond oversight over the public sector ombudsmen to cover also matters relating to the quality and standards of administration provided by Civil Service departments and matters relating to the Civil Service. In recognition of this wider role, the Committee has been renamed the Select Committee on Public Administration.

The Select Committee has, at times, applied pressure to government departments to provide remedies where they have shown reluctance to do so. Over the years, the Committee has also encouraged successive Ombudsmen to take a broader view of maladministration, but it has had little success in persuading governments actually to broaden the limits of the PO's jurisdiction. The usefulness of the Select Committee really emanates from the fact that it exists and that civil servants know they might have to answer questions before it. The Committee's inquiries have led to a continuing dialogue being established between MPs and the Civil Service.

Although the PO has no power to enforce a remedy, refusal by a department or other body to accept a decision or recommendation is relatively rare. If a department refuses to follow a PCA recommendation, there is nothing the complainant can do. The Select Committee may comment, or an individual MP take the matter up, but there is no formal means of enforcement. The most stringent sanction which the Ombudsman possesses is his power under s 10(3) of the Act to lay a special report before Parliament where it appears to him that injustice has been caused as a result of maladministration and that the injustice has not been, or will not be, remedied. The PO has recently issued a special report under s 10(3), only the second in the history of the office, and it is worth examining that particular case in detail for the light it sheds on the interplay between the Ombudsman, the Select Committee and government.

The Channel Tunnel Rail Link saga[8]

In late 1992 and early 1993, the PO received complaints via three MPs representing constituencies in Kent about the inability of a number of householders to sell their properties because of the Department of Transport's handling of the Channel Tunnel Rail Link (CTRL) project. Five individual complaints were accepted for investigation, but as it was clear that there were other aggrieved parties, the Ombudsman decided to treat those five cases as specimens for their respective constituencies and to examine them in the context of the department's handling of the project as a whole.[9] This action was close, though not totally analogous, to the kind of administrative audit recommended by the Select Committee in its review of *The Powers, Work and Jurisdiction of the Ombudsman*,[10] a recommendation rejected by government on a number of, arguably thin, grounds.[11]

The Ombudsman told the Select Committee that the investigation was the largest single one in his time as Parliamentary Commissioner.[12] In the course of the investigation, some 10,000 pages of departmental material, as opposed to the more usual hundreds, were examined. As a result of the investigation, the Ombudsman found that there had been maladministration and a draft report was sent in the usual way to the Permanent Secretary, Sir Patrick Brown. Unusually, despite discussions and exchange of letters, the Permanent Secretary declined to accept the Ombudsman's view that there had been maladministration in his department.[13] The Ombudsman was therefore moved to lay a special report[14] before Parliament under s 10(3) of the Parliamentary Commissioner Act 1967.

This outcome was unusual, as has been said, in that it was only the second such special report in the history of the Parliamentary Commissioner for Administration. The first, issued in 1978, interestingly also concerned the Department of Transport, when it refused to meet late claims for compensation in respect of the depreciation of homes caused by the

8 See James and Longley, 'The Channel Tunnel Rail Link, the Ombudsman, and the Select Committee' [1996] PL 38.

9 *The Channel Tunnel Rail Link and Blight: Investigation of Complaints against the Department of Transport,* PCA Fifth Report, 1994–95, HC 193.

10 First Report of the Select Committee, 1993–94, HC 33. See, also, Gregory, Giddings and Moore, 'Auditing the auditors: the Select Committee Review of the powers, work and jurisdiction of the Ombudsman 1993' [1994] PL 207.

11 See *Memorandum attached to Fifth Report of the Select Committee,* 1993–94, HC 619; and see Giddings and Gregory, 'Auditing the auditors: responses to the Select Committee's Review of the United Kingdom Ombudsman system 1993' [1995] PL 45.

12 *The Channel Tunnel Rail Link and Exceptional Hardship,* Sixth Report of the Select Committee on the PCA, HC 270, Minutes of Evidence, p 1.

13 For the detailed response of the Permanent Secretary, see Append 4, HC 193.

14 1994–95, HC 193.

'improvement' of the road in Rochester Way at Bexley.[15] In that instance, the Government acceded to the Select Committee's recommendation that the department should remedy the injustice and agreed to amend legislation and pay compensation to those affected.

In the CTRL case, the Select Committee recommended that the department should accept the Ombudsman's finding and consider putting in hand arrangements to determine whether there were householders whose circumstances merited compensation on the grounds of exceptional hardship. In making this recommendation, the Select Committee emphasised that they had not assumed automatically that the Ombudsman was right, but had considered the arguments from the Ombudsman and from the Department of Transport objectively and dispassionately.[16]

The Ombudsman had found the CTRL project to be an exceptional one, not least because it will be the first major railway to be built in this country this century. Whilst there may have been comparable developments, the particular nature of the project has meant that there could be no assurances about its effects. It was perceived by the public to be an exceptional project and has generated exceptional fears. 'From the outset, the project generated widespread blight for which no arrangements had been made.'[17] This was exacerbated by the considerable delay in deciding the actual route for the rail link, the matter being left open between June 1990 and April 1994.[18] The Ombudsman found that there had been maladministration on the part of the department during that period since, in his view, they should have considered the need to provide redress for persons suffering extreme or exceptional hardship who were not covered by the existing compensation schemes.[19] His grounds were that '[G]ood administration means having due regard at all times to the position of the citizen, not just to the position of the Government and the taxpayer, but to the individual citizen'.[20] The department had failed to have such regard and the Ombudsman was arguing here for individualised justice in the face of an over-rigid administration. He recognised that it was government policy not to compensate those affected by the kind of generalised blight being faced here, but nevertheless, in his view, the department still had a responsibility to consider the circumstances of the

15 Sixth Report of the PCA, 1977–78 HC 598; Third Special Report of the Select Committee, 1977–78, HC 666.

16 *The Channel Tunnel Rail Link and Exceptional Hardship*, Sixth Report of the PCA, 1994–95, HC 270, para 5.

17 Evidence to the Select Committee by Mr William Reid, 1 March 1995, HC 270, p 2.

18 The PCA's own words in his evidence to the Committee well describe the impact this had on the individuals affected. 'The project was in limbo; limbo is the borders of hell and I think it was regarded as the borders of hell by many of those who were affected by the proposed blight.' Evidence to Select Committee, 1 March 1995, HC 270, p 2.

19 Ie, British Rail and the Union Railway schemes.

20 Evidence to the Select Committee, 1 March 1995, HC 270, p 2.

individual who was suffering exceptional hardship and to make recompense in exceptional cases on an *ex gratia* basis.

The Department of Transport took issue with the Ombudsman on a number of points. It argued that the project was not exceptional in its funding, the uncertainty generated, the area affected, nor in its environmental impact. Nor was it reasonable to claim that the project had been unduly delayed, since the time span from the start of planning to the opening of the CTRL would be around 14 years, which was average for major trunk road schemes. The Permanent Secretary indicated that his view and that of ministers was that the generalised blight effects of the CTRL were not materially different from those of many other projects, and consequently, the policy not to compensate for generalised blight should apply. In any event, any decision as to whether to compensate or not should be made by reference to the effect of blight rather than the nature of its cause.[21]

Furthermore, the Permanent Secretary pointed out that, during the period in which the Ombudsman had found that maladministration had occurred, the Planning and Compensation Act 1991 was going through Parliament. This had presented Parliament and ministers with a clear opportunity to reconsider the policy of not compensating for generalised blight. They had not done so and, in those circumstances, he failed to see how officials could be accused of maladministration for failing to propose a new scheme given the 'reluctance of successive governments to deal with generalised blight and continuing ministerial agreement to that policy'.[22]

There were other, practical, problems which militated against special relief. The Permanent Secretary confessed himself concerned about the danger of 'snowballing blight', which had been witnessed where existing purchase schemes were in operation, and he also found it difficult to envisage how a fair discretionary scheme could be managed or how criteria could be developed to identify cases of extreme hardship in a way which would be equitable and command general public acceptance.

The Select Committee were not persuaded by Sir Patrick's arguments.[23] They accepted the Ombudsman's finding that the department should have given direct and comprehensive consideration to the question of whether it was either desirable or possible to offer *ex gratia* compensation to those exceptionally afflicted by the generalised blight of the CTRL project. The department had provided no evidence that there had been any such consideration.

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21 Sir Patrick Brown, Permanent Secretary, DOT, Evidence to the Select Committee, 1 March 1995, HC 270, pp 4–5.

22 1994–95, HC 270, p 4.

23 Nor indeed by the evidence of the then Secretary of State for Transport, the Rt Hon Brian Mawhinney MP, 23 May 1995, HC 270, pp 18–30.

The Committee did not accept the department's view that the project was unexceptional and agreed with the Ombudsman that, in the particular circumstances, the department had no excuse for not having *considered* the possibility of *ex gratia* redress for extreme hardship. To some extent, this was supported by the Permanent Secretary's own evidence to the Committee when he declared it was clear that where, from time to time, there are serious effects of a policy on individuals, it is appropriate for the department, together with ministers to reconsider whether they should maintain the policy in explicit terms.[24] This was a significant admission, made in response to a question as to what the department had learned from the Ombudsman's report.

Nor did the arguments regarding 'snowballing blight' and the problems of discretionary payments cut any ice with the Select Committee, as what was envisaged was a small number of *ex gratia* payments in exceptional cases. Other government departments, the DSS and Inland Revenue for example, make such payments from time to time and the Committee was not persuaded that 'such discretion, by no means unusual in public administration, cannot be applied prudently and intelligently'.[25] It would be for the department to determine whether there were householders who merited such compensation.

The Committee also pointed out that the department were flying in the face of government policy, which had admitted the possibility and propriety of distinguishing the very exceptional case in certain circumstances. The Committee had argued in its report on *Maladministration and Redress*[26] that all departments should be prepared to compensate for worry and distress in exceptional circumstances. The Government had replied that this could be justified only in 'very exceptional cases', but this was clearly not the same as ruling it out altogether.

Closely related to this was the disagreement which came to light as to the scope of the Ombudsman's jurisdiction. In his evidence to the Committee, Mr Reid had indicated that it had been put to him that, in his report, he was criticising government policy. This he had robustly denied. 'I am well aware of the boundaries of my jurisdiction. I comment on the effects of policy and a failure to consider the possible need for action to address those effects. That is not the same thing at all.'[27] The Select Committee clearly endorsed this approach. In a powerful passage, the report explicitly sets out the Committee's view of its own jurisdiction and that of the PCA:

> We would also disclaim any attempt to question government policy. Our purpose is rather to establish how any policy should be administered. At the

24 Evidence to Select Committee, 1 March 1995, HC 270, p 15.

25 1994–95, HC 270, para 25.

26 First Report of the Select Committee on the PCA, 1994–95, HC 112.

27 *Ibid*, Evidence to the Select Committee, p 3.

> heart of this debate is a definition of maladministration found in the PO's Annual Report for 1993 – 'failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment'. The definition, which we fully support, implies an expectation that when an individual citizen is faced with extraordinary hardship as a result of strict application of law or policy, the executive must be prepared to look again and consider whether help can be given.[28]

There are clear echoes here of the familiar requirement, expounded in *British Oxygen v Board of Trade* (1971),[29] that public bodies should not fetter the exercise of a discretionary power. In that case, the House of Lords held that a public authority may have a quite detailed and specific policy which it normally applies, as long as it is prepared to consider the merits of individual cases which raise unusual or novel points.

The case for improved guidance and redress

In *Maladministration and Redress,* the Select Committee had concluded that departmental guidance on redress for maladministration was outdated, directed more towards the protection of the public purse than to the rights of complainants. It was expressed mainly in a negative manner and had failed to set down any general framework or unifying principle which might guide departments. This prompted an assurance from the Economic Secretary to the Treasury that guidance on redress and *ex gratia* payments was under review.[30]

The Committee recommended that departments should carry out a form of 'self-audit', actively seeking out others who might be affected where maladministration comes to light and to look for patterns of maladministration. They linked this with the aim of the Citizen's Charter, which was to provide better redress for the citizen when things go wrong, and their concern that many departments had yet to adopt practices of redress which adequately reflected Charter principles.[31] They therefore recommended the setting up of a 'Redress Team' within the Charter Unit to monitor the granting of redress and advise government departments and agencies, particularly in difficult cases. The Committee believed that this would have the advantage of developing a consistent approach to the resolution of complaints throughout the administration.[32]

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28 Sixth Report from the Select Committee, 1994–95, HC 270, para 20.

29 *British Oxygen v Board of Trade* [1971] AC 610.

30 First Report of the Select Committee on the PCA, 1994–95, HC 112, para 5.

31 The Committee also had in mind principles of procedural fairness in that they recommended that departments should consult with the complainant on the appropriate form of redress: 1994–95, HC 112, para 55.

32 1994–95, HC 112, para 25.

Revised guidance should also include the Ombudsman's examples of maladministration as a checklist to assist departments in considering their administrative actions.[33] Of particular significance is the definition that was applied in the CTRL case, namely, 'failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment'.[34] This is a welcome development, which is in line with recent judicial calls for substantive fairness to form the basis of public law control of the administration.[35] The Committee clearly supported this approach.[36]

The Committee's final recommendation as regards CTRL was that, in the event of the Department remaining obdurate, there should be, as a matter of urgency, a debate on the floor of the House on a substantive motion in government time. Had such a debate taken place, it would have been particularly embarrassing for the Government in the light of comments made in the previous years by the then Government ministers, and quoted in the Select Committee Report,[37] where they had repeated the conventional understanding that government operates on the basis that it accepts and implements the PCA's recommendations. As the Select Committee has stated: 'There would be no point in having an Ombudsman if the Government were to show disregard for his Office, his standing as an impartial referee, and for the thoroughness of his investigations.'[38]

The department's response came finally in a short letter to the Chairman of the Select Committee[39] from Sir George Young, who had by then taken over as Secretary of State for Transport. In brief, Sir George reiterated the department's earlier contention that there had been no maladministration, but said that the Government was prepared to consider afresh whether a compensation scheme might be formulated to provide redress for those affected to an extreme and exceptional degree by the generalised blight. The Government had agreed to look at a compensation scheme, he said, 'out of respect for the PCA Select Committee and the office of the Parliamentary Commissioner, and without admission of fault or liability'. The final paragraph of his letter emphasised the grudging nature of their partial capitulation and at the same time provided a ground for the Government on which a compensation scheme might, in the end, be rejected. Sir George said that, in looking at a scheme, the department would have to consider seriously

33 PCA Annual Report 1993, para 7.

34 1994–95, HC 270, para 20.

35 See Woolf, 'Droit public – English style' [1995] PL 57, and Laws, 'Is the High Court the guardian of fundamental constitutional rights?' [1993] PL 59.

36 It is also the approach adopted in a number of private sector ombudsman schemes. Eg, the Building Societies Ombudsman may investigate complaints about unfair treatment.

37 See 1994–95, HC 270, paras 1 and 5.

38 *Ibid*, para 1.

39 *The Channel Tunnel Rail Link and Exceptional Hardship – The Government Response*, 1994–95, HC 819.

the possible costs, which could not yet be established. He added that he would not be discharging his 'responsibility to the taxpayer by offering an open-ended commitment on an uncosted basis'.

The reasons put forward for the department's refusal to accept that there was any maladministration are, it has to be said, disappointing. They took the form of a reassertion by the department that there was nothing exceptional about the project, that it was never in limbo, and that there could be no maladministration where there was clear government policy not to provide a remedy for generalised blight. Officials could not, therefore, be held to have acted improperly for failing to propose to ministers that something should be done for exceptional hardship cases. Sir George had further asserted that, if the arguments set out in the Committee's report were taken to their logical conclusion, a fundamental new principle of administration would be introduced. It would imply, he said, that if a new policy were adopted, or a new circumstance arise which affects an existing policy, the government has a duty to identify those individuals who would be particularly adversely affected and to provide financial redress.

This new principle of administration would be unacceptable to government, he said, since it would make government unworkable. This argument is, at best, a misconstruction of the point which the Committee were making in their Report where they said that 'when an individual citizen is faced with extraordinary hardship as a result of strict application of law or policy, the executive must be prepared *to look again and consider* whether help can be given'.[40] The Committee was arguing for the exercise of discretion regarding a limited number of cases, not for an open-ended commitment to compensation or the automatic provision of financial redress.

The letter of response ignored the admission of the Department of Transport's Permanent Secretary, made before the Committee, that there might be occasions when it was appropriate to reconsider the continuation of a policy and also failed to address the Ombudsman's point that good administration requires due regard to the position of the individual citizen as well as that of the government and taxpayer.

Evidence to the Select Committee and recent reports of the Ombudsman have revealed inadequacies in much of the redress offered by many departments and agencies, through unwillingness to admit fault, refusal to apologise, and failure to identify and compensate those affected by maladministration, as well as unacceptable inconsistencies in departmental practices;[41] all of which highlight the need for reinforcement of the principles of the Citizen's Charter to improve administrative standards. The Department of Transport had shown itself particularly reluctant to enter into the spirit of

40 1994–95, HC 270, para 20. Our italics.

41 1994–95, HC 112, para 1.

the Charter and take on board the principles which underlie it. Importantly, the CTRL episode has also revealed an apparent difference of view between the Select Committee and the Government, which warrants further examination, as to where the boundary lies between the making of policy and its administration.

Laudably, the Select Committee regarded it as vital that not only should injustice be remedied in individual cases, but that standards of good administration and fairness should pervade the whole government machine. To this end, they seem prepared to invoke whatever means were available, namely, the Ombudsman, the Citizen's Charter initiative and the authority of their own recommendations.

As a postscript, the Government did produce a scheme to provide compensation on the lines recommended by the PO, which was superseded by the general election in May 1997. The scheme was then considered by the incoming Government, which increased the level of payments for redress to £10,000. This was put to the new Select Committee, which accepted the Government's proposals. Following this, the compensation scheme has been advertised and applications invited.

It should be remembered, however, that the CTRL saga does not represent the normal pattern on redress. Departments *do* normally follow the recommendations of the PO, and the role of the Select Committee in exerting informal and formal pressure is often crucial in this.

No direct access to the PO

One area where the Select Committee has been reluctant to initiate reform is in the requirement that complainants may only take their case to the Ombudsman through an MP. The reasons for this so called 'MP filter' lie in constitutional concerns, particularly evident at the time of the passing of the 1967 Act, that the Ombudsman should not usurp the traditional role of the MP in protecting and taking up the cudgels on behalf of constituents against the executive. This hurdle has been much criticised, but it seems unlikely that reform is imminent, since the Select Committee examined and rejected the arguments in favour of direct access comparatively recently.[42] This leaves individuals very much at the mercy of their particular MP and it is interesting, if not a little disturbing, that a major survey of MP's attitudes, carried out by the Select Committee in the early 1990s, found that while 52% of MPs referred complaints to the Ombudsman 'sometimes', 40% 'seldom' did so.

In 1997, the PO received 1,528 complaints. This figure was a 21% decrease on that for 1996; a change which the Ombudsman partly ascribes to the

42 The Powers, work and jurisdiction of the Ombudsman', 1993–94, HC 33.

intervention in 1997 of the general election when, for a period, there were no MPs to whom complaints might be referred.[43]

Accessibility is an issue affecting most ombudsmen and questions are raised as to how well publicised the office is and how easy it is to make a complaint. Public awareness of all ombudsmen is still not high. While surveys have shown an improvement this decade, the latest findings are still disappointing: a MORI survey in 1995 found that 46% of those questioned had heard of the PO and the same percentage had heard of the Banking Ombudsman (the one having been introduced in 1967, the other in 1986). On the latter point, the PO has recently taken the step of including an interactive complaint form on the internet for those who wish to make a complaint in that way. Traditionally the socio-economic profile of those who take a complaint to an ombudsman shows a predominance of those from a professional and managerial household,[44] and it is not clear how accessible the procedures are for those from other social classes.

The Select Committee has jurisdiction over not just the PO, but also the Health Service Commissioners for England, Scotland and Wales, and the Northern Ireland Ombudsman.

The Health Service Commissioner or Health Service Ombudsman

The Health Service Ombudsman (HSO), a post normally held concurrently with that of PO, was established by the National Health Services Reorganisation Act 1973. In contrast to the PO, there is direct access to the HSO as long as the health body concerned has been given adequate opportunity to investigate the complaint first. The remit of the Health Service Ombudsman appears to be wider than that of the PO, in that alleged failures of service may be examined, but whether this is the case in practice is debatable.

Some major reforms to the jurisdiction of the HSO were introduced under the Health Service Commissioner (Amendment) Act 1996. The HSO may now also investigate complaints about family doctors and dentists, pharmacists, opticians, nurses and others providing NHS family health services, including Family Health Service Authorities, and also private hospitals, nursing homes or other private bodies if the complaints are about services provided for the NHS.

Apart from those extensions of jurisdiction, the most significant recent change made to health service complaints procedures has been the extension of the jurisdiction of the Health Service Ombudsman to complaints relating to

43 Fifth Report of the PCA, 1997–98, HC 845, July 1998.

44 See, eg, James and Seneviratne, 'Offering views in both directions: a survey of complainants and members agencies on their views of the OCEA scheme', 1996.

family health service providers and to the exercise of clinical judgment. Previously, an estimated quarter of complaints that had to be rejected by the Ombudsman were related to matters of clinical judgment. This often led to an arbitrary division being made between different aspects of the same complaint. Although clinical judgment is not defined in the Health Service Commissioners (Amendment) Act 1996, it has been taken tentatively to be 'that which a health professional makes by virtue of his or her particular skills, expertise and training' and includes diagnosis, care and treatment.[45]

In addition, a previous restriction which prevented information obtained during the course of an investigation being disclosed to a third party has been amended. The Ombudsman now has a discretion to disclose, in the interests of the health and safety of patients, such information to anyone whom he considers fit. This may include professional regulatory organisations (such as the General Medical Council) and employers of health service personnel who have had complaints made against them.[46] However, neither the Ombudsman nor his officers or advisers can be called to give evidence of matters which have come to their knowledge in the course of an investigation, should malpractice litigation arise.[47]

Whilst the latest Act has extended the Ombudsman's remit and clarified a number of ambiguities in previous legislation,[48] important restrictions remain and some new anomalies have arisen. Whilst the merits of clinical complaints may be investigated, the merits of administrative failures may not. These are restricted, as formerly, to hardship or injustice arising from maladministration. This may make it difficult for the Ombudsman to investigate fully a complaint about purchasing and policy decisions which are frequently influenced by financial considerations as much as clinical ones. The distinction between administrative and clinical matters in these circumstances is likely to be fine. It is for the Ombudsman to decide whether such a complaint falls within his jurisdiction.[49]

In terms of continuing restrictions, there is no power to investigate where a legal remedy is available. Whilst this provision may seek to prevent potential litigants embarking on 'fishing expeditions', it can also lead to injustice where the complainant is unable to obtain legal aid and cannot afford legal action. Perhaps one of the most important restrictions to remain is that the Ombudsman may not invoke an investigation into overall policy on his own initiative. This, arguably, limits his ability to act as watchdog. Instead, the

45 Hansard, HC Vol 268, col 898.

46 Health Service Commissioners (Amendment) Act 1996, s 11.

47 Health Service Commissioners Act 1993, s 15, amended by the 1996 Act, s 11.

48 See Harpwood, 'The Health Service Commissioner: an extended role' (1996) 3 EJHL 207.

49 However, if issues of resource allocation amount to a failure to provide a service which it was a function of the health body to provide, the matter does fall within the Ombudsman's jurisdiction. Health Service Commissioners Act 1993, s 3.

Ombudsman tries to ensure that general concerns raised by individual complaints are highlighted in the annual reports. However, experience has shown that the educative purpose of these documents does not always have the intended impact. Not nearly as much attention is paid to them by health organisations, other than those directly involved in the complaint, as the government and the HSO would like to believe. Something much stronger by way of guidelines or codes of practice of general application is needed, although this has been resisted by the Ombudsman on the grounds that this would restrict his own discretion. But, as the local Ombudsman and other jurisdictions have shown, this does not have to be the case. Centrally produced protocols can be effective in combating ambiguity and national inconsistencies in similar services throughout the health service. The Ombudsman would retain the discretion to decide whether the spirit, rather than the letter, of guidelines or codes of practice had been followed.

Notwithstanding the above, the HSO now has the widest powers of any of the UK public sector ombudsmen, although they do not quite meet those enjoyed by similar bodies which have burgeoned through the private sector in recent years and which in many instances are proving to be a real alternative to the courts.[50] The way in which the office now proceeds with its new powers will be crucial to the development of a genuinely more effective complaints system.

New Zealand

In contrast to the piecemeal approach to health service complaints procedures adopted in Britain, New Zealand has opted for a more holistic system, based on patients' rights. The history of reform of health service complaints procedures in New Zealand, like that in the UK, is rather chequered, if not as long. The impetus for change was the report of the Cartwright Inquiry in 1988 into allegations concerning the treatment of cervical cancer at the National Women's Hospital. Cartwright proposed various measures to protect the rights of patients, as well as changes in the practice of medicine and research. In particular, the Report recommended the establishment of a Health Commissioner to produce a Code of Patients' Rights and provide independent advocacy services and examination of complaints when the Code was breached.

As in the UK, consideration of these complaints mechanisms was also affected by other legislative reforms, which radically reorganised the provision of health services[51] and revised regulation of medical practitioners. Although it had a contentious and slow passage through the NZ Parliament,

50 James, *Private Sector Ombudsmen and Public Law*, 1997.

51 See Longley, *Health Care Constitutions*, 1996.

the Health and Disability Commissioner Act (HDC) came into force in 1994 and the first Commissioner was appointed in December of the same year.

The remit of the Act is extensive, covering *all* health and disability services, whether public or privately provided. It is grounded in the provision of legally enforceable patient rights and its purpose is to facilitate fair, simple, speedy and efficient resolution of complaints relating to the infringement of those rights. The Act refers specifically to rights because this is seen as necessary to redress the imbalance that has traditionally occurred between providers of services and consumers in the health and disability sectors. The rights legislation encompassed in the Act is, as the Commissioner herself has stated, 'quite different to comparable legislation anywhere else in the world and is therefore setting new ground',[52] and there is a capacity to enjoin health rights with both disciplinary proceedings and other rights tribunals.

The Act is all encompassing. It defines consumers and providers of health and disability services and the services themselves *inclusively* rather than *exclusively*. In fact, it is difficult to think of any service with some connexion to health and disability that does not come within its ambit. Not only those providers whom one would clearly expect to be included are covered, but also 'alternative medicine' services, such as homeopathy, acupuncture, reflexology, etc. Also included are health related services through Housing New Zealand, psychological testing of prisoners by the Justice Department, special schools and rehabilitation, home alteration and accommodation support, amongst others.

The Act provides for the preparation, content, review and notification of a Code of Patient Rights by the Health and Disability Commissioner (HDC) and the operation of advocacy services independent of the Commission. Although, at first sight, the Code appears similar to the Patient's Charter, in contrast, the Code creates 10 legally enforceable rights by way of regulation. To ensure that it remains relevant to current situations, it may be amended at any time and must be reviewed every three years. Before any such changes may be made, there are wide ranging consultation provisions.

Because the Code is enshrined in regulation, it is not as straightforward as some consumer groups would have preferred and it has consequently been criticised for its rather formal presentation. However, the rights encoded may be presented to consumers in any way providers may choose as long the latter's duties under the Code are met. Every provider is expected to inform consumers of their rights *and* enable them to be exercised. Where these obligations are not met, the onus is on the provider to show that this was reasonable in the circumstances.

52 Stent, *Health and Disability Commissioner; Gaining an Insight into the Code of Rights,* 1996.

It is envisaged that the test of reasonableness will develop as it is applied over time, and the system moves out of its initial phase and 'beds down', when a greater degree of compliance with requirements is expected.[53] This approach has facilitated the necessary degree of flexibility to allow for the building of standards as well as individuation in the treatment of complaints. This balance, grounded on a solid rights base, is reflected in the emphasis given to partnership between consumers and providers in the Code. This declares that patients also have a responsibility to communicate as effectively as possible, participate in partnership and learn about their rights, so as to empower themselves.

The right to complain is set out in detail in Right 10. As is the tradition in New Zealand in contacting ombudsmen, there is no provision that a complaint should be written. A consumer may complain in any form appropriate to themselves, and may complain to those who provided the service, or any person authorised to receive complaints on behalf of the provider, or any other appropriate person, including an independent advocate provided under the HDC Act, as well as the HDC. This avoids the dilemma that can face patients in Britain in initiating a complaint directly against those who have provided care and may have to continue to do so in the future.

In the first instance, all complaints are referred to the health or disability provider to see if local resolution is possible. Every complaint is expected to be acknowledged within three working days of receipt and the complainant informed of any internal, external or investigating procedures. The consumer must receive all information held by the provider relevant to the complaint. Within 10 working days, the provider must either accept the complaint or not, or indicate how much additional time is needed to investigate. Monthly updates must be given on any unresolved complaint. There is a requirement that the consumer is informed of the reasons for any of these decisions, and told of any action to be taken and any appeal procedures.

Beside the usual rights to respect, freedom from discrimination, dignity, information, etc, of particular interest is the right to services of an appropriate standard.[54] Under this heading are included the right of every consumer to have service provided in a manner that minimises the potential harm to, and *optimises the quality of life* of, that consumer; and the right to *co-operation among providers to ensure quality and continuity of services*. It will be interesting to see how these rights are actually interpreted by HDC as cases arising from breach of the Code bite. In contrast to Britain, there should certainly be no difficulty in dealing with multi-agency complaints, but there is room for a deal of discretion in the interpretation of quality of life factors. The health service in New Zealand is as cost containment conscious as the NHS. There, as here,

53 *Op cit*, Stent, fn 52, p 2.4.

54 Cl 2, Right 4.

there is no entitlement to particular services, and in its initial stages, the Act and the Code was criticised for their procedural focus. However, there appears to be a clear possibility for the HDC, in some circumstances, to consider more substantive rights and to investigate the merits of purchasing decisions.

The purpose of the advocacy service is 'to promote and protect the rights of health and disability service consumers by empowering them through advocacy support'.[55] Advocacy is seen as the first step in the process of assisting consumers who are unable to resolve their concerns. Advocates may receive complaints directly from consumers, or they may be referred by the HDC or other persons. Their role is to assist consumers to pursue their complaints through formal and informal procedures, including proceedings before health professional bodies. They may also refer unsolved complaints to the HDC and have a duty to report any matter relating to the rights of consumers that, in the advocate's opinion, should be drawn to the attention of the Commissioner.[56]

Advocates and the Director of Advocacy act independently of the Minister of Health, health and disability purchasers and providers, and the HDC. But the Director is responsible to the HDC for the efficient, effective and economical management of his/her activities and is charged with the establishment and administration of a nationwide advocacy service. Under s 28 of the Act, the HDC is authorised to issue guidelines relating to the operation of these independent advocacy services. Advocates are required to assist complainants under an 'empowerment model';[57] no judgment or mediation is undertaken in any situation. Consistency of advocacy throughout the New Zealand health service is regarded as fundamental and is achieved through national training, monitoring, guidelines, performance standards and protocols and information gathering.

In the course of investigation, the HDC may liaise with a number of other bodies, including professional health bodies, whose jurisdiction is related to or overlaps with that of the Commissioner. If a complaint is made to a professional health body about one of its members, it must be referred to the Commissioner and all action in respect of that complaint suspended until the HDC has investigated it. The HDC also has a discretion to refer a complaint to the Human Rights Commission, the Ombudsman or the Privacy Commissioner if she considers that the matter could be dealt with more properly by them. Where the HDC finds evidence of any significant breach of duty or misconduct, s 48 requires the matter to be referred to the appropriate person or authority, including the police or the Coroner.

55 Health and Disability Commissioner Act 1994, Pt III (the HDC Act).

56 *Ibid*, s 30.

57 The key principle is to work with the consumer in a manner 'which supports them and gives them skills, knowledge and confidence to resolve the issue with assistance', *Gaining an Insight into the Code of Rights*, 1996.

In addition, the HDC may call for a mediation conference to resolve a matter by agreement between the parties. Mediation is binding, final and confidential, but it is not the role of the mediator to impose a solution on the parties. Any information, statement or admission disclosed or made during a mediation conference cannot be used as evidence in any court or before any person acting judicially.

The Act also makes provision for the appointment of a Director of Proceedings (DP), whose role is to assist or represent complainants or others in an action, or to bring an action in his or her own right in respect of a complaint. Like those of the Director of Advocacy, the functions of the DP are exercised independently of the HDC to protect the HDC's investigatory and mediation impartiality. At the conclusion of an investigation, the HDC may refer a complaint to the DP for a decision on whether legal proceedings should be brought concerning a breach of the Code. The DP must decide whether to decline to bring an action,[58] bring proceedings before the Complaints Review Tribunal (CRT) – the body which hears proceedings brought under the Human Rights Act and the Privacy Act, as well as the Health and Disability Commissioner Act – or a professional health disciplinary body or, where appropriate, take the matter before the courts. In making the most appropriate decision, the DP will take account of the views of the complainant, but also of the wider public interest. Proceedings cannot be brought if the complaint has been resolved by agreement between the parties, for example, in mediation. Proceedings are generally less formal than those of a court, but an action before the CRT may result in the award of damages or an order to rectify what has gone wrong, where this directly benefits the individual complainant.

Where the HDC finds that there has been a breach of the Code, the report may include recommendations and request that these be implemented within a specified time. Recommendations may also include the taking of disciplinary action. If, within a reasonable time, no appropriate or adequate action has been taken, the HDC may make comment and report the matter to the Minister of Health.

Thus, it can be seen that New Zealand provides an integrated and comprehensive system which is thoroughly enmeshed in the respect for human rights established there over recent years.

The Commission for Local Administration (CLA)[59]

The CLA was established by the Local Government Act 1974, which introduced three Commissioners for England and one for Wales, who are

58 The complainant may still pursue the matter personally through the Complaints Review Tribunal or health professional disciplinary body.

59 See website: www.open.gov.uk/lgo

normally known as the Local Government Ombudsmen (LGOs). There are also local ombudsmen in Scotland and Northern Ireland. The jurisdiction of the LGO has changed somewhat since its inception, but currently the LGO has the power to investigate, inter alia, complaints against local authorities, police and fire authorities and the National Rivers Authority.

Access to the LGO was originally via a local councillor, a procedure which was subject to considerable criticism and which has now been amended. Schedule 3 of the Local Government Act 1988 allows for direct access as long as the complaint is in writing, and complainants are expected to have raised their complaint with the local authority concerned first. The introduction of direct access led to a significant increase in the number of complaints lodged, and to that extent might lend support to the argument that the MP filter for the PO represents a barrier for some complainants which they do not cross.

The LGO is empowered to investigate complaints of injustice arising from maladministration, but is not allowed to look into a matter which in his opinion 'affects all or most of the inhabitants of the area of the authority concerned'. This prevents an investigation of a complaint concerning improper expenditure or other wrongful action on financial matters. Other exclusions for which there seems little justification are contractual and commercial matters (other than land acquisition or disposal), personnel matters and internal school and college matters. This latter exclusion is extremely wide and produces odd anomalies. For example, there can be an investigation into the treatment of a child in a local authority home, but not a local authority school.

Like the other public sector ombudsmen considered above, the LGOs may only make a recommendation as to a remedy. Not every local body is willing to accept the decision of the LGO as binding on them. Originally, where the local authority failed to respond or to respond adequately, all the LGO could do was to issue a second report. This was found to be unsatisfactory. Under Part II of the Local Government and Housing Act 1989, a further procedure was introduced. Local authorities are now given three months to notify the LGO of the action they propose to take on any adverse report. The authority is then given a further three months to confirm that the action has indeed been taken. If no response is received within the time limits or the Ombudsman is dissatisfied, a further report can be issued, setting out the facts and the recommendation. The same time limits apply to this further report. If no action or unsatisfactory action follows, the report must then be considered by the whole council and the LGO may require the local authority to publish an agreed statement in the local press, detailing the action recommended and, if the authority chooses, a statement of reasons for non-compliance. This is still a convoluted and unsatisfactory procedure, not least because the complainant may still not get a remedy despite the bad publicity and, as the Ombudsmen have noted, the cost of publication in the local press often costs the council

considerably more than the sum recommended be paid to the complainant as compensation in the first place.[60]

By 1996, 69 statements had been required to be published in the press under Part II of the 1989 Act.[61]

Why do councils fail to comply with recommendations? The LGOs have conducted research to try to find an answer to this question. The main reason given was that the council concerned disagreed with the Ombudsman's finding of maladministration and second, that the council disputed the finding that injustice had been suffered. These results have led the Ombudsmen to take various measures to encourage greater compliance. These include explaining the nature of maladministration and the reasoning behind individual findings of its existence; giving authorities notice in advance of criticisms which might be included in a final report; and publishing guidance on how they assess remedies.[62]

Without the support of a Select Committee which the PO enjoys, the failure of the LGO to see that complainants receive a remedy in a minority of cases is perhaps the major weakness of this particular public sector ombudsman, although in terms of accessibility and number of complaints dealt with they may well be considered the most successful. Although again, knowledge of the LGO seems to be linked to social class. A survey undertaken in 1995–96 found that 59% of social groups A, B and C1 were aware of the existence of the LGO, but only 32% of 'non-white' ethnic minority groups had such an awareness.[63]

The issue of enforceability of awards was one matter considered by the Financial Management and Policy Review (FMPR), which reported in the summer of 1996. It found that, in the overwhelming majority of cases, councils do comply, but that on average over the last 20 years, about 6% of the ombudsmen's recommendations each year have not been wholly accepted by the councils concerned.[64] While this is a comparatively small figure for non-compliance, it is clearly unsatisfactory in that any failure to remedy injustice caused by maladministration must be deprecated because of its effect on those complainants concerned and because of the implications it might have for the credibility of the office of LGO.

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60 Annual Report 1992–93.

61 Annual Report 1995–96.

62 *Ibid*.

63 *Ibid*.

64 Report of the Financial Management and Policy Review of the CLA in England, published in November 1996. This had been preceded by the Chipperfield Review, which had recommended a wholesale change to the Local Government Ombudsman system, laying greater stress on internal complaint handling by local authorities and confining the Ombudsmen to a supervisory role over those internal procedures. There was considerable, coherent opposition to these proposals and they were rejected by the government.

The solution to non-compliance is not so easy, however, and it remains to be seen whether or not the measures which the Ombudsmen have initiated, outlined above, will bear fruit. If not, then further pressure may be brought to bear. So far, there has been little political will to change the informal nature of the ombudsman remedy. As long ago as 1986, the LGOs had argued in their evidence to the Widdicombe Committee that complainants should be given the right to go to court for an order of compensation where the authority failed to provide a remedy after a finding of injustice as a result of maladministration.[65] The Widdicombe Committee endorsed this proposal, but the Government rejected it, because of the effects it might have on the ombudsman process. In the Government's view, such a change would mean that local authorities might be less willing to co-operate, and investigations would become increasingly formalised, lengthy, legalistic and costly. At the same time, complainants might find the process more intimidating.[66]

The FMPR examined the notable exception to the general rule that public sector ombudsmen do not have powers of enforcement, which is in Northern Ireland, where the Ombudsman's recommendations can be enforced by the courts. If a complainant is aggrieved by the refusal to grant the redress recommended by the Ombudsman, the complainant can ask the court to order the council to comply. The court is empowered to enforce the recommended remedy or to substitute its own view of an appropriate remedy. There have been very few such cases: a recent analysis reports only 32 county court applications in the history of the office, about 6% of all findings of maladministration made by Northern Ireland's local government. The FMPR report came to no firm conclusion on enforceability of the Ombudsman's awards. It noted that Lord Woolf, in his final report on Civil Justice,[67] had recommended that the LGOs' decisions be enforceable through the courts and proposed that there should be full consultation on the issue.

A further proposal which has been put, is that the Select Committee on the PO should take on oversight of the LGOs. This proposal originally came from the Select Committee itself, but was endorsed by the FMPR, which recommended that the LGO should come within the remit of the Select Committee in relation to matters of policy, administration and resources. The Select Committee had, in 1986, suggested that its powers should be extended to allow it to perform the same kind of role in backing up ombudsmen's recommendations. It suggested that the leaders of a council which refused to implement a recommendation could be called before the Committee to give evidence in the same way that ministers and civil servants are asked to do. There are arguments that the different constitutional position of local

65 *The Conduct of Local Authority Business*, Cmnd 9797, 1986, London: HMSO.

66 *The Government's Response to the Report of the Widdicombe Committee on the Conduct of Local Authority Business.*

67 *Access to Justice*, July 1996.

authorities might lessen the impact of the Select Committee on this point. As it is, this proposal was rejected by the Government in 1986 and the FMPR's proposals were also rejected in 1996 by the then Government. It seems that currently, there are no plans to implement the recommendation.

The European Ombudsman

The Treaty on European Union 1992 (the Maastricht Treaty) established a European Ombudsman under Art 138e.[68] Jacob Soderman, former Finnish PO, was elected the first European Ombudsman[69] and he began work on 1 September 1995.

The European Ombudsman (EO) investigates complaints about maladministration by institutions and bodies of the European Community, which include the European Commission, the Council of the European Union, the European Parliament, the Economic and Social Committee, the European Investment Bank, and the Court of Justice (except in its judicial role). It will take time for his office and powers to become known throughout the EU and the EO has, as yet, received relatively few complaints, given the scope of his jurisdiction. In 1997, 1,181 new complaints were received; this represented an increase of 40% on the number of complaints received in 1996, and the EU reported a further increase of 15% in the first half of 1998.[70] As he has said, there is still a lot to be done in the field of information.[71]

Maladministration was not defined in the Treaty, but the Ombudsman, in his first few years, has given some guidance as to what constitutes maladministration. First, there is maladministration if the EC institution fails to act in accordance with any binding provision of EC law, whether found in the treaties or in a decision of the Court of Justice. So, for instance, he will take into account the requirement that Community institutions and bodies must respect fundamental rights. He also adopted a more detailed list of examples: administrative irregularities; administrative omissions; abuse of power; negligence; unlawful procedures; unfairness; malfunction or incompetence; discrimination; avoidable delay; lack or refusal of information. The EU Parliament, in accepting this explanation of what constituted maladministration as set out in the Ombudsman's Annual Report for 1996, asked that he should not only make full use of his mandate to deal with maladministration but that he should also attempt to provide a

68 See, also, the Statute of the Ombudsman, European Parliament decision 94/262 of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ L113, 1994, p 15.

69 Individuals are elected to the post by the European Parliament for the duration of its term of office.

70 Speech to the European Parliament on the occasion of the presentation of the Annual Report for 1997, Strasbourg, 16 July 1998.

71 Annual Report for 1997.

more precise definition of the term. In looking at a possible definition, he asked the national ombudsmen in Member States to define how maladministration is conceived in their jurisdictions. From the replies he received he discerned the fundamental notion that 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'.[72] While this might be a guiding principle, there were some important points of difference between the scope of the EO and some national ombudsmen.

Specifically, he pointed to the fact that, under the Parliamentary Commissioner Act 1967, the UK Ombudsman may not normally investigate where there is a possible judicial remedy. This was not a restriction normally held to be part of the meaning of maladministration and it was not a restriction which applied to the EO. The EO can review the lawfulness of administrative acts, indeed he has said that his 'first and most essential task must be to establish whether [the body] has acted lawfully',[73] always bearing in mind that it is the Court of Justice which is the highest authority on the meaning and interpretation of Community law. Again, unlike some national ombudsmen (including, of course, the UK public sector ombudsmen), the EO does deal with complaints of maladministration arising from contractual relationships. This is not least because part of the mission of the EO is to help relieve the burdens of litigation, by promoting friendly solutions and by making recommendations that avoid the need for proceedings in court. This does not mean that he will rule on whether there has been a breach of contract by either party, since this could only be dealt with effectively by a court competent to apply the relevant national law and decide on the facts, but as a matter of good administration he will expect the public authority to be able to provide a coherent account of the legal basis for its actions and to explain why its view of the contractual position is justified.[74]

His approach in dealing with complaints about the exercise of discretionary power is not to question the choice of action which has been made, provided that the institution has acted within the limits of its legal authority. He therefore applies the general limits established by the jurisprudence of the Court of Justice which requires, for example, that administrative authorities should act consistently and in good faith; avoid discrimination; comply with the principles of proportionality, equality and legitimate expectations; and respect human rights and fundamental freedoms.[75] He does not entertain complaints about the political activities of the European Parliament.

72 Annual Report for 1997.

73 *Ibid*.

74 *Ibid*.

75 See further discussion of these principles below, Chapter 5. The European Ombudsman also looks to the Council of Europe Recommendation No 4(80) 2; see *The Administration and You: a Handbook*, 1996.

He has welcomed the work which is currently being undertaken by the Commission in drafting a Code of Good Administrative Behaviour and has contributed to that work by drawing on a wide range of ombudsman jurisprudence from, *inter alia*, the 1985 Danish law on public administration, the 1982 Finnish law on administrative procedures, the 1991 Portuguese code of administrative procedures, recent French draft law concerning relations between the administration and the public, principles of the UK's Citizen's Charter and checklists of good administrative behaviour established by the ombudsmen of Ireland and Hong Kong. Given the wide trawl for best practice, if the EC succeed in providing a synthesis of all this material, the new code could provide an invaluable resource.

Complaints may be made to the EO by any citizen of the Union or any natural or legal person residing or having its registered office in a Member State. Complainants need not have been directly affected by the maladministration, but must have contacted the institution or body concerned with the complaint first. Complaints must be made within two years of the date on which the complainant knew of the facts which form the basis of the complaint; a time limit which is more generous than the one year which applies in the case of the UK public sector ombudsmen.

One particularly strong power which the EO possesses in contrast to his UK counterparts is the ability given him to undertake investigations on his own initiative. This is a power which the LGOs have long sought, but as yet, no government has been prepared to concede this extension to their jurisdiction. In 1997, the EO launched four own-initiative investigations and at the end of that year he presented his first Special Report to the European Parliament following an own-initiative inquiry into public access to documents held by certain Community institutions and bodies.[76] He has this power to make a special report under Art 3 of the Statute of the Ombudsman, but it is a power which is likely to be exercised sparingly, only in relation to important matters when the Ombudsman needs the support of the Parliament on a particular issue. In his first Special Report, he detailed the inquiry which he had undertaken into the extent to which there was public access to documents held by Community institutions, other than the Council and the Commission, which already had adopted their own rules. During the course of his inquiry, virtually all the bodies concerned had drafted rules on access and in his formal decision made at the end of that inquiry in December 1996, he made recommendations on those draft rules and stated that failure to adopt, and make easily available to the public, rules governing public access to documents could constitute maladministration. One important matter which he raised in his Special Report, however, was his concern that the

76 Special Report by the European Ombudsman 15 December 1997.

substance of the rules (based on those of the Council and Commission) was quite limited, particularly in comparison with the provisions governing some national administrations. The rules do not, for example, require the establishment of registers of documents. He therefore asked the European Parliament to consider whether the rules that have been adopted ensure the degree of transparency that European citizens expect of the Union.

While it is too early to attempt an evaluation of the work of the European Ombudsman, his powers make an interesting contrast to those of our UK public sector ombudsmen and it will be interesting to see what impact, if any, his jurisdiction and practice might have on our own ombudsmen. Other influences may come from the private sector, to which we now turn.

THE PRIVATE SECTOR

The Ombudsman changes his spots – evolutionary mayhem?

In 1981, the first 'private' ombudsman, the Insurance Ombudsman, took up office. This was to mark the start of a new trend as private corporate power adopted an erstwhile public sector remedy to manage their complaints and at the same time re-worked the ombudsman concept. The private sector reinterpretation was that of an ombudsman who provides a real alternative to the courts: an individual who can decide on the merits of a case and make a binding award. This implicitly represents a shift on the continuum from grievance handling to dispute resolution, with individual ombudsman schemes located at different points. Despite this shift, comparisons can be drawn between the public and private versions and there is much common ground which distinguishes them, crucially, from the courts, both in the nature of their jurisdiction and their processes. Both employ inquisitorial procedures, for example, which tend towards a decision making approach which values conciliation, mediation, and non-juridification in place of adversarial formality. They also share the advantages over courts of comparative speed and informality.

The private ombudsman has also achieved wide coverage. As a result of their rapid proliferation, private ombudsmen now take responsibility for the resolution of a significant body of disputes, covering complaints about, *inter alia*, banks, building societies, lawyers, estate agents, the pensions and investment industry, funeral directors as well as insurance companies.

This growth has been almost entirely unco-ordinated, however, with the result that we now have a range of differently constituted ombudsmen. Some are statutory: the Legal Services Ombudsman and the Pensions Ombudsman, who both take a hybrid public/private form. The Building Societies

Ombudsman, a private ombudsman in jurisdiction, although not statutory, was set up as a result of statutory requirements,[77] and the others, who made up the majority of private ombudsmen, were set up as a voluntary initiative by companies in a particular sector. These ombudsmen aptly illustrate how the term 'ombudsman' has come to be used in different settings, with sharply differing powers and set up under a variety of structures; it is worth examining them, albeit briefly.

The Legal Services Ombudsman

The Legal Services Ombudsman (LSO) was set up under the Courts and Legal Services Act 1990 following long standing concern about the way in which the self-regulatory procedures for dealing with complaints against the legal profession had been operating. The LSO investigates allegations about the manner in which a complaint about a lawyer (whether barrister, solicitor, or licensed conveyancer) has been handled by the relevant professional body[78] (Bar Council, Law Society, or Council for Licensed Conveyancers) provided the complaint is made to her within three months of the date on which the professional body notified the complainant of its decision on the complaint.[79] If the LSO investigates an allegation, she *may* investigate the matter to which the complaint relates. This means that an individual with a grievance against her lawyer cannot take the complaint direct to the LSO and in practice, in the vast majority of cases, the original complaint is not investigated by the Ombudsman. This is one feature which marks the LSO out as particularly unusual amongst ombudsmen.[80]

There are some circumstances specified in the act where the LSO is not allowed to investigate. Normally, she cannot investigate where the matter is still being investigated by the professional body, but, if the complaint being made is that the professional body has acted unreasonably in failing to start an investigation or, having started an investigation, has failed to complete it in a reasonable time, then she may do so.

She may also not investigate if an appeal is pending against the professional body's decision on a complaint, or indeed, where the appeal period has not expired. Nor can she investigate any matter which has been the subject of a decision in court, or by the Solicitors Disciplinary Tribunal, the Disciplinary Tribunal of the Council of the Inns of Court or any other tribunal specified by the Lord Chancellor.

77 Building Societies Act 1986.

78 Courts and Legal Services Act 1990, s 22(2).

79 General Directions made by the Lord Chancellor, 1 January 1991, under Sched 3 of the Courts and Legal Services Act 1990.

80 See, further, James and Seneviratne, 'The Legal Services Ombudsman: form versus function (1995) 58 MLR 187.

Where the LSO upholds a complaint, she can recommend that the professional body reconsider the complaint or exercise any of its disciplinary powers; that compensation be paid by the professional body; and/or that compensation be paid by the lawyer against whom the original complaint was made – in those cases where the original complaint has been investigated.

There are no limits on the amount of compensation which the Ombudsman may award, although in practice, the LSO has not made large awards and has tended to bear in mind the self-regulatory framework within which the professional bodies' complaints systems operate in assessing what might be realistic.

Her awards are not binding. The only sanction for non-compliance with a recommendation is that of publicity. The Act requires the lawyer and or the professional body to notify the Ombudsman within three months of her recommendation as to what action they have taken or propose to take to comply with the recommendation.[81] If they fail to comply, the Act requires the lawyer to publicise, at his own expense, the reasons for non-compliance; the final sanction is publicity by the Ombudsman, expenses to be reimbursed by the miscreant.[82] (This closely resembles the sanction available to the Local Government Ombudsmen and the Building Societies Ombudsman.)

Anyone who is affected by what is alleged in relation to the complaint may make a complaint to the Ombudsman. There is no discretion to accept 'late' complaints, that is, those outside the three month time limit, and it is a short time limit in comparison with other ombudsmen.

Supervision of professional bodies

This second task, while not of immediate significance to the individual with a grievance, does have the potential to benefit the consumer interest in the long run and it represents the main statutory purpose of the office. As has been said, the LSO supervises the way in which the professional bodies handle complaints. The specific power under the Act is to make recommendations to any professional body about the arrangements which that body has in force for the investigation of complaints.[83] If such a recommendation is made, then it is the duty of the professional body 'to have regard to it'.

The LSO thus has jurisdiction over those operating in the private sector, but her powers are more closely analogous to those of public sector ombudsmen in that she may only make recommendations as to redress.

81 Courts and Legal Services Act 1990, s 23(7).

82 *Ibid*, s 23(8), (9), (10).

83 *Ibid*, s 24(1).

The Pensions Ombudsman

The Pensions Ombudsman is in a similar category, but his powers mark him out as a rather different animal. Set up under the Social Security Act 1990.[84] his jurisdiction covers complaints about both private and public sector pension schemes, but the majority currently concern private schemes. He is unusual amongst ombudsmen in that his awards are not only binding on both parties, without the usual requirement that the complainant accepts it first, but also enforceable in the courts. He not only deals with complaints about injustice as a result of maladministration by the trustees or managers of an occupational pension scheme or personal pension scheme, but he also has the power to deal with disputes about fact and law between the trustees or managers of a scheme, or an employer.[85] He is subject to the supervision of the Council on Tribunals in respect of his jurisdiction over such disputes. In many respects, he is closer to a tribunal than an ombudsman.

The division of jurisdiction into complaints and disputes is more apparent than real, however. Disputes of fact or law usually arise incidentally to a complaint of maladministration without needing a separate investigation or decision. Of the 326 cases determined during 1995–96, for example, 308 were classified as complaints of maladministration, eight as disputes of law or fact, and 10 as both complaints and disputes, and the Ombudsman has said that relatively few cases can properly be classified as being solely disputes.[86] He adopts the same approach to defining injustice and maladministration as does the Parliamentary Ombudsman.

Complainants must bring complaints to him within three years of the act or omission which forms the basis of the complaint, the period to run from the time when the complainant learns of it. Complainants must first seek the help of the Occupational Pensions Advisory Service. The Pensions Ombudsman cannot investigate a complaint or dispute already the subject of court proceedings or on which a court has already given a final decision. His procedures are governed by rules laid down by statutory instrument and these allow him to hold oral hearings. Most cases are dealt with by correspondence, but he has held a few oral hearings.

If the Pensions Ombudsman finds against the pension scheme or employer, he will decide if a remedy is appropriate, whether it is a money payment or not. The figures involved in the kind of pension cases with which he deals are often extremely high; in one case in 1995–96, for instance, the sum involved was £30 m, a financial level which takes him some way away from

84 His jurisdiction is now also governed by later legislation, including the Pensions Schemes Act 1993 and the Pensions Act 1995.

85 For a detailed discussion of the role of the Pensions Ombudsman and of the main private ombudsman schemes, see James, *Private Ombudsmen and Public Law*, 1997.

86 *Ibid*, p 163.

the usual case handled by the ombudsmen we have already examined. The Pensions Ombudsman's decisions are final and binding on both parties, subject to an appeal on a point of law to the High Court. If there is no appeal, the Ombudsman's decision can be enforced in a county court on application by the complainant.

The provision for appeal is one which pension schemes have not been slow to take up and the courts have not always taken a sympathetic approach to the Ombudsman's exercise of his powers in favour of the individual.[87] There is a danger that, if recourse to the courts is invoked too often, it could subvert the advantages of an ombudsman scheme in providing a cheap and informal remedy for the private individual against the large bureaucracy, public or private.

The Building Societies Ombudsman (BSO)

The BSO shares the same institutional structure as the 'voluntary' private ombudsmen, discussed below, and like them, is funded directly by the industry concerned. Unlike them, however, he is not empowered to make awards which are binding on the members of a scheme, instead, he shares with the LGO and the LSO the sanction of adverse publicity. As with the LSO scheme, miscreants may take the publicity option rather than abide by the Ombudsman's recommendation for redress. As it has turned out, however, the BSO's recommendations became binding *de facto,* if not *de jure*, since only one society opted for publicity since the inception of the scheme in 1986 and there developed a strong presumption against others following suit.

Ombudsmen in the financial services sector

The voluntary, self-regulatory ombudsman schemes, notably, but not exclusively, those which cover the insurance and banking sectors, have the strength of being able to make binding awards and it is to the credit of the companies concerned that they have accepted this jurisdiction. The inevitable disadvantage of a voluntary scheme, however, is that not all companies in an industry made the commitment and joined the scheme and, most importantly for public law concerns of independence and accountability, the ombudsman's terms of reference and jurisdiction were ultimately in the hands of the industry.[88]

In 1997, however, following the change of government, reform was proposed for those ombudsmen operating in the financial services sector. The

87 See discussion in *op cit*, James, fn 85, Chapter 6.

88 This was so, although possibly to a lesser extent, in the case of the BSO, too.

Chancellor of the Exchequer announced in 1997 that the system of self-regulation current under the 1986 Financial Services Act was to be replaced with a new and fully statutory system, and it was clear that this would also entail changes to the burgeoning financial services ombudsman schemes. The Consultation Document[89] published by the new Financial Services Authority (FSA), which had been set up by the Government to replace the Securities and Investments Board, confirmed that this was the case. The new proposals from the FSA followed the Government's decision that there should be a single Financial Services Ombudsman (FSO) scheme to replace eight existing[90] complaints mechanisms, with membership of the scheme compulsory for all firms authorised by the FSA. Following consultation, the complaints handling arrangements were set out in the draft Financial Services and Markets Bill which also created the new statutory regime under which the FSA takes on its full regulatory and registration powers. The Bill was followed by an FSA Policy Statement giving more detail of the new ombudsman scheme and, at the time of writing, it is understood that legislation will be brought forward in early 1999 with the intention that its provisions take effect in 2000. This will mean that the existing financial services ombudsmen (but not the Pensions Ombudsman) will cease to exist and be replaced by the new FSO.

In terms of classification, the new FSO will be another hybrid, embracing both the public and private, set up by public law, but with jurisdiction over companies operating in the private sector.[91]

This is obviously a major reorganisation which has caused controversy in some quarters, but there are compelling arguments for reform of the current system and for introducing one FSO on a statutory basis.[92] For a start, the reform will deal with some practical issues which have been a cause for concern, including the confusion caused to complainants when faced with a plethora of schemes. The draft Bill proposes to have one unified scheme to which complainants may address themselves, but to retain the benefits of the specialist expertise which currently exists by having a panel of ombudsmen, under a chief ombudsman. It is interesting that each of the panel of 'subordinate' ombudsmen are to be given responsibility for a particular product, for example, complaints relating to mortgages, rather than having responsibility for complaints made against a particular provider, such as banks or building societies, as formerly. This conceptual move from provider

89 Financial Services Authority, *Consumer Complaints*, December 1997.

90 These are the Banking Ombudsman, Building Societies Ombudsman, Investment Ombudsman, Insurance Ombudsman, Personal Insurance Arbitration Service, PIA Ombudsman, SFA Complaints Bureau and Arbitration Scheme, FSA Direct Regulation Unit and Independent Investigator.

91 There are analogies here with the Pensions Ombudsman and the Legal Services Ombudsman.

92 Much of the foregoing discussion has appeared in James, R, 'Reform of the complaints process in financial services – the public and the private' [1998] PL 201.

to product seems to ensure a more logical base for the scheme and to have advantages for consistent decision making. A unified scheme will allow the FSO to adopt the best practice from the current schemes and since it will be a statutory scheme, it also addresses problems caused by the voluntary nature of some existing schemes where it is, by definition, possible for some companies to remain outside. One danger, however, is that a bureaucratic monster will have been created, where size of operation and probable expense may militate against the traditional benefits of ombudsmanry.[93]

While the reform is largely to be welcomed, the work of the individual financial schemes should not be discounted, since they can point to considerable achievements over the years.

Since their introduction, these private ombudsmen have dealt with a large workload and often made decisions in complainants' favour of a high order – far higher, for instance, than the remedies available in the small claims courts. As an indication of workload, for example, in 1995–96, the Banking Ombudsman received just over 8,000 initial complaints,[94] the BSO, over 13,000 and the Personal Investment Authority Ombudsman, over 17,500. (In the same period, the CLA in England received 15,266 complaints and, in 1995, the PO 1,706.) Most of the schemes were able to make recommendations for financial compensation up to a limit of £100,000 and large scale awards were frequently made along with the more traditional type of 'small award', where a simple apology or limited financial compensation was appropriate. Another indication of their scale of operation might be the overall amount of their awards: in 1995–96, for instance, the Insurance Ombudsman's awards came to £10.2 million in total.

Their success can also be measured in terms of the high degree of expertise developed within their offices by their specialist staff and by the impact they have had on practice and policy within their various sectors.[95] Each ombudsman scheme has developed its own approach to decision making, based on this specialism and the particular temperament of the post holder, so that a body of 'soft' precedent now exists which companies have been able to use as guidance in their own practice. This is in much the same way that the

93 Unfortunately, there will still be gaps in jurisdiction which will only partially be filled by the 'voluntary' jurisdiction which is likely to pertain under the new FSO arrangements.

94 Figures taken from Annual Reports. Many of these complaints will have been outside jurisdiction, however, a factor which has long pointed to the need for reform, as indeed is the case with the figures for the public sector ombudsmen. The different methods of recording 'inquiries' and 'complaints' makes it notoriously difficult to reach meaningful comparisons between schemes.

95 It has to be acknowledged, however, that in many cases, the individual ombudsmen have struggled valiantly with a reluctant industry. Their achievements are all the more significant. See, generally, *op cit*, James, fn 85.

public sector ombudsmen have been able to exert an influence on public administration.[96]

One serious concern that public lawyers have had about the existing schemes concerns the failure to demonstrate that the ombudsman has a sufficient degree of independence from the industry which funds and sponsors the scheme. The institutional structure which was devised[97] to place a barrier between the ombudsman and the industry consists of an Ombudsman Council, interposed between the Board of the Ombudsman Company (made up entirely of representatives of member companies) and the ombudsman himself. The Ombudsman Council, chaired by an independent public figure, combines an industry and independent membership, with the independents making up the majority. Broadly, the Ombudsman is responsible to the Council, which has responsibility for monitoring the operation of the scheme and its expenditure while the Board itself has ultimate control over the budget; indeed it is the Company which raises the funds from member companies. While it is clearly legitimate for the industry to have some say, it has been of concern that Boards have retained final control both over the appointment and security of tenure of the ombudsman and the terms of reference and jurisdiction of the scheme. This was the case even in the non-voluntary Building Societies Ombudsman Scheme, set up under the requirements of the 1986 Building Societies Act. The relationship with the industry is on the same footing, and the Board has been as reluctant as those in the voluntary schemes to concede jurisdictional clarification or extension at the behest of the ombudsman or the Ombudsman Council.

A further concern on grounds of independence arises from the fact that, on this tripartite model, the same individuals may be members both of the Board and the Council and this does little to allay fears about an inadequate separation of powers[98] and a failure to keep the industry sufficiently at arm's length. On arrangements for independence and accountability, therefore, the private ombudsman has been at a distinct disadvantage in comparison with his public sector counterpart and this is an important point which can be rectified with the introduction of the new FSO.

These concerns are still relevant to some private ombudsman schemes which remain on a voluntary basis, outside the financial services field, notably the scheme for estate agents and funeral directors, discussed below, p 84.

96 See, for example, *Fourth Report of the Select Committee on the PCA*, 1995–96, HC 380, paras 15, 16; *Report of the Financial Management and Policy Review of the CLA in England*, August 1996, Part III.

97 Originally for the Insurance Ombudsman Bureau and followed in later schemes.

98 Cf Barendt, 'Separation of powers and constitutional government' [1995] PL 599 in relation to the PCA.

The proposed new structure for financial services ombudsmen

Under the draft Bill, the FSA is to set up a limited company to administer the new ombudsman scheme, with its own Ombudsman Board, independent of the FSA. Members of the Board would be appointed by the FSA 'in the public interest' to 'blend industry experience and a wider consumer perspective'.[99] The appointment of chairman of the company is subject to the approval of the Treasury. It would be the responsibility of this Board to appoint the FSO and the panel of ombudsmen.

Broadly, the FSO and the Board would have control over operational matters but the FSA itself would retain control over funding and any changes to the scheme's rules, upon the recommendation of the FSO Board. This model seems appropriate on public law grounds, since it would better secure the scheme's independence from both firms and practitioners. It would also protect the independence of the ombudsman's decisions in individual cases. At the same time, the FSA retains control of the scope of the scheme under the terms of the legislation, and also the ability to ensure that the 'scheme is run economically'.[100]

Fairness in decision making

One of the defining characteristics of the private ombudsman has been the ability to make decisions on the merits, and this is reinforced by the powers of most of them to look to substantive fairness in exercising their jurisdiction. While they must take account of legal rules and contractual terms in adjudicating on a complaint, most are able to consider what is 'fair and reasonable in all the circumstances' or whether there has been 'unfair treatment', and some are able to trump legal provisions with overriding considerations of fairness. The individual ombudsmen have, for the most part, exercised this function robustly, developing a significant equitable jurisprudence in their own specialised areas which has not only benefited individual complainants, but in some cases has entailed an alteration of policy or application of policy by the companies concerned. The PO has made some moves in this too, as discussed above.[101] In making decisions on grounds of fairness, ombudsmen have to make a judgment which balances the interests of the individual with a grievance against the interests of others likely to be affected. So, for example, the Building Societies Ombudsman has said that he has to bear in mind the interests of the individual complainant and the commercial interests of societies in so far as they might have a bearing on all

99 Financial Services Authority, *Consumer Complaints*, December 1997.

100 *Ibid*, para 99.

101 *First Report of the Select Committee on the PCA*, 1994–95, HC 112, para 10.

investors or borrowers within a society.[102] Again, the Pensions Ombudsman recognises that a decision made by him in relation to one member of a pension scheme could have adverse effects on other pensioners within that scheme. These considerations are similar to the kind of approach which a court may have to adopt in a judicial review case in deciding on the competing interests of fairness to the individual as against the wider public interest.

What of the new FSO? The draft Bill says that a complaint may be determined in favour of the complainant if the Ombudsman finds that the matter complained of is contrary to law or not fair and reasonable in the circumstances. The matters which can be taken into account in determining whether an act or omission was fair and reasonable are to be set out in the scheme rules, which are to be devised by the Ombudsman Company with FSA approval. The Banking and Building Societies Ombudsmen have the overarching requirement to make decisions by reference to what is 'fair in all the circumstances'. The important point is that the FSO scheme rules should allow the Ombudsman to trump legal provisions with a fair and reasonable test, where appropriate.

Funding

The mode of funding can have implications for fairness. Funding is to come from the firms concerned through a general levy on firms authorised by the FSA, and the Bill provides for the imposition of a case fee on companies in certain circumstances. While there are good reasons for this, it is not unproblematic from the point of the view of a civil redress system. If pitched at the wrong level, it may encourage the settlement of cases where the company should more properly let the case go to the ombudsman on a matter of principle. (It bears repeating that we all pay for our ombudsmen, public and private, in one way or another.)

Capable of making binding decisions

As already mentioned, an important feature of many of the existing private ombudsman schemes is the ability to make binding awards, a clear differentiation from the power to make recommendations of the public sector ombudsmen.[103] One rationale for the binding award in the private sector is that, where the scheme is voluntary, then a company has agreed to accept the constraints of the scheme and, theoretically at least, has the option of leaving the scheme if it does not wish to abide by the decision. Under the provisions of the draft Bill, the FSO's determinations will be binding upon both parties once

102 See *op cit*, James, fn 85, Chap 4.

103 But the Parliamentary Ombudsman has a good record on compliance.

accepted by the complainant. A determination of the FSO will be enforceable in a county court (or in Scotland by the Sheriff) at the instance of the complainant. Failure to meet an award will be a disciplinary matter, which the FSA will take up in its role as regulator. There is an appeal to the High Court for either party on a point of law and judicial review is likely to be available. In addition, the parties will have rights resulting from the incorporation of the European Convention on Human Rights in UK law under the Human Rights Act and, in particular, those arising under Art 6 of the ECHR.

The implications of Art 6 for ombudsman procedures

The potential implications of Art 6 of the Convention, incorporated under the Human Rights Act 1998, have caused concern for the established ombudsmen, and the British and Irish Ombudsman Association (BIOA) (see below, p 89) has made representations to government on the point. Article 6 provides that in:

> ... the determination of his civil rights obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly ...

The matters which cause concern centre around the likely interpretation of 'public hearing', and also on the fact that judgments should be made public. It seems that all schemes where membership is compulsory and where there are binding awards would be caught by Art 6 and there has also been a view expressed that those schemes with a publicity sanction might also come within the provision, thus affecting the LGOs and the LSO. The FSO scheme, for example, would have to provide a hearing where there was a dispute about primary facts.

The imposition of a hearing would militate against many of the traditional advantages of ombudsman procedures by importing formality, expense and adversarial procedures into the process, all of which would have the effect of tipping the balance in favour of the powerful party in the dispute – the company or authority with far greater financial resources on which to call. It would put the unrepresented complainant and all but the rich at a serious disadvantage. That and the requirement for the decision to be made public would also undermine the advantages which ombudsmen have had in carrying out their investigations and obtaining information in confidence. There is another view, however, which some hold, including one or two existing ombudsmen. This is that an oral hearing is quite appropriate to an ombudsman's adjudicative role and may be the only way to resolve important disputes about facts. Counsel's opinion sought by the FSA has advised, inter alia, that the Ombudsman would be entitled to control procedures to preserve informality and inquisitorial approach. The FSA has decided to put procedures in place to meet the Art 6 requirements within the ombudsman

system rather than having a separate appeal system. We shall have to wait and see how these are to operate and, indeed, what view the courts would take were this approach to be challenged by either party. At present, it is too early to say what impact this type of procedural right will have on the FSO and other affected ombudsmen. There is even doubt at this stage as to the scale of the problem, in that no one can predict how many oral hearings will, in fact, take place. But it would be particularly ironic if the ombudsman remedy were to go the way of other initiatives originally designed to improve access to justice. Tribunals and arbitration both set out to observe informal procedures, but over time have been colonised by lawyers and their adversarial approach.

THE OMBUDSMAN'S ENVIRONMENT: A COLOURFUL COMPLAINT HANDLING COMMUNITY

The number of ombudsmen has expanded enormously over the last few decades, as has the number of quasi-ombudsmen or other types of complaint handlers. While it is not possible to discuss all them in detail here, mention must be made of the more important ones. Some are 'recognised'[104] ombudsmen, some perform the same function under another name,[105] others handle complaints effectively but lack the institutional independence normally associated with the title ombudsman. The following brief account is intended to draw attention to the multiplicity of the 'complaints industry'[106] and to illustrate the context within which the established ombudsmen operate.

The Police Complaints Authority

This body supervises the investigation of the most serious complaints about the conduct of police officers in England and Wales and of non-complaint issues voluntarily referred by police forces because of their gravity and exceptional circumstances. The authority also determines the disciplinary outcome of all completed complaints and voluntarily referred investigations into the conduct of police officers. The present Home Secretary has indicated that reform of this system is now on the political agenda.

104 See discussion about the British and Irish Ombudsman Association (BIOA) below, p 89.

105 Eg, the Police Complaints Authority, which is a voting member of the BIOA.

106 Even when one discounts the so called 'ombudsmen' who are simply part of an internal process – as, for example, ombudsmen set up by some newspapers.

The Independent Housing Ombudsman

He investigates complaints about the actions or omissions of certain landlords by their tenants and other who receive a direct service from them. The scheme replaced the Housing Association Tenants Ombudsman Service on 1 April 1997, and landlords formally subject to its jurisdiction have become members of the Independent Housing Ombudsman Scheme, as have other registered social landlords, such as companies managing homes transferred from local authorities. Some landlords who are not social landlords are also members of the scheme.

The Broadcasting Standards Commission

This is the statutory body for both standards and fairness in broadcasting and covers all radio and television, including cable, satellite, and digital services. It provides redress for people who believe they have been unfairly treated or subjected to unwarranted infringement of privacy. One of its main tasks, set out in the 1996 Broadcasting Act, is to consider and adjudicate on complaints.

The Estate Agents Ombudsman

This scheme covers most of the large chains owned by banks, building societies and insurance companies, and also offices under the management of members of the main professional bodies. The Ombudsman can deal with most complaints, from private individuals as actual or potential buyers or sellers of residential property in the UK, made within 12 months of the event.

The Funeral Ombudsman

The Ombudsman deals with complaints against those members of the scheme who are funeral directors who belong to the Funeral Standards Council or the Funeral Planning Council.

The Adjudicator

The Adjudicator investigates complaints from people and businesses about how the Inland Revenue (including the Valuation Office Agency), Customs and Excise and the Contributions Agency of the Department of Social Security have handled their affairs. The Adjudicator does not look at issues of law or of tax liability, because there are tribunals who resolve these problems. She looks into excessive delay, mistakes, discourtesy of staff, and the use of discretion.

The Independent Case Examiner for the Child Support Agency

This case examiner investigates complaints about maladministration by the Child Support Agency, when clients are dissatisfied with the outcome of the Agency's internal complaints service.

The Independent Complaints Reviewer to the HM Land Registry

The complaints reviewer investigates complaints about the Land Registry. Her role is to establish whether there has been maladministration on the part of the Agency in the conduct of matters giving rise to complaints. These include failure to meet standards of service, quality, speed and performance. Where appropriate, she makes recommendations aimed at putting matters right for an individual complainant and improving Land Registry services in the future.

The Prisons Ombudsman

The Prisons Ombudsman considers complaints from prisoners about their treatment in jail. He can consider both the merits of the case and the procedures followed.[107]

Relationship with the Prisons Ombudsman

These last four are in an interesting position, in that the PO has overriding jurisdiction over the complaints with which they deal. The interposition of a complaint reviewer/adjudicator between the department concerned and the PO has caused some controversy although, as individuals, they have an impressive record of dealing with complaints and effecting improvements.[108] The major criticism has been that structurally, they are too close to the department against whom complaints are made and there are therefore questions about their perceived independence.

View of the Select Committee

The Select Committee on the PO had expressed concern that the currency of the term 'ombudsman' brought with it the threat of devaluation.[109] They would have liked the New Zealand solution of empowering the Chief

107 For an interesting study, see Morris and Henham, 'The Prisons Ombudsman: a critical review' [1998] 4 EPL 345.

108 Morris, 'The Revenue Adjudicator – the first two years' [1996] PL 309.

109 'The powers, work and jurisdiction of the Ombudsman', *First Report of the Select Committee on the PCA*, 1993–94, Cmnd 33-1, London: HMSO.

Ombudsman to decide who had the right to use the title adopted in the UK and that power given to the PO, but recognised that 'the horse had bolted'.[110] They were particularly unhappy that the Prisons Ombudsman had been so called, given that there was still a right of appeal to the PO, and made representations to government on this point, urging that 'the title of the complaints adjudicator with the Prison Service be changed and the word "ombudsman" removed'. Government has not conceded this point, however.

Still the favoured child

The age of expansion is not yet over; we continue to see the introduction of ombudsmen to cover new areas, and this seems likely to continue. Lord Woolf, in his preliminary report, *Access to Justice*, welcomed the spread of ombudsman schemes and suggested that the ombudsman remedy should be strengthened and extended in both the public and private sectors. This has been taken up by the Office of Fair Trading, who have recently proposed the introduction of ombudsmen into the retail sector.[111]

The popularity of the ombudsman remedy is not hard to understand. Ombudsmen provide a cost effective solution to some of the problems caused by delay and high cost in the courts and the diminution in legal aid. Lord Woolf places them within the context of a growing interest in alternative dispute resolution worldwide, given that such mechanisms can, amongst other things, save scarce judicial and other resources and offer a variety of benefits to litigants, not least of which is the inquisitorial approach. More recently, he has spoken of the success of the 'ombudsman innovation', which had conveyed 'a clear message that in the past we have been unduly complacent in this country in assuming that disputes can only be resolved satisfactorily by the traditional common law trial'.[112] That last comment may sound rather hollow in the future if fears about the implications of Art 6 prove to be well founded.

The ombudsman as one species?

Despite the undoubted variety of structural forms, it is our contention that it is not only appropriate to consider the ombudsman as a generic institution, operating according to the usual public law imperatives, but that it is important to subject them to scrutiny given the role which they play in our

110 William Reid, as Parliamentary Ombudsman in his evidence to the Select Committee, 1993–94.

111 *Raising Standards of Consumer Care*, February 1998, London: Office of Fair Trading.

112 Lord Woolf, The Tom Sargant Memorial Lecture, 19 November 1996, as reported in (1996) 146 NLJ 1701.

civil justice system and that this applies with equal force to those classified as 'private' or 'hybrid' ombudsmen as to those operating in the traditional, although increasingly privatised, public sector.[113] Given the constitutional implications of the ombudsman role, however it is defined and wherever it is located, there is a need for public lawyers to turn their attention to the issues which arise. The idea that all ombudsmen are a concern of public law should be uncontroversial. As Birkinshaw has said, they are 'essential features of public law protection, as necessary for the righting of individual grievances and wrongs as for seeking to ensure appropriate standards in the provision of public service and in the machinery of bureaucracy, public or private'.[114] And, as long ago as 1989, Gordon Borrie, as he then was, argued that private power should be subjected to public law controls including ombudsman schemes.[115] Most influentially, Lord Woolf has argued in the context of judicial review that the Aegon[116] decision was 'questionable', that it should be the nature of the activity and not the nature of the body which should be decisive in deciding whether they are the concern of public law. He sees the ombudsman function as one which should be for public law.

On this basis, it is important that they should all operate according to public law standards of openness, fairness, independence and accountability. The first three aspects have already been touched on earlier in this chapter and it can be said that ombudsmen do largely meet the required standards, but the issue of accountability bears examination in some detail, since the question arises as to who would take action if they failed to meet requirements. To whom are ombudsmen accountable?

ACCOUNTABILITY

Legal accountability

The unsatisfactory situation which pertained after the Aegon decision, under which some ombudsmen were subject to judicial review and some were not, has now largely been sidestepped with the changes in the financial services sector. The new statutory FSO, who will supersede the existing banking, insurance, and other schemes, will be subject to judicial review. Fears have been expressed, notably by the existing ombudsmen, about the potentially deleterious impact judicial review might have if it were invoked too often, as it would be handing the advantage back to the powerful party – the company with the financial resources – to challenge ombudsman rulings in the courts,

113 A full treatment of our argument can be found in *op cit*, James, fn 85, Chap 1.

114 Birkinshaw, 'The ombudsmen: what lies ahead?', BIOA Lecture, 9 May 1995.

115 Borrie, 'The regulation of public and private power' [1989] PL 552.

116 See discussion below, Chapter 6.

thus negating the advantage of the informal ombudsman dispute mechanism. In addition, there is some evidence of an unhelpful attitude on the part of the judiciary to the operation of ombudsmen as mentioned in relation to the Pensions Ombudsman, where an appeal is provided.[117] Whether this judicial approach arises from unfamiliarity with the special characteristics of the ombudsman function, or from their traditional antipathy to any body which purports to oust the courts' own jurisdiction, is unclear, although the wider issue of the relationship between ombudsmen and the courts has been examined by Lord Woolf.[118] (He has suggested, *inter alia*, that there should be a type of two way referral between ombudsmen and the courts, the one on points of law, the other on matters of fact; but there is no sign that this proposal is to be taken up.) The points cannot be debated here, save to suggest that the role of the court as ultimate arbiter must be preserved, but that it is a power which should be exercised sparingly, with the court intervening only when an ombudsman has misinterpreted the law or has made a decision which is manifestly unfair or unreasonable.

At the same time, legal accountability will still not be universal; there is a minority who are operating on a voluntary basis, notably the Ombudsman for Estate Agents and the Funeral Ombudsman. There is still room for rationalisation.

Again, legal accountability can only operate as a kind of back stop, providing a mechanism of control, *ex post facto.* There is a need for some more immediate supervision. As it is, individual ombudsman schemes operate under a variety of institutional arrangements; there is no one pattern of mechanism to guarantee independence and accountability. As we have seen, the first ombudsman established in this country, the PO, reports to the Select Committee on the Parliamentary Commissioner for Administration; the Pensions Ombudsman is responsible to the Council on Tribunals for *part* of his jurisdiction; the LSO is responsible to the Lord Chancellor; most of the private sector ombudsmen have been responsible to an Ombudsman Council which is made up of an independent chairman, industry and non-industry representatives, with the latter in the majority; the arrangements for the FSO have yet to be finalised. What is painfully evident is that there is no office or body in place to perform the type of function which the Lord Chancellor performs in relation to the courts, or the Council on Tribunals in relation to tribunals, and there is no statutory framework which might, at the very least, give protection to the title 'ombudsman'.

117 This has been brought out, eg, in relation to the Pensions Ombudsman, where the legislation specifically provides for appeal on points of law.

118 See, eg, Lord Woolf, the Tom Sargant Memorial Lecture, November 1996.

A regulatory body for ombudsmen?

It seems to us that there is a need for measures to ensure that all schemes operate according to public law precepts, and to provide a measure of protection and support for individual ombudsmen should this be needed. This *ought* to be seen in the context of a fundamental reform of our administrative law models, a reform which is long overdue, as has been well argued elsewhere.[119] One recommendation has been for the introduction of a Standing Administrative Conference to oversee public law matters as the most effective solution.[120] Others have argued for a Ministry of Justice to take on some of the tasks.[121] But in the absence of such wholesale reform, we need to consider what is required specifically in relation to ombudsmen, both private and public. The question which then arises is what form should this regulatory body should take? There is an existing organisation, the BIOA, which might potentially fulfil that role.

The BIOA

This association was formed in 1993,[122] principally as a response to concerns that the title ombudsman was losing its essential value by being applied in some rather unlikely contexts. The term 'ombudsman' seemed during the 1980s and early 1990s to have caught the imagination in an extraordinary way and new examples of the beast began to spring up, often in inappropriate settings. There were fears that the term would be devalued if it were to be connected with in-house complaints processes which lacked the independence (and possibly some of the other characteristics) properly associated with the traditional ombudsmen. This was a danger perceived by the established ombudsmen, both public and private, and the setting up of the BIOA was a response to this concern, given that it seemed unlikely that government would intervene to regulate the use of the term. They joined together principally to try to impose some sort of criteria for the use of the term ombudsman, on a self-regulatory basis.

The BIOA is an unincorporated association which operates according to rules which set out the objectives of the Association and the different

119 Loughlin, *Public Law and Political Theory*, 1992; Prosser, 'Towards a critical public law' (1982) 9 JLS 1.

120 Lewis and Birkinshaw, *Justice against the State: When Citizens Complain*, 1993.

121 See, eg, Birds and Graham, 'Complaints mechanisms in the financial services industry' [1988] Civil Justice Quarterly 313.

122 Then called the United Kingdom Ombudsman Association. Its name was changed in the following year to allow into membership three Irish Ombudsman schemes. The inclusion of Irish schemes would be one issue to be resolved if the Association were in the future to be given statutory regulatory powers to govern ombudsmen in the UK.

categories of membership. It publishes the criteria which it applies to applicants for full membership of the Association and which represent the essential conditions which an ombudsman should meet to be recognised as such by the Association. It operates with a main Executive Committee, and its other standing committee is the Validation Committee, which has the task of considering applications for full or voting membership. The key criteria which must be fulfilled before an applicant can be granted voting membership, and by implication be entitled in the eyes of the BIOA to bear the title 'ombudsman', are as follows: independence of the ombudsman from the organisations the ombudsman has the power to investigate; effectiveness; fairness; and public accountability. Consideration of the ombudsmen discussed in this book will enable the reader to recognise which meet these standards. (Two notable complaints handlers whose schemes have not been able to meet the Association's criteria on independence are The Adjudicator and the Prisons Ombudsman.)

The Association has set up subcommittees from time to time to deal with, *inter alia*, good practice issues. It publishes a Directory of Members which is circulated widely, and a regular bulletin, which is circulated to members of the Association and is designed to provide information about other schemes for those who work in ombudsman offices. It operates on a voluntary basis, with minimal funding, and has made an impressive start in addressing the kind of matters with which a regulatory body would have to deal.

It is remarkable that the BIOA has been able to bring together the whole range of ombudsman schemes, public and private, statutory and non-statutory. That is a considerable achievement in itself, but it also provides an arena in which lessons can be learnt one from the other, since the different formulations exhibit different characteristics with corresponding advantages and disadvantages.

The ability to draw on experience in a wide range of ombudsman schemes presents a real opportunity for a regulatory body to promote the strengths, whether in jurisdiction or good practice, wherever they are found, and to supplement the weaknesses. In answer to the question of what form a regulatory body should take, a number of proposals have been made. Farrand has argued for a statutory body, similar to the Council on Tribunals, a sort of 'Ofomb', to supervise and control;[123] Birkinshaw has posited a 'super Select Committee' or a statutory Ombudsman Commission which could, *inter alia*, 'take stock of ombudsman developments in changing patterns of service provision'.[124]

123 Dr Julian Farrand, Pensions Ombudsman and former Insurance Ombudsman, at an OFT Symposium on Consumer Redress, 27 September 1995.

124 Birkinshaw, 'The ombudsmen: what lies ahead?', BIOA Lecture, 9 May 1995.

The Consumers Association has looked at the matter in some detail over the years and at one point drafted a Bill which would have provided for the setting up of a Council on Ombudsman Schemes. More recently, the Director of the Consumers Association has suggested that the BIOA itself, strengthened by statutory backing, might best do the job.

> If it was thought that (giving more steel to the Association) could only be achieved through statutory backing, the CA would be happy to throw its weight behind legislation, most logically linking the Association to the Office of Public Service. But we're not sure the timing is right.[125]

An alternative would be for the Lord Chancellor's Department to take on a supervisory role, but there is no evidence that this would be a welcome development for those concerned. That there has been a lack of cohesion both within government departments and between them is evidenced by the piecemeal introduction of different ombudsmen, in much the same way as tribunals have been introduced on an ad hoc basis without any master plan. (The consultation document on the proposals for the FSO, which come under the auspices of the Treasury, made no mention of the Pensions Ombudsman (who reports to the Social Security Minister) despite the fact that the two jurisdictions are closely interwoven, given the linking of providers and products in the financial services market. Could this be a result of tunnel vision on the part of government departments?) The suspicion also exists that no one department within government has adequate knowledge of the multiplicity and forms of the existing ombudsmen. The provisions of the Data Protection Act 1998, legislation sponsored by the Home Office, makes mention only of the PO, the Health Service Commissioner and LGOs in connexion with exemption for their statutory purposes. It makes no mention of other statutory ombudsmen, nor of any of the other recognised ombudsmen for whom the exemption might be appropriate in view of their adjudicative role. Their fate depends on the interpretation of 'public body' within the Act. Whether this came about by accident or design is unclear.

In our view, there is now the need for some regulatory body to be in place soon. It could be based on a self-regulatory approach like that of the BIOA. Certainly, it seems to us that a re-formation of the BIOA has much to commend it, given the work it has already done and the goodwill and co-operation it has engendered within the ombudsman community. The Association certainly provides a ready-made organisation with an established reputation, and there are strong arguments that any regulatory body should be based upon it.

But, significant changes would have to be made: finance would be required for a permanent staff and organisation; and it would need to have

125 McKechnie, 'The future of ombudsmen' (1995) 5(6) Consumer Policy Rev 213.

statutory backing for its functions so that it could actually perform a regulatory role. The form, powers and jurisdiction of such a body require detailed study and the institutional design must take account of constitutional norms. This body should have the power to 'recognise' acceptable schemes, and perhaps even more important, to withdraw recognition where standards are not met. This would be the body to guarantee the conditions of independence of the individual ombudsman and to monitor performance to ensure that individual schemes operated in a manner which provided appropriate conditions and redress for the individual with a grievance. It should also have the power to hear references from individual ombudsmen with concerns about their own scheme. The form this regulatory body should take needs urgent consideration.

Conclusion

As has been demonstrated, the term ombudsman is now used to cover a wide range of complaint handling bodies. It has developed and evolved since the introduction in 1967 of the PO. Ombudsmen have been the subject of some criticism, but they can also point to considerable success in providing a cheap and informal remedy for individual citizens. The public sector ombudsmen, in particular, have the advantage over courts of wider powers of investigation, and access to documents. Courts are not designed to review facts or decide on the correct administrative decision. While tribunals are usually ideal at reviewing decisions, neither they nor the courts are equipped to investigate the manner in which the decision has been reached and to find that there has been maladministration. Ombudsmen fill this gap and provide a remarkably effective alternative method to judicial review for rectifying maladministration.

There has always been a tension in the British ombudsman system between the function of grievance redress for the individual and improving administration. Originally, the LGOs performed this latter function more satisfactorily than the PO but, in recent years, there have been welcome changes in the way the PO has operated in this respect.

The structures within which the public sector ombudsmen work have always buttressed their independence. The same could not be said about the private, self-regulatory ombudsman schemes where the structures did not allow a sufficient barrier to be placed between the ombudsman and the industry concerned to guarantee perceived independence. While most of the schemes where this was a problem are now to be reformed, as has been discussed, some still exist with this model and when ombudsmen are introduced elsewhere, perhaps in the retail sector, the customary self-regulatory model may again be taken up.

At the same time, private ombudsmen have exhibited advantages over the traditional public sector ombudsmen in being able to adjudicate in legal disputes, applying legal provisions, and making decisions on the grounds of substantive fairness. Again, they have been able to make binding awards. The implications of Art 6 will have to be considered and dealt with in the future.

There is a richness in this variety and ombudsmen have been able to provide a cheap and informal remedy for individuals where they might not have had a remedy at law, or where it would not be appropriate, or possible on practical grounds, to take the matter to court. Some improvements need to be made, not least on accessibility to all citizens, and on the ability to improve practice within a sector, but generally they should be seen as a success story.

But, given the multiplicity of forms and powers, there is a clear need for some rationalisation and supervision, the present system is complicated for citizens to use and results in gaps in jurisdiction. Their scope for handling individual disputes and grievances pervades virtually all areas of life; the role they play is too important to be handled on an ad hoc basis, without a coherent structure and without some form of regulation to ensure that the present standards continue and improve.

CHAPTER 4

TRIBUNALS AND PUBLIC HEARINGS: TRIALS OR TRIBULATIONS?

Tribunals and inquiries (the main type of public hearing) are commonly bracketed together, not least because they formed the subject matter of the Franks Committee Report of 1957 which resulted in the Tribunals and Inquiries Act 1958.[1] They are, however, quite distinct creations, fulfilling different functions and with separate powers one from the other. More confusingly, there are significant differences amongst tribunals and inquiries themselves, to the extent that it may not be possible to enunciate a precise definition of either institution. It is also important to recognise that not all 'tribunals' match the common features of a tribunal, and may not indeed be 'tribunals'; equally, other redress mechanisms may, in some individual cases, be more appropriately regarded as tribunals, even though they have not been so designated.[2]

TRIBUNALS

Broadly, a tribunal is an adjudicative body, empowered to hear and decide disputes in particular circumstances. Tribunals are sometimes referred to as court substitutes, in that they have the power to make legally enforceable decisions, but they are regarded as having the advantages over courts of speed, cheapness, informality, and expertise. Certainly, they proliferated at a time when the welfare State apparatus was being set up and extended and they were seen as important in providing a forum for the individual to challenge decisions of the administrative State in relation, for example, to State benefits, where tribunal proceedings would be more appropriate to the issue in dispute than a judicial process. There was also the view, in some quarters, that the judiciary might not be sympathetic to the objectives of some of the legislation so that the courts were inappropriate venues for the hearing of such disputes. Further, it was clear that the ordinary court system would not have been able to cope with the increased workload.

More recently, there have been notable comments from an influential member of the judiciary who argues for the extension of the tribunal system on the grounds, *inter alia*, that it would enable more decisions to be made by specialist adjudicators and would relieve some of the judicial review pressures from the High Court and Court of Appeal.[3]

1 See, now, the Tribunals and Inquiries Act 1992.

2 See, eg, the Pensions Ombudsman scheme, discussed above, Chapter 3.

3 Woolf, 'Judicial review: a possible programme for reform' [1992] PL 221.

Tribunals have been set up to deal with particular policy areas, including industrial and employment matters, social security, immigration, mental health, data protection, education appeals and many more. Indeed, one criticism levelled against the tribunal system is that there is no governing principle or coherence within it, with Parliament setting up new tribunals to deal with new situations (for example, as under the Data Protection Act), rather than identifying areas where an existing tribunal could take on new functions.

The Report of the Committee on Administrative Tribunals and Inquiries (the Franks Committee)[4]

This Committee, which was set up following the Crichel Down affair, was limited in its remit to consideration of those areas where a decision was reached after a formal statutory procedure had been followed. It made a number of important recommendations, which were to shape the way the tribunal system developed.

Before the setting up of the Committee, there had been those who argued that tribunals should be regarded as part of the machinery of administration, that is, that they related to the implementation of policy, while others argued that tribunals should properly be regarded as part of the system of adjudication. This was one of the major decisions for the Committee who came firmly to the latter view. The specific recommendations of Franks were made in the context of this view, that tribunals were part of the machinery of adjudication. Tribunals should therefore embody the values, typically associated with judicial proceedings, of openness, fairness, and impartiality. The emphasis on adjudication clearly had implications for the debate as to whether procedures should be adversarial or inquisitorial and as to where the balance should be struck between formality or informality.

The other major recommendations of Franks related to the constitution of tribunals and procedure before them. On constitution, Franks stated that chairmen of tribunals, who should normally be legally qualified, should be appointed by the Lord Chancellor, and the wing members by the Council on Tribunals. In this way independence of the government department concerned would be achieved. As regards procedure, Franks stated that individuals should know of their right to go to a tribunal and should know in advance the case to be met. The hearing should be public, save in exceptional circumstances, and legal representation should be allowed. Tribunals should have powers of subpoena, to administer oaths, and to award costs. Additionally, reasoned decisions should be communicated to the parties as soon as possible after the hearing. The Committee recommended that judicial review of tribunal decisions should not be outlawed by statute and that there

4 Cmnd 218, 1957, London: HMSO.

should be provision for appeal on fact, law and merits from a first instance tribunal to an appellate tribunal.

Many, but not all, of the Franks recommendations were enacted in the Tribunals and Inquiries Act 1958 (now replaced by the 1992 Act, a consolidating measure.)

The system

One of Franks's central proposals had been the establishment of a permanent Council on Tribunals to supervise the organisation and procedure of tribunals and to keep under review the working of individual tribunals. It was to be made up of legal and lay members (the latter to be in the majority) and it was hoped that such a body would provide the focal point which had previously been lacking, not only to supervise tribunals, but also to investigate complaints about tribunals. The Council on Tribunals was set up under the 1958 Act, but it emerged as purely an advisory body. Its duties are to keep under review the constitution and working of those tribunals listed in the Schedule to the Act and to report on any matter referred to it by government. (There are now over 2,000 different tribunals subject to the jurisdiction of the Council on Tribunals, known as 'listed' or 'scheduled' tribunals.) The Council is consulted by government departments from time to time in connexion with tribunal matters, and it must be consulted before any new procedural rules for tribunals are implemented, but it does not have responsibility for drafting those procedures (a recommendation of Franks not implemented in the legislation). It has, however, drafted advisory Model Rules of Procedure for Tribunals. The Council's Annual Report is laid before Parliament.

As part of its work in 'keeping under review the constitution and working' of tribunals, the Council implements a programme of visits by Council members to individual tribunals. It seems that, whilst a number of such visits are undertaken annually, and these visits comprise 'an element of inspection: of premises, of procedure, and of the chairman's performance', they do not constitute a system of inspection of tribunals as a whole, although visits are undertaken 'on a rational and systematic basis'.[5] The Council receives relatively few complaints from individuals and while, in the early days, visits were seen as an effective way of investigating them, this is no longer the case. A complaint could lead to a visit, but it is a minor factor in the overall programme of visits and complainants are told that the information they have given will form part of the Council's examination of the operation of that tribunal.[6]

5 Foulkes, 'The Council on Tribunals: visits policy and practice' [1994] PL 564. This article gives particular examples of instances where the author feels the Council, through its visits, has been able to make an impact on procedure in individual tribunals; see, eg, the case of Family Health Service Authorities committee hearings, p 571.

6 *Ibid*.

As to the constitution of Tribunals, the Act departed from the Franks recommendations. Chairmen are appointed either by the Lord Chancellor directly or chosen by the minister concerned from a panel drawn up by the Lord Chancellor, while so called wing members are generally appointed by the minister. The wings are lay people, generally chosen for their expertise in the particular subject matter of the tribunal.

On procedure, the requirement for reasoned decisions was included in the Act in relation to statutory tribunals *provided* one of the parties makes a request before the decision is given or notified.

The availability of judicial review was safeguarded, but appeals to the High Court were limited to points of law.

As Craig has commented, the statutory and administrative reforms which followed the Franks Report introduced a measure of rationality and cohesion into a system which had developed very largely in an ad hoc manner.[7] Uniformity was not, however; the result and the diversity of tribunals is a feature to this day, so that one has to look to the particular statute to discover the scope, function, and procedural rules of any one tribunal.

Tribunals may be organised nationally, regionally, or locally, depending upon the type of subject matter. One important development has been the introduction of the 'presidential' system, under which a president (frequently a judge) is appointed to take responsibility for the administration of tribunals within a particular area. This system is said to enhance independence from government and to ensure greater consistency in decision making between one individual tribunal and another under the same president. One issue of concern regarding independence has been in relation to the permanent staff of tribunals since, for the most part, they are appointed by the government department concerned.

Reforms to the tribunal system, which have been proposed by Lewis and Birkinshaw, include the introduction of an Administrative Appeal Tribunal in the UK; tribunals organised on a regional basis; and the further possibility of regional public law courts.[8]

PUBLIC HEARINGS

As the use of tribunals expanded during this century, so too did the use of public hearings, the most important of which, for our purposes, are statutory inquiries. The main functions of these inquiries are to provide an appeal

7 Craig, *Administrative Law*, 1994.

8 Lewis and Birkinshaw, *When Citizens Complain: Reforming Justice and Administration*, 1993.

mechanism, to allow objections to be aired, and to act as an investigation after an accident or government *cause célèbre* – breaches of security, for example. They can also provide a mechanism for gathering information and for resolving disputes.

Inquiries may be mandatory (where there is a statutory requirement to hold an inquiry before a decision is taken) or discretionary (where, for instance, an inquiry is set up to investigate an accident). Typical mandatory inquiries concern land use planning, where the subject might be principally a local matter – compulsory purchase of land, or appeals against refusal of planning permission, or a matter of national importance concerning major developments like the siting of a new airport or extension to a nuclear power plant. The public inquiry into the Sizewell B pressurised water nuclear power station, chaired by Sir Frank Layfield, proved to be the longest public inquiry held in this country. It opened in January 1983, closed in March 1985 and the report was presented to the minister in December 1986.[9] However, it is interesting to note that one of the most significant land use developments in recent years, the building of the Channel Tunnel and associated work, was initiated and implemented by government without the self-imposed requirement to hold a public inquiry beforehand where objections and policy choices could have been aired.

Although some inquiries are principally fact finding exercises, most are concerned with the hearing of objections to a proposal, usually a land use planning proposal.[10] In these cases, an inspector is appointed by the appropriate minister (usually the Secretary of State for the Environment) to hold the inquiry. In inquiries about developments of national importance, the inspector conducts the proceedings, hears the submissions of those concerned, and prepares a report, usually with a recommendation for the minister to consider in making the decision as to whether or not that development should proceed. The minister is not obliged, however, to follow the inspector's recommendation in making his policy decision.

A new creation, the Planning Inquiry Commission, was introduced by s 101 of the Town and Country Planning Act 1990. Under the Act, such a Commission can be established in circumstances where there are considerations of national or regional importance or issues of new scientific or technical development which require a special inquiry. Such a Commission operates in two stages: first, a general, wide ranging investigation, secondly, a local inquiry. This is a development which has to be welcomed, but it remains to be seen how often it is invoked in practice, and with what results.

In the majority of planning inquiries, those which concern local development, it is the inspector who makes the final decision, frequently

9 For a full account, see O'Riordan, Kemp, and Purdue, *Sizewell B: An Anatomy of the Inquiry*, 1988.

10 See, further, the discussion on procedures below, Chapter 8.

without an oral hearing, on the basis of written representations. Rather confusingly, these are known as planning appeals.

Franks

Inquiries were included in the remit of the Franks Committee following concerns about a lack of transparency in the way in which inquiries operated, and also concerns about the cost and delay that was frequently involved.

Franks said that the objects of the inquiry procedure were twofold: to protect the interests of those citizens most directly affected by a government proposal by granting them a statutory right to be heard, and to ensure that a minister is better informed of the whole facts of the case before a final decision is made.

As with tribunals, Franks was asked to consider whether inquiries should be regarded as part of the administrative or judicial machinery, but in this instance the Committee took the view that inquiries could not be classified as either purely administrative or judicial. The Committee's recommendations in relation to inquiries took this into account. Broadly, Frank's recommendations covered the pre-inquiry stage, procedure at the inquiry, and post-inquiry practice and, in essence, specified principles which we would now recognise as being part of natural justice requirements. So, for instance, they recommended that the government department should be required to state its case in full before the inquiry, including a statement of policy from the minister where applicable, so that the other parties had full information of the case which they would have to challenge.

Under the Tribunals and Inquiries Act, the Council on Tribunals was given the power to consider and report on matters of special importance concerning administrative procedure involving an inquiry, but again, its powers are advisory only. Franks's recommendation concerning the requirement for a ministerial statement of policy to be given in advance of the inquiry was rejected by the Government and not included in the Act; as was the recommendation that the inspectorate should come under the aegis of the Lord Chancellor.

Procedure

Under the Act, the procedure at an inquiry is left largely to the discretion of the inspector, subject to the rules of natural justice. The content of the rules of natural justice in relation to inquiries was one of the issues before the House of Lords in *Bushell v Secretary of State for the Environment* (1981),[11] which

11 [1981] AC 75.

concerned the conduct of a public local inquiry where objections to a road proposal were being heard. Here, the right to a hearing was held not to include the right to cross-examine government experts about their projections of future traffic flow, the majority in the House of Lords seeming to reach this decision on the grounds that the projections were, themselves, part of government policy.

As we shall see later, the content of the rules of natural justice may vary depending on the situation. In the context of public inquiries it seems that the courts weigh the balance in favour of government ministers. A recent inquiry gave rise to criticism from two *former* Foreign Secretaries (Lord Howe and Douglas Hurd). This was the 'Arms to Iraq' inquiry conducted by Sir Richard Scott, a senior member of the judiciary.[12] Sir Richard distinguished the appropriate procedures for inquiries from those used in ordinary court proceedings:

> There is, however, a significant and fundamental difference between litigation and inquiries that makes procedural comparisons unsafe. Litigation in this country, whether civil or criminal, is adversarial in character. The nature of an inquiry, on the other hand is, with very rare exceptions, investigative or inquisitorial.

In his view, fairness does not require:

> ... that adversarial procedures, such as the right to cross-examine other witnesses, the right to have an examination-in-chief or a re-examination conducted orally by the other party's lawyer ... should always be incorporated into the procedure at inquisitorial inquiries. The golden rule ... is that there should be procedural flexibility, with procedures to achieve fairness tailored to suit the circumstances of each inquiry.[13]

After an inquiry, the practice generally is that the inspector's report is published, which is in line with the recommendation of Franks, although the provision was not included in the Act, it being found in statutory instruments in relation to some inquiries. In other cases, publication of the report is dependent on departmental practice. The giving of reasons by ministers for their decisions after the holding of a public inquiry is now required by s 10(1)(b) of the 1992 Act, but is subject to the same qualifications as in the case of tribunals.

Public inquiries have much potential for fulfilling the requirements of participatory democracy. As Lewis and Birkinshaw have argued:

> ... to allow people to contribute to the shaping of decisions that significantly affect their lives and to allow them to participate in a constructive manner or to

12 *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, 1995–96, HC 115.

13 Scott, 'Procedures at inquiries – the duty to be fair' (1995) 111 LQR 596. See, also, the Autumn 1996 edition of *Public Law*, which is devoted to articles about the Scott Inquiry.

> raise objections about proposals is far more likely to reduce or remove the cause of later grievance.[14]

For public hearings to fulfil their potential for participation and for government by consent, however, certain conditions need to apply, not least the provision of adequate information to all parties[15] and a requirement for the policymaker to take a hard look at the submissions made at the hearing.[16]

INTERNAL MECHANISMS FOR RESOLVING COMPLAINTS

We have noted the growth of the tribunal system over the course of this century, but there is now a trend identified for government to introduce internal review and 'one man bands' as adjudicators in place of tribunal hearings:

> Having introduced tribunals to adjudicate on disputes between citizens and the intervening State, they then had to be seen to be operating openly, fairly and impartially ... which, government claimed, imposed increasing financial, organisational and bureaucratic burdens on the process of administration.[17]

This has been confirmed, to an extent, by research which argued that, while tribunals might be good for individualistic justice, they resulted in an overall reduction in what was being provided collectively and resulted in a tendency for departments to handle complaints internally (and, therefore, less openly), where, before, a tribunal might have been set up.

The trend towards more closed systems of redress been deprecated by the Council on Tribunals, which has raised some real concerns with government about, for example, arrangements in relation to Social Fund reviews, internal procedures within local authorities to deal with complaints from homeless applicants, and procedures for complaint handling in parts of the health service.. The issue is not clear cut, however, for there is often a tendency for the Council on Tribunals to overvalue the virtues of adjudication in comparison with other grievance redress mechanisms. Further, for tribunals to perform functions other than adjudication may well be beneficial in striking the right balance in the development of policy and its fair application in the process of regulation. On the trend towards one man adjudicators, it has been argued that there is nothing inherently wrong with such a move, provided there are adequate safeguards to protect the full range of interests involved.[18]

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14 *Op cit*, Lewis and Birkinshaw, fn 8.

15 For an interesting approach to participatory requirements, see Prosser, 'Towards a critical public law' (1982) 9 JLS 1.

16 See Harden and Lewis, *The Noble Lie: the Rule of Law and the British Constitution*, 1986.

17 *Op cit*, Lewis and Birkinshaw, fn 8.

18 *Op cit,* Lewis and Birkinshaw, fn 8.

PART II

ADMINISTRATIVE JUSTICE AND THE COURTS

CHAPTER 5

JUDICIAL REVIEW IN ENGLISH AND EUROPEAN COMMUNITY LAW: AN OVERVIEW

The important thing to remember in relation to judicial review is that policy beliefs as to the desirable scope of judicial review have been fundamentally important in shaping the outcome of cases, and it is often futile to look for conceptual coherence or consistency in judicial reasoning. *The political and social context of each case is of overwhelming importance and this makes generalisation difficult*.

The next pages introduce some of the key issues relating to judicial review and remedies, both in domestic and European administrative law. Many of the matters only outlined here will continue to be discussed in more detail in later chapters.

JUDICIAL REMEDIES IN ENGLISH LAW

Remedies are of the utmost importance – without them, you cannot hope to resolve complaints or grievances. Although the courts are regarded as the overall control mechanism, it is important to remember, as we have made clear in Part I of this book, that judicial remedies are only one aspect of possible grievance redress available to a complainant against a public body. In *quantitative* terms, these latter, non-judicial mechanisms deal with far more cases than the courts and may be far more appropriate to the resolution of disputes.

Surprisingly little empirical research has been done on judicial review, other than that by Bridges *et al.*[1] They found that judicial review cases had more than tripled in the last 15 years and had raised issues from a diverse area of activities, although cases were largely dominated by immigration, housing, planning and licensing. Alongside the increase in judicial review, there has been an incremental expansion of the 'common law' principles of review as judges have become more aware of, and more sophisticated in their approach to, the requirements of lawful government and administrative action.

Although the actual number of judicial review cases may seem relatively small when compared to the thousands of decisions taken daily by the administration or complaints dealt with in non-judicial schemes, judicial review is significant in *qualitative* terms and because of the impact it can have on administrative decision making. 'Number crunching' fails to take account

1 Bridges, Meszaros and Sunkin, *Judicial Review in Perspective*, 1995.

of the effect that one judicial review decision may have on similar cases, or on the principles laid down by the courts. Indeed, in some situations, *the courts may be the only outside scrutineer* of administrative action.[2] This, in itself, makes the conduct of the court fundamentally important. You will see that courts have often been concerned to keep control of their own procedures and to protect public bodies from unmeritorious or inconvenient litigation. Until quite recently, a deferential attitude to the decision making of public authorities and a narrow standard of review were evident. But, there are now some clear signs that this is changing.

Briefly, the judiciary consider a number of issues important in controlling access to the court. These roughly correspond to the questions of under what circumstances might an action for judicial review be brought. They are:

(a) the issue of standing – *who* may bring an action challenging the decision of a public body?;

(b) the issue of amenability – *against which bodies* may an action be brought and by which procedures?; and

(c) the issue of timing – *when* can an application for judicial review be made? This includes consideration of delay, and the provision of alternative remedies.

THE JUDICIAL REVIEW PROCEDURE

The High Court has an inherent common law power to review the legality of acts and decisions of administrative agencies, inferior courts and tribunals. Until the late 1970s, judicial remedies in public law were highly complex. However, in 1977, reforms provided a new procedure for bringing public law cases before the High Court: the application for judicial review (AJR). The current rules for the AJR are found in s 31 of the Supreme Court Act 1981 and in RSC Ord 53. Since 1981, the AJR has also been subject to a number of practice directions and administrative modifications. A Crown Office list of judges with expertise in administrative law has been established, and these are assigned judicial review cases. Further practice directions have also brought non-jury actions with an administrative law element and appeals to the High Court from tribunals with an administrative flavour into the Crown Office list.

An applicant for AJR must obtain the 'leave' of the High Court, usually before a single judge, before seeking judicial review. In order to gain leave, a number of factors must be present:

2 Eg, in relation to the Social Fund for Income Support or decisions made by local authorities in respect of the homeless.

(a) the application must be brought within three months of the date on which the decision or action being challenged was taken, and even within that time span must be brought promptly;

(b) the applicant must have sufficient interest in the matter;

(c) the applicant must have an arguable case;

(d) the applicant *may* also have to demonstrate that other, possible alternative remedies have been exhausted.

The requirement for leave when seeking judicial review is controversial in a number of ways.[3] The criteria on which leave is granted are unclear, leaving a wide discretion to the particular judge hearing the application. The result is that obtaining leave is something of a lottery – significantly, about half of all applications are refused. It has also been argued that the leave requirement forces judges into case load management, deflecting them from sole consideration of the legal merits of the case.[4] The need to obtain leave is not a requirement in private law; consequently, the leave hurdle makes it more difficult to challenge public bodies in judicial review than it is to bring an ordinary action in the county court. This makes access to redress of grievances inconsistent, and is contrary to the fundamental principles of administrative justice.

The Law Commission has recommended that grounds for refusing leave should be set out explicitly, that applicants should have to show their case discloses 'a serious issue to be tried', and that judges should give brief reasons for refusal of leave. It was also suggested that the term 'leave' should be dropped and replaced by 'preliminary considerations', in order to allay the perception that public law rights are secondary.[5] The Law Commission did not, however, recommend that the requirement for leave should be abandoned, the justification being that leave enables the court to filter out unarguable cases. This protects public bodies from unwarranted interference and ensures that cases considered to be of merit are not delayed by an overloaded system.

There are a number of further critical points to be made about elements of the AJR in comparison to private litigation. Cross-examination and discovery of documents are only available at the discretion of the court, unlike actions begun by writ or originating summons, where these are available as of right. Thus, applicants may only obtain documentary evidence if the respondent body volunteers it or if the court orders it to be disclosed. This difficulty of access to evidence has been compounded by there being no general duty to

3 See Sunkin and Le Sueur, 'Applications for judicial review: the requirement for leave' [1992] PL 102; and *op cit*, Bridges, Meszaros and Sunkin, fn 1, Chaps 7 and 8.

4 See Gordon, ''The Law Commission and judicial review: managing the tensions between case management and public interest challenges' [1995] PL 11.

5 Law Com No 226, 1994; and see the Woolf report, *Access to Justice*, 1996.

give reasons in English law and the under-development of provisions for freedom of information. It can therefore be extremely difficult to establish a case for judicial review on both factual and legal grounds. Cross-examination is rarely available in judicial review. This inhibits not only the capacity of each party to challenge the evidence presented by the other, but also curtails the effectiveness of judicial review as a mechanism for scrutinising government, particularly when compared to the operation of select committees and other inquiries. Thirdly, when compared to non-judicial remedies and some county court actions, it is extremely difficult to bring a judicial review case without legal expertise and unfortunately, specialist knowledge in the area is scarce and expensive. The lack of availability of legal aid adds further to the problem of obtaining appropriate advice and the bringing of a case.[6] Because of these limitations, many of the cases brought are necessarily supported by charities and other interest groups.

TIME LIMITS AND DELAY

As a general rule, an action must be brought within three months of the decision under challenge,[7] although the court has a discretion to extend the time limit, provided there is a good reason to do so. Given the short time in which to lodge an application, the manner in which the court is prepared to exercise its discretion in relation to delay is of crucial importance. But the court has not erred, in this context, on the side of generosity. Even where an action is brought within the three month time span, it may still be struck out if the court considers it has not been brought sufficiently promptly.[8]

Undue delay has also been used as a legitimate reason for the court refusing to exercise its discretion in favour of granting a remedy, even where it has held that there has been an error of law. In *Caswell* (1990),[9] Caswell received an adverse decision from the Dairy Quota Tribunal in February 1985, but did not begin judicial review proceedings until November 1987. It was held that, although the tribunal had erred in law, relief would be refused because of undue delay. The court considered that granting a remedy would be detrimental to good administration as account had to be taken of the effect on other potential applicants and the consequences if the application was successful.

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6 Changes to legal aid now also frequently require the exhaustion of internal complaints procedures prior to it being granted.

7 In contrast, a civil action in contract or tort must be brought within six years and three years respectively. There is a 12 month limitation period for complaints to the ombudsmen.

8 *R v Swale BC ex p Royal Society for the Protection of Birds* [1991] 1 PLR 6.

9 *Caswell v Dairy Produce Quota Tribunal* [1990] 2 All ER 434.

The discretionary element is well illustrated in *Ex p Furneaux* (1994).[10] In late 1990, a medical practice applied for, and was granted, outline permission to provide pharmaceutical services at the surgery. Two local pharmacists raised objections and appealed successfully to the Secretary of State. However, it later came to light that, in reaching his decision in July 1991, the minister had taken into account certain information not known to the medical practitioners. They had, consequently, been deprived of an opportunity to respond. It was not until January 1992, however, that an application for judicial review was made on their behalf. The Court of Appeal held that an applicant for judicial review who failed to apply promptly was guilty of undue delay and that under s 31(6) of the Supreme Court Act 1981 the court had a discretion to refuse to grant a remedy, if this would substantially prejudice the rights of another person. Moreover, *this applied even if the court were satisfied that there was good reason for the delay*. The application was duly dismissed.

Thus, this is an uncertain area. It well may be that such a restrictive approach to time limits might actually encourage applicants to submit ill prepared and misconceived applications for fear that time is passing and even seemingly good reasons for lack of promptness, or delay, may be deemed unacceptable by the court.

STANDING

The issue of standing (or *locus standi*) has until recently been one of the most complex and troublesome issues in judicial review. A potential litigant must have 'sufficient interest in the matter to which the application relates'.[11] The question is, what constitutes a sufficient interest? It may be construed narrowly – restricting access to the courts, or more broadly – widening scrutiny of administrative bodies. An early, leading House of Lords case on this issue is *R v IRC ex p National Federation of Small Businesses*,[12] which failed to lay down clear principles, but opened the door for wider interpretation of standing requirements. After the IRC case, the courts no longer required the infringement of any specific legal right or special damage for standing to be satisfied. More recently, several cases have further liberalised standing and have set out a number of criteria, although it is best to keep in mind that a significant amount of discretion remains with the court.

10 *R v Secretary of State for Health ex p Furneaux* [1994] 2 All ER 652; and see commentary by Lindsay, 'Delay in judicial review cases: a conundrum solved?' [1995] PL 417.

11 The rules on privity in contract and remoteness in tort, to some extent, perform a similar function to the rules of standing in public law.

12 [1981] 2 All ER 93.

What is clear is that requirements of standing for individuals in domestic law are more generous than those for actions before the European Court of Justice (ECJ), which have a time limit of two months and are extremely stringent for individuals *not directly* addressed by the decisions of EC institutions.

The appropriateness of judicial review: when can judicial review be used?

As the use of judicial review has increased, the courts have had to consider what kind of decisions and which bodies are to be subject to judicial review. Appropriateness therefore includes issues of the effect of alternative remedies, statutory exclusion of judicial remedies and amenability. All three issues will be dealt with more closely in the following chapter, but below, we give a brief flavour of the complexity and uncertainty that can be encountered by potential litigants and their advisors when seeking judicial review.

THE EFFECT OF ALTERNATIVE REMEDIES

Here, we are dealing with the relationship of the superior courts to other mechanisms for the resolution of disputes. The question that arises is *at what point can you use the courts in place of the designated statutory system?* There are two basic principles that have to be reconciled. First, parliamentary sovereignty requires that, when the legislature has empowered a specific procedure for the redress of a grievance, then recourse must be by that means and litigants must not normally be allowed to circumvent it. On the other hand, the courts, disliking anything that takes away their jurisdiction, demand that access to them can only be restricted by the most explicit statutory language and retain a discretion to allow judicial review in place of other remedies. The tension between these two factors is evident in the inconsistency of case law.

Further, as we have seen in Part I, there is no common pattern of alternative grievance procedures; some are preferable to others, some are more effective and convenient, others may positively discourage potential litigants from seeking recourse in the courts. In exercising their discretion, a number of factors may be taken into account by the court, which concern the efficacy and effectiveness of the alternative. But, as might be expected when there is no consistency in the provision of alternative remedies, there has been little consistency in the application of these factors. Consequently, the general principle – that prior use should be made of statutory alternative remedies before judicial review is sought – is often hedged round by exceptions.

STATUTORY EXCLUSION OF JUDICIAL REVIEW

The tension between the principle of parliamentary sovereignty and the role of the courts in safeguarding against abuse of power also manifests itself in jurisdictional matters. On a number of occasions, the legislature has attempted to exclude judicial review by the use of 'ouster clauses'. Such attempts have been viewed with considerable suspicion by the judiciary, such that recourse to the courts may not be excluded except by the clearest of terms. The best known judicial reaction of a legislative attempt to oust the jurisdiction of the courts was in *Anisminic*,[13] where s 4 of the Foreign Compensation Act 1950 provided that decisions of the Foreign Compensation Commission 'shall not be called into question in any court of law'. Taken at its word, this could have prevented challenge to even the most blatantly unlawful decisions. Ultimately, the House of Lords held that, if Parliament had intended the ouster clause to cover unlawful decisions as well as lawful ones, much clearer wording would have been used. Since *Anisminic*, parliamentary drafters have tried to find a form of words that will prove to be judge-proof.[14]

Attempts to oust the courts altogether may be contrasted with provisions which seek to limit the time, say six weeks, within which a challenge may be made. These time limit clauses are common in the context of land use planning and are generally adhered to by the courts.

AMENABILITY

The question of which bodies and what decisions are subject to judicial review is often couched in terms of the public/private procedure divide and is one of the most vexing issues in public law. After the reforms of 1977, the question was whether *all* public law cases had to use the AJR or whether litigants would be free to commence proceedings by writ or originating summons, as in an ordinary contract or tort action. After some hesitation, the House of Lords, in *O'Reilly v Mackman*,[15] laid down that, as a general rule, all public law cases must use the AJR. There were two exceptions to this principle: if the parties consented or if there was a collateral challenge. The possibility of other exceptions was left open to be considered on an individual case basis. Initially, the courts interpreted these exceptions narrowly, but some complex case law has gradually arisen as to what *actually constitutes a public law issue*. This is a difficult question, which will be considered in more detail below.

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13 *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

14 See, eg, the Interception of Communications Act 1985, s 7(8), and the Local Government Finance Act 1987, s 4.

15 [1983] 2 AC 387.

REMEDIES AVAILABLE IN JUDICIAL REVIEW IN ENGLISH LAW

In English law, the judicial remedies for *ultra vires* actions or decisions are certiorari, prohibition, mandamus, declaration and injunction. All these forms of relief can be applied for in the AJR and can be coupled with a claim for damages, depending on what is appropriate for the particular case. Although damages are available under judicial review, they have as yet been awarded but rarely, and it is important to remember that *all* remedies are discretionary only. The court may withhold a remedy, even where it has held that the decision or action of the public body was *ultra vires.*

The prerogative orders

Certiorari, prohibition and mandamus are referred to as the prerogative orders and are remedies specific to public law. Initially, they allowed the Crown the opportunity to oversee the activities of both the inferior courts and administrative bodies to ensure they carried out the functions entrusted to them. Gradually, these remedies became available to others, the Crown being involved only in a nominal capacity. The rather different style of citation of a judicial review case reflects this historical background.

CERTIORARI

Certiorari is the most commonly sought of the prerogative remedies and is often the only remedy required. Certiorari is an order to quash an action or decision by a public body and may be sought on three main grounds: substantive *ultra vires,* procedural *ultra vires* and error of law on the face of the record. It can be obtained against a wide range of bodies, for example, administrative tribunals (when there is no appeal), local authorities, inferior courts, ministers of the Crown and other miscellaneous statutory and non-statutory public bodies. In granting certiorari, the court does not impose its own decision, but simply quashes the original decision. This results in the matter going back to the original body for reconsideration.

PROHIBITION

This is a remedy very similar to an order of certiorari, but which seeks to *prevent* an *ultra vires* action or breach of natural justice occurring in the first place. It is similar to an injunction.

MANDAMUS

This requires anyone who is under a duty to perform a public function to carry out that duty. In most cases where mandamus has been granted, there has been a clear *statutory* duty and a plain and unlawful refusal to perform that duty by a public agency. It is similar to a mandatory injunction. Disobeying an order of mandamus places the body concerned in contempt of court.

ORDINARY REMEDIES

In contrast to the prerogative remedies, declaration and injunction originated and developed from litigation between private parties. Their use in public law is relatively recent.

DECLARATION

This is a remedy which confirms the legal status of a relationship, clarifying the respective rights of the parties to an action, without directly affecting those rights. It is now widely used in administrative law, even though it does not coerce or force a party to do or refrain from doing anything. Its most obvious use is on those occasions when it is declared that an act or decision of an administrative body is *ultra vires*. It can also be used for breaches of natural justice, challenges to delegated legislation and situations where it is established that an administrative agency is bound by an act or representation. The effectiveness of a declaration comes from the preparedness of public bodies to abide by the law as stated by the courts.

Declaration is unsuited to and will not be granted in respect of decisions where there has been an error of law on the face of the record. Such errors are only voidable and certiorari is required to quash the decision, so that, from the date of quashing, it has no force in law.

INJUNCTION

Unlike a declaration, an injunction is a coercive remedy that can require a party to discontinue their activities or, more rarely, to undertake a specific act. In practice, it is not uncommon to ask the court for a declaration that some act is unlawful and an injunction to prevent any reliance on, or enforcement of, the act. There are three types of injunction: prohibitory, which restrains action;

mandatory, which commands action; and interlocutory, which preserves the status quo until the issues have been fully decided.

TORTIOUS LIABILITY AND PUBLIC AUTHORITIES

In English law, a public authority, like any other organisation, may cause loss to individuals either by an act or an omission. Where Parliament has imposed a statutory duty on a public body to carry out a particular function and a plaintiff has suffered damage as a consequence of the body's performance or non-performance of that function, the question is whether the plaintiff has a right of action in damages against the authority. We shall consider two issues relating to the tortious liability of public authorities. First, the difficulties of the application of the principles of negligence to public authorities in the exercise of their statutory functions and secondly, misfeasance in public office, which is a tort specific to public authorities. As we shall see, these are by no means problem free.

Damages and discretion

One of the most common actions in tort against public bodies is negligence. In many instances, this will not cause any more difficulty than would a similar action in private law. However, particular problems can arise where negligence is applied to a public body exercising its *discretionary* powers. Most statutes which impose a statutory duty on public authorities at the same time confer a discretion as to the extent to which, and the methods by which, that duty is to be performed. However, a distinction may be drawn between decisions which are about policy (possible options and their adoption) and the operation of those policy choices.[16] As the courts demur from interference in policy decisions, the difficulty lies in identifying whether the decision is a matter of policy or not. It should be clear that the dividing line between a decision on policy and a decision as to its operation can be particularly unclear.

Suppose a local authority has a *discretionary* power to inspect the foundations of buildings prior to their construction. Taking into account its resources, the local authority has to decide how best to exercise that power. If the foundations of a building are not inspected in certain ways because a policy has been adopted not to do so and a citizen suffers loss because defects later become apparent, any claim will have to show not only that the local authority had acted *ultra vires,* but also that they were negligent in some way

16 See the discussion in Bailey and Bowan, 'The policy/operational dichotomy – a cuckoo in the nest' [1986] CLJ 430.

in deciding or choosing the policy. The courts will be reluctant to intervene, because what is really being challenged is the allocation of resources; this is regarded as a policy matter.[17] In short, *loss suffered as a result of an ultra vires decision does not automatically entail negligence*.

If, on the other hand, a local authority *has* adopted a policy to inspect foundations, but fails to take reasonable care in doing so or does not inspect, then there may be a case for negligent action, because the challenge is to the *operation* of the power.

This policy/operation dichotomy was emphasised in *Anns v Merton LBC*.[18] The plaintiffs were tenants of maisonettes in which cracks had appeared in the walls due to poor foundations. It was claimed that the council had been negligent in the inspection of the foundations, but it was unclear whether any inspection had actually been made. The House of Lords considered two alternative situations; where the discretionary power to inspect had not been used, and where the power to inspect had been used carelessly.

Lord Wilberforce stated that it was easier to impose a common law duty of care on a statutory power where there had been an operational, rather than a policy decision. The policy would depend on the resources available. If a public body decided it could only carry out limited tests, an individual could not claim negligence merely because further inspection would have revealed a fault; that would be part of the policy and therefore immune from liability. However, where an inspector had carelessly carried out an inspection, the local authority would be liable, as this is operational negligence.

Anns was criticised for focusing on the policy/operational dichotomy. It can be argued that the policy/operational distinction is unnecessary, because there is plenty of scope within ordinary tort principles to accommodate any policy decision that might militate against the imposition of a duty of care on a public body or against holding it to be in breach of a duty. The emphasis on the public law aspects of the case and the effort to develop principles governing the liability of public authorities for their discretionary decisions could actually operate to the detriment of clarifying the law. Liability for negligence might indirectly affect resource allocation and might actually inhibit public authorities from exercising important statutory powers.

The issue was considered by the House of Lords at length more recently in *X (Minors) v Bedfordshire CC*,[19] where the question was whether the careless performance by a local authority of its statutory duties relating to the education and welfare of children could found an action in negligence by those children adversely affected. Lord Browne-Wilkinson found that a

17 This reluctance on the part of the courts is also clearly evident in the cases involving the allocation of health care; see pp 21–28.

18 [1978] AC 726, having first raised its head in *Home Office v Yacht* [1970] AC 1004.

19 [1995] 3 All ER 353.

common law duty of care in relation to the taking of decisions which involve policy matters *cannot* exist. However, if the complaint alleges carelessness not in the taking of a discretionary decision to do some act, but in the *practical manner* in which that act is performed, the question of whether or not there is a common law duty of care falls to be decided by the application of the usual principles of tort (foreseeability, proximity, the reasonableness of the imposition of a duty of care).

He went on to recognise, however, that the question is also *profoundly influenced* by the statutory framework within which the act complained of is carried out. A duty of care cannot be imposed if its observance would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties. As a consequence, 'the courts should be extremely reluctant to impose a common law duty of care in the exercise of discretionary powers or duties conferred ... for social welfare purposes'.

This really highlights the weakness in English law of the public delict;[20] individuals may suffer as a result of administrative action where no cause of action can be established. This is particularly pertinent in cases of social welfare, where the resulting harm may be both physical and psychological.

Misfeasance in public office

The actions already mentioned have involved the application of private law torts to public bodies, and it is clear that there are limitations, some inherent, some developed by the courts. There is, however, a tort peculiar to public bodies, that of misfeasance – maliciously or knowingly exceeding one's power – which may allow redress in specific circumstances. But, redress under this tort has also met with some difficulty, much of which relates to the question of whether malice is an essential ingredient, or whether mere knowledge that the power had been exceeded is sufficient for damages to lie for misfeasance.

In *Bourgoin v Minister of Agriculture*,[21] the plaintiffs were French turkey farmers who had had their import licence replaced, with the effect that the new licence prevented trade with the UK. The main question concerned a breach of EC law, but misfeasance was a subsidiary issue. On this latter question, the court held that the knowledge that you do not have the power to take a decision, and that it is reasonably foreseeable that your administrative action will damage the plaintiff, will suffice.

20 Note *O'Rourke v Camden LBC* [1997] 3 WLR 86, which confirms this. See Carnwath, 'The Thorton heresy exposed: financial remedies for breach of public duties' [1998] PL 407.

21 [1986] QB 716.

However, in *Jones v Swansea CC*,[22] the city council reversed a previous resolution allowing a change of use to premises owned by Jones. He brought an action claiming, amongst other things, misfeasance by the council. Confusingly, the court held that there was no reason why a decision taken with the intent to injure, or with knowledge that the decision was *ultra vires*, should not give rise to an action in the tort of misfeasance. But, the court then went on to state that, if malice had been established on the part of the council, the plaintiff would have good cause. On the facts of this case, no malice had been shown. So, it seemed that, from *Jones*, malice was required to establish the tort of misfeasance in public office.

More recently, in *Three Rivers DC v Bank of England (No 3)*, the requirements for misfeasance were discussed at length.[23] The plaintiffs were depositors in BCCI, an investment bank licensed by the Bank of England (BE), who had lost their entire deposit when BCCI failed and went into liquidation. They brought an action against BE for damages, claiming that BE was liable for misfeasance in public office in the performance of its duties to supervise banking operations in the UK. It was alleged that BE had either wrongly granted a licence to BCCI or had wrongly failed to revoke it. The plaintiffs contended that, for misfeasance, it was sufficient to show that BE knew it was acting unlawfully or was reckless as to whether it was so acting.

It was held that the tort of misfeasance in public office required the deliberate and dishonest wrongful abuse of powers and could be established in two ways:

(a) where a public officer performed or omitted to perform an act with the object of injuring the plaintiff (targeted malice); or

(b) where he performed an act which he knew he had no power to perform and which he knew would injure the plaintiff.

Accordingly, malice and knowledge were *alternative*, not *cumulative*.

The *Francovich* principle, subsequent cases and damages

The effect of EC law and, in particular, the decision in *Francovich v Italy*[24] in this area needs to be recognised as, in some circumstances, an individual may be able to claim redress by relying on Community law.[25]

Initially, where citizens had suffered damage from the non-implementation of EC directives by Member States, not only did they not get

22 [1990] 3 All ER 737.

23 [1996] 3 All ER 558. See, also, Hadjiemmanuil, 'Civil liability of regulatory authorities after the *Three Rivers* case' [1997] PL 32.

24 [1992] IRLR 84; [1993] 2 CMLR 66.

25 See Gordon and Miskin, 'European damages' (1996) 146 NLJ 1055; and see, further, Steiner and Woods, *Textbook on EC Law*, 1998, pp 61–69.

the rights given them by directives, there was also no redress available against national authorities. However, the ECJ sought to resolve this injustice, and the right to sue for non-implementation of a directive, where it was held to be directly effective, soon became firmly established in ECJ jurisprudence.[26] The doctrine of direct effect went some way towards solving the problem, but it did not deal with the situation where the directive was *not* directly effective. There were also problems in obtaining compensation, particularly in relation to the question of whether EC law or national law should lay down the principles under which compensation should be provided.

The situation in *Francovich* was a particularly plain example of the hardship individuals can suffer as a result of a Member State's failure to comply with Community law. The principle established in the case has offered the opportunity to individuals to gain compensation from their national government if it has failed to implement a European directive within the time specified.

The innovation introduced by the ECJ in *Francovich* is that, if an individual has suffered through a breach of EC law, then it is up to the Member State to make good the damage. The case itself concerned the non-implementation by the Italian Government of a directive which was designed to safeguard employees in circumstances where the company they work for becomes insolvent. In *Francovich*, the employee applicants' salaries had consequently been left unpaid and they sought damages from the Italian Government. The right to relief was not based on the principle of direct effect, for the relevant directive was held not to be directly effective, but on liability arising from the failure of a Member State to carry out its treaty obligations.

As a result of *Francovich*, payment of compensation depends on the fulfilment of three conditions:

(a) the result set out in the directive must involve the grant of rights to individuals;

(b) the content of those rights must be identifiable from the provisions contained in the directive; and

(c) there must be a demonstrable causal link between the breach of obligation by the Member State and the damage suffered by the individual.

However, there was one difficulty. Because there was no relevant Community legislation, the ECJ left it to domestic law on liability to govern the basis on which damages should be assessed and awarded, with the proviso that national conditions should not be any less favourable than those relating to similar domestic claims, nor framed in such a way as to make it difficult for compensation to be obtained.

26 See *Van Gend en Loos v Nederlandes Administratie der Belastingen* [1963] ECR 1 and subsequent cases, and the requirements that must be satisfied to establish direct effectiveness.

The result of *Francovich* immediately highlighted a problem in English law, as the concept of suing the State for failure to legislate, or unlawfully or negligently legislating, was unknown.[27] The position was that in *Bourgoin*, the court had held that the government was not liable either under English or Community law to compensate individuals for loss suffered as a result of acts, found by the ECJ to be contrary to Community law, *unless* the minister had acted in the knowledge that the act in question was invalid and with the intention or knowledge that it would injure the applicant – in other words, unless it could be shown that liability for misfeasance had been incurred. The mere breach of a treaty obligation was considered insufficient to found damages; there had to be something more.

This issue has now been rectified in *Brasserie du Pecheur*, which was joined with *Ex p Factortame*[28] and which also broadened further liability for damages. The issue here was not whether damages were payable for failure to comply with a directive, but whether they were available where *the national law* in each case had been found by the ECJ to be *in breach* of Community law. The ECJ held that its judgment, that there had been *an infringement of Community law*, was *alone sufficient* to found an action in damages. It follows that, in English law, it would be unlawful to make the right to recover dependent on establishing a duty of care or misfeasance.

The *Brasserie* principle has since been applied in *R v MAFF ex p Hedley Lomas*[29] where, in breach of EC law, the applicants were refused a licence to export sheep to Spain. It could be argued that the decisions in these cases perhaps indicate an increasing impatience of the ECJ with the pace and weakness of enforcement of EC law by Member States and the inadequacies of existing systems of national remedies for the purpose.

JUDICIAL REVIEW IN EC LAW[30]

As in England and other Member States, Community agencies have only limited powers of rule making and individual decision. The treaties serve as constitutional documents to define those powers and the jurisdiction of the ECJ in reviewing the lawful exercise of such powers.

27 Although it is arguable that it is possible to draw an analogy with breach of statutory duty.

28 [1996] 2 WLR 506.

29 [1996] All ER 497.

30 The Treaty of Amsterdam 1997 (not yet ratified at the time of writing) has renumbered most of the Articles of the EC Treaty. These are referred to in brackets throughout the text.

Challenging community acts/rules/laws

Thus, the law making institutions of the Community, like our own government, are obliged to act within the law (within the limits of the powers conferred on them). A coherent system of legal protection requires that the acts and omissions of Community institutions can be challenged for their legality by those persons on whom Community obligations are imposed. There are a number of ways in which this can be done.

First, Community acts may be challenged *indirectly*:

(a) under Art 177 (234) in a reference from national courts for a ruling on the *validity* of Community law; or

(b) in an action for damages which may put in issue the legality of a measure alleged to have injured the applicant. In practice, actions for damages have frequently led the ECJ to examine the legality of Community legislation.

Secondly, the EC Treaty provides for a *direct* route to judicial review before the ECJ under Art 173 (230) – *an action for annulment*, supplemented by Art 184 (241) – *plea of illegality* and Art 175 (232) – *an action for failure to act*.

The indirect route

As well as providing for rulings of interpretation of Community law, Art 177 (234) provides for preliminary rulings from the ECJ on the validity of acts of the EC institutions and the European Central Bank, on request from national courts or tribunals. Any binding act – regulation, directive, decision – may be challenged. (Treaty provisions cannot be challenged.)

Provided the individual has a genuine claim and standing to bring an action under domestic law, and proceedings are brought within the limitation period appropriate to the domestic action, he may challenge the validity of the Community law on which the domestic action is based, *whatever its nature* (consequently a legislative or administrative action may be challenged) and regardless of the date of its coming into force.

This is wider in its scope than is direct action under Art 173 (230) (which, as you will see, is quite restrictive) and has consequently assisted individuals where Art 173 (230) has failed. In seeking a ruling on the validity of a community measure, the national court has to set out the reasons for which it is alleged that the measure is invalid.

However, there is a general presumption that the provisions of community law are valid and rulings on invalidity are much less frequent than rulings on interpretation. In other words, Community law is often obscure, but is seldom invalid. Where the ECJ does rule that a measure is valid or invalid, the ruling is binding on the referring court. When ruling a measure invalid, the ECJ has treated it as being void for *all.* This differs from a

decision under Art 184 (241), which merely declares the measure to be inapplicable in the *instant* case. However, the Court may decide to limit any retrospective effect of its ruling in order to leave any previous transactions unaffected.

The direct route

The *direct* route to judicial review of community acts and omissions before the ECJ is provided by Arts 173 (230) and 175 (232). The rules for standing under Art 173 and 175 are very restrictive for individuals, but where an applicant is held to have standing, he may not be permitted to challenge under Art 177 (234). The issues of standing in EC law are dealt with later.

Art 184 (241) (plea of illegality) can only be invoked before the ECJ and is essentially a complementary remedy to Art 173 (230). A close parallel in English procedure is where a challenge is raised collaterally to the validity of a statutory instrument or bylaw in a prosecution for its infringement. Art 184 (241) may be used even after the lapse of the time limit imposed by Art 173 (230). On a strict reading of Art 184 (241), it would seem to lie only against a regulation, but the Court has held that it may be invoked to challenge *any* general act which has binding force.

Under Art 215 (288), it may also be possible to challenge the validity of a Community regulation by bringing an action for damages for 'normative injustice' where there is a sufficiently flagrant breach of a superior rule of law protecting individuals. Normative, here, just means an act laying down a rule, as opposed to an individual decision.

However, just as in our own domestic courts, as regards liability of public bodies, it is extremely difficult to obtain damages from the Community for losses, even significant losses, resulting from unlawful legislative acts. The Court has held that, where the Community institution is charged with wide power to legislate on matters involving choices in policy, it would not be liable, unless it had 'manifestly and gravely disregarded the limits on the exercise of its power'.

Grounds for review

Broadly, in English law, the grounds for review are substantive and procedural *ultra vires.* However, the *ultra vires* doctrine is employed in many subcategories, or principles, which are derived from the traditional grounds enumerated by Lord Green in *Wednesbury* or Lord Diplock in the *GCHQ* case. All these will be examined in detail in later chapters.

In EC law, there are *four* basic grounds on which an act or decision of an EC institution may be annulled. These apply to both direct and indirect

actions, and have some counterpart or echo in English law, though in a much less developed state. The grounds are:

(a) lack of competence;

(b) infringement of an essential procedural requirement;

(c) infringement of the EC Treaty or any rule of law relating to its application;

(d) misuse of powers.

The lines between these four grounds are fluid, and one or more may be pleaded in the alternative or in combination. In fact, the European Court rarely examines grounds precisely and is often vague as to which ground forms the basis of a judgment. It is wise for an applicant to plead as many of the grounds as seem appropriate. Although drawn for the most part from French and German administrative law, no reliance should be placed on national interpretations or usage, as they are not necessarily applied in the same way. This would remove the flexibility and breadth of interpretation given by the ECJ. In practice, reliance is placed on all available legal authorities.

Lack of competence

This is equivalent to the English doctrine of substantive *ultra vires* – that the institutions of the EC have acted outside the powers granted to them under the treaties or under secondary legislation. The legal basis for all EC acts is documented in the preamble to legislation. Since there may be some overlap between different treaty provisions, with different procedural requirements, the Commission's choice of legal base can be crucial and is not infrequently challenged. However, since areas of Community competence and the scope of the Commission's powers cannot be precisely defined, the Court allows some leeway on these matters and challenges are rarely successful.

Infringement of a procedural requirement

This is roughly equivalent to the English doctrine of procedural *ultra vires,* but is more stringently applied than in the UK courts. Procedural infringements are commonly invoked and it is then for the ECJ to decide whether the infringement is an essential requirement. Cases basically fall into two categories: the requirement to give reasons, and the requirement to consult.

Article 190 (253) of the EC Treaty requires that all secondary legislation must state the reasons on which it is based and must refer to the proposals and opinions required to be obtained. The ECJ has held that, to enable it to exercise its powers of review, reasons must not be too vague or inconsistent, they must be coherent, and they must mention the essential figures and facts on which they rely. However, the Court will not annul on this ground unless

the applicant can show that the result would have been different if it had not been for the defect of reasons given.

Failure to consult adequately will render an act liable to annulment.

Infringement of the Treaty or any rule of law relating to its application

This is the most important ground for review. It is extremely wide, and has been liberally construed by the ECJ. In practice, it is pleaded in nearly all annulment actions. It is under this ground that the *general principles of law* (see below, pp 123–27) which underpin the EC legal order, and against which the legality of all EC institution acts must be measured, have been developed. These principles have been drawn from the various national administrative and constitutional laws and constitute the developing system of European law. They are what may be termed the general concepts of legality and cover the general requirements of due process – good faith and fairness – and other concepts such as proportionality, legitimate expectation, equality, legal certainty and principles of human rights.[31]

Misuse of power

This was derived from French administrative law, and roughly means the use of power for purposes other than those for which it was granted. It is a difficult ground to establish and its use has generally been taken over by the third ground, namely, *infringement of the Treaty or any rule relating to its application*.

THE GENERAL PRINCIPLES OF COMMUNITY LAW: THE JURISPRUDENTIAL POLICY OF THE ECJ

The general principles of Community law as applied by the ECJ (and the Court of First Instance) are an important source of Community law. They stem from the legal systems of Member States and impose significant limitations on the discretion of Community institutions. Failure to observe a general principle is a ground for the annulment of a Community act and may also lead to an action for damages. In addition, the general principles of law bind Member States. A national measure which implements a provision of Community law may be struck down on the ground that it runs counter to a

31 See, also, the discussion on the European Ombudsman above, Chapter 3.

general principle of law. Furthermore, the ECJ uses the general principles of law as an aid to interpretation.

Here, we briefly discuss some of the more important principles: human rights, legal certainty, legitimate expectations, equality, and proportionality.

Human rights

The Treaty of Rome itself makes no provision for human rights to be protected under Community law, but the ECJ has held that they are to form an integral part of the Community legal order. The adoption of this doctrine was as much a matter of expediency as conviction,[32] prompted by the desire to persuade the German courts to accept the supremacy of Community law. The ECJ, however, has made it clear that it will annul any provision of Community law which it considers to be contrary to human rights.

The first case in which the Court recognised the importance of fundamental human rights was *Staunder v City of Ulm*,[33] but the concept has been expanded in a number of subsequent cases. In *Nold v Commission*,[34] the ECJ stated:

> ... fundamental rights form an integral part of the general principles of law, the observance of which [the ECJ] ensures.
>
> In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot, therefore, uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States.
>
> Similarly, international treaties for the protection of human rights on which Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

As would be expected, the most important treaty in this respect is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The ECJ has made reference to the ECHR a number of times, but it is now undoubtedly part of Community law through Art F(2) of the Treaty on European Union (Maastricht) (now Art 6), which states that the Union:

> ... shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

32 Hartley, *The Foundations of European Community Law*, 1998, pp 140–49.

33 [1969] ECR 419.

34 [1974] ECR 491.

The ECJ has also referred to the European Social Charter 1961 and Convention 111 of the International Labour Organisation 1958.

As regards Member States, rather than Community institutions; first, they are indirectly bound by the Community concept of human rights whenever it is used to interpret provisions in the Community treaties or legislation. Secondly, any derogations from Community provisions allowed on the grounds of public policy must not violate the Community concept of human rights. Third, when Member States implement Community acts, they are bound by human rights as understood in Community law. The ECJ has also implied that national courts will be obliged to strike down, or not apply, national legislation which fails to meet this test.

However, in areas *outside* the scope of Community law, Member States are not bound by the Community concept of human rights.

Legal certainty

The principle of legal certainty requires that the effect of Community legislation must be clear and predictable for those who are subject to it. Whilst legal certainty is recognised by most legal systems, it plays a much more concrete role in Community law and has a number of subforms, the most important being non-retroactivity and legitimate expectations.

Non-retroactivity covers both completed acts (true retroactivity)and pending ones (quasi-retroactivity). For example, suppose a new regulation imposes increased customs duty on imported goods. If the increased level of duty applies to goods which were already imported before the new regulation was made, this is a case of true retroactivity. If, however, the increased duty applies only to goods imported after the new regulation was passed, but this includes those transactions to which the importer was legally committed before the regulation was made, this is a case of quasi-retroactivity. In both these circumstances, it could be argued that the action of the public authority is unacceptable, unless there are special circumstances.

There is a *rule of interpretation* that, in the absence of a clear provision, legislation is presumed not to be retroactive. In addition, there is a substantive rule that *prohibits retroactivity in general*, but allows exceptions where the purpose of the measure could not otherwise be achieved, provided the legitimate expectations of those affected have been duly respected.

Legitimate expectations

This principle is closely allied to that of legal certainty and requires that Community measures (in the absence of an overriding matter of public interest) do not violate the legitimate expectations of those concerned.

Legitimate expectation is the basis of a rule of interpretation as well as a ground for annulment of a Community measure. However, it is most frequently used as the basis of an action in damages for non-contractual liability (tort).

In deciding what constitutes a legitimate expectation, the ECJ takes a number of factors into account. First, the expectation must be reasonable; the standard used is that of the prudent person with regard to all the circumstances. The applicant must also not have been trying to take advantage of any weakness in the Community system or exploit the situation. (This is similar to the requirement in English equity law that the plaintiff must come to court with 'clean hands'.)

Equality

Although certain provisions of the treaties provide for the principle of equal treatment, for example, prohibition of discrimination on the grounds of nationality or gender, the ECJ has gone beyond these and held that the principle of equality is a general principle of law which precludes comparable situations from being treated differently unless the difference in treatment is objectively justified. In other words, there must be no arbitrary distinctions, either overt or covert, between different groups within the Community.

Proportionality

The principle requires that action taken by the Community must be proportionate to its objectives. In other words, a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure. This requires that there should be a reasonable relationship between the end and the means, and it is to some extent analogous to the English concept of reasonableness. The extent to which proportionality is currently recognised as a ground for review in UK law is discussed below, Chapter 7.

Although first incorporated into Community law by the ECJ, the principle of proportionality has now been embodied in the treaties by the Maastricht agreement. Article 3b (Art 5) states:

> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

While this goes no further than the established case law of the ECJ, it emphasises the importance attached to the principle by Member States. The Court will have recourse to the principle not only in order to determine the validity of Community acts, but also in order to assess the compatibility of measures taken by Member States with Community law. It is of particular

importance in regard to economic law, since this frequently involves taxes, levies, charges or duties. In the *Skimmed Milk Powder* case,[35] the Council had sought to reduce the surplus of skimmed milk powder in the Community by forcing animal feed producers to incorporate it in their product in place of the normal soya. The drawback was that the powder was three times more expensive than soya. In consequence, the ECJ held that the regulation embodying the scheme was invalid, partly because it was discriminatory, partly because it was against the principle of proportionality; the imposition of the obligation to purchase the skimmed milk powder was not necessary in order to reduce the surplus.

As Hartley notes,[36] one of the most striking points about the doctrine of proportionality is that it leaves a great deal of discretion to the Court, enabling it not only to exercise control of the legality of a measure, but also to some extent control of its merits. The ECJ does not, however, generally interfere unless there is a clear and obvious breach of the principle, but it is not always easy to predict when the Court will consider that point has been reached.

35 *Bela-Muhle Josef Bergman v Grows-Farm* [1977] ECR 1211.

36 *Op cit*, Hartley fn 32, p 156.

CHAPTER 6

CONSTRAINTS ON JUDICIAL REVIEW: THE OBSTACLE COURSE

THE PUBLIC/PRIVATE ISSUE[1]

When Ord 53 was first formulated, it was thought that declaration and injunction would still be available against a decision of a public body by way of an ordinary action. In fact the Law Commission had recommended that the new application for judicial review (AJR) procedure *should not* be the only way in which issues relating to public bodies should come to court. They considered that, where alternative procedures existed, they should remain available. However, the wording of the Supreme Court Act 1981 differs slightly from that of Ord 53 and this gave rise initially to some confusion as to whether injunction and declaration could still be sought by ordinary action in situations in which there was a public law element to the case.

Section 31(2) of the Supreme Court Act states that the AJR procedure *shall* be used for seeking a declaration and injunction in any case where an application for judicial review seeking that relief has been made. Order 53 is less directive and uses the word 'may' rather than 'shall'. Compared to judicial review, an ordinary action carries with it certain advantages, particularly for the plaintiff, in that the application is not heard *ex parte* and so requires a response from the other party. Furthermore discovery of documents and cross-examination are more or less automatic and the time limits in which to bring an action are considerably longer.

The culmination of the uncertainty invoked about the interpretation of s 31 of the Supreme Court Act came in the case of *O'Reilly v Mackman*,[2] which purported to restrict the circumstances in which declaration and injunction could be sought outside s 31; that is, by means other than an AJR in a public law case.

O'Reilly v Mackman

The case arose out of prison riots in Hull. Prisoners who had lost remission as a result of their involvement in the disturbances claimed that a hearing before the Board of Visitors had breached the rules of natural justice and sought a declaration that the loss of remission was unlawful. The plaintiff proceeded by

1 See, generally, Emery, 'Public law or private law? The limits of procedural reform' [1995] PL 450; and McHarg, 'Regulation as a private law function?' [1995] PL 539.

2 [1982] 3 All ER 1123.

way of writ (ordinary action), but the House of Lords held that this was an abuse of process and that the proper way to proceed was by way of Ord 53 and that was to be the *general rule with only limited exceptions*.

The reasoning was as follows. Before the reforms to judicial review, in 1977, there had been a number of limitations to which the prerogative orders had been subject. As we have mentioned above, neither discovery nor damages were available, and cross-examination was rare. In the face of these restrictions, in the interests of justice, the courts could allow alternative procedures to be used. But the court now reasoned that these restrictive factors had been removed by the reforms and the issue of damages, etc, were now squarely within the court's discretion. The use of an ordinary action in public law cases could therefore no longer be justified.

In addition, the reformed procedure provided important safeguards for public authorities. The requirement for leave to apply for judicial review and the short time limits for making an application meant that public bodies were not to be kept unduly in suspense as to whether their decisions or actions were valid or not. The court in *O'Reilly* concluded that it would be contrary to public policy and, as such, an abuse of process to permit anyone seeking to establish a public law right to proceed by way of an ordinary action.

There could, however, be three exceptions to this general rule:

(a) *collateral issues*: the infringement of a right arising from private law;

(b) *consent*, where neither party objected to relief being sought outside Ord 53;

(c) *other exceptions* that might exist and were to be decided on a case by case basis.

Following *O'Reilly*, it appeared that we were left with strict time limits and an apparent loss of the right to sue public authorities in the local county courts in many instances. This was unfortunate, because judicial review is a relatively expensive and complex process.

The *O'Reilly* judgment left two main problems for subsequent litigants. First, what are the other exceptions alluded to in the case likely to be? Secondly, and more fundamentally, just what is a public law case? Where is the public/private law division? As you will be aware, there has been a considerable blurring of the public/private divide in the modern State, which has become even more pronounced with recent developments in privatisation, contracting out, market testing and the like.

The question of whether or not a body is a public one, and whether public law rights are involved, can only be dealt with rationally on the basis of *substantive* principles and a realisation that there is no strict public/private division in the modern State. There is no simple test for deciding whether an institution is a public one or not and there is no simple test for deciding in which situation public law rights as opposed to private law rights should be invoked.

How have the courts dealt with this problem and the after effects of the judgment in *O'Reilly*? In *Davy v Spelthorne*,[3] Lord Wilberforce admitted that a major difficulty was that there was no comprehensive definition of a public law matter. In October 1980, Spelthorne Borough Council (SBC) served an enforcement notice which required Davy to stop using his land for the manufacture of concrete products and to remove all buildings and machinery within three years. Prior to this, Davy had come to an agreement with SBC that he would not appeal against such a notice if the council refrained from enforcing it for a period of three years. Thus, the notice to quit was, in fact, valid.

Accordingly, in line with the agreement, Davy did not appeal and the time for doing so expired. However, in 1982, presumably regretting the agreement, Davy issued a writ against SBC for a declaration that the agreement was *ultra vires* and also claiming damages for negligent advice. Following *O'Reilly*, SBC claimed that this was an abuse of process – where there was an issue between a public body and a citizen which involved a challenge to a public notice or order, Ord 53 should be used. The House of Lords, whilst accepting for the most part the interpretation in *O'Reilly* that Ord 53 should be the normal procedure in such cases, held that the matter here could not be classified as a public law issue.

It was held that, in this case, Davy was not challenging the validity of the enforcement notice, but his inability to appeal against it, because the time for doing so had expired. The public law element of the case was not a 'live issue' and Ord 53 was therefore inappropriate. The way to proceed was by ordinary writ for negligent advice.

Lord Wilberforce appeared to cut back *O'Reilly* arguing that, *prima facie*, an applicant can choose which procedure to adopt, the onus being on the defendant to show that the plaintiff is abusing procedures by seeking to circumvent the safeguards of Ord 53. This is quite different from saying that Ord 53 should normally be used in a public law matter.

He also noted:

> Before the expression 'public law' can be used to deny a subject a right of action in the court of his choice, it must be related to a positive prescription of law by statute or statutory rules. We have not yet reached the point at which the mere characterisation of a claim in public law is sufficient to exclude it from consideration in the ordinary courts; to permit this would be to create a dual system of law with the rigidity and procedural hardships for the plaintiffs which it was the purpose of the recent reforms to remove.

A leading case in this area, which raised the question of under what circumstances an organisation or body might be regarded as a public one or not, is *Ex p Datafin*.[4]

3 *Davy v Spelthorne Borough Council* [1983] 3 All ER 278; and see [1984] PL 16, 16–22.

4 *R v Panel on Takeovers ex p Datafin* [1987] 2 WLR 699.

Datafin plc had been bidding in competition with a company called Norton to take over a third company. Datafin complained to the Takeover Panel that some of Norton's actions were in breach of the City code on takeovers. But, the Takeover Panel dismissed these complaints. Datafin consequently applied for judicial review, seeking an order of certiorari to quash the decision of the Takeover Panel and an order of mandamus to compel them to reconsider the complaint. At first instance, this was refused, but the Court of Appeal granted leave in order to consider the substantive application and the question of jurisdiction, that is, whether the decision of the Takeover Panel was susceptible to judicial review.

The Panel argued that it was part of a system of self-regulation and derived its powers solely from the consent of those whom its decisions affected. It was, in effect, purporting to be a voluntary, supervisory body operating within private contract law. The court held that it was in fact operating as an integral part of the governmental framework for the regulation of financial activity in the City of London and that it was *supported by a periphery of statutory powers and penalties* and was under a duty to exercise what amounted to *public powers to act judicially*. The court, therefore, had jurisdiction to review the Panel's decisions. However, the court adopted a restrictive approach to the substantive issue. On the particular facts of the case it was held that there were no grounds for interfering with the Takeover Panel's decision and the substantive application was dismissed. By making the Takeover Panel publicly accountable, the court was able to protect both the autonomy of Panel's decision making and the integrity of the scheme.

An important point here is that the court indicated that the only essential element necessary for the court to review was a public law element, and *this could take many forms*. In this case, the Takeover Panel was operating wholly within the public domain, incorporating City institutions and customs into its own regulatory framework. The reasoning underpinning the judgments was that susceptibility to public law remedies should be governed by reference to the nature of the *functions* being exercised by the decision maker, rather than solely by reference to the *source* of its power. Although *Datafin* was hailed as a ground breaking case, which opened the prospect of an expansion of judicial review in terms of those bodies which might be susceptible to it, it has been narrowed to some extent in subsequent cases, possibly fuelled by pragmatic judicial concern for the impact on the courts or a perception that all power is not public power.[5]

In *R v Chief Rabbi ex p Wachmann*,[6] the court vacillated between source and power – uncertain which test to apply, asserting that, in order to attract the court's supervisory jurisdiction, there must be not merely a public, but potentially a government interest in the decision making power in question.

5 Craig, *Administrative Law*, 1994.

6 [1992] 1 WLR 1036.

This line of argument was followed in *Ex p Aga Khan*,[7] where the Jockey Club had disqualified the Aga Khan's horse from racing and fined the horse trainer. The court held that the Jockey Club was not a body established by statute and disciplinary control was exercised by the agreement of the members to be bound. The court tightened further the ambit of the 'public' function requirement endorsed in *Datafin* to a more specific 'governmental' requirement. The Jockey Club fell outside the jurisdiction of the court and was not susceptible to judicial review, because it was not woven into any system of 'governmental' control. Against this background, *R v Insurance Ombudsman Bureau ex p Aegon Life Assurance*[8] came before the Divisional Court.

The Insurance Ombudsman Bureau was set up in 1981 to resolve complaints made against members of the scheme by the public. The source of its power was contractual. However, when the Financial Services Act 1986 came into force, the Bureau was recognised by the self-regulating authority, Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), as performing a complaints investigation function under the Act. In March 1993, as a result of complaints, the Insurance Ombudsman made 23 awards against one of the members of the scheme, Aegon Life Assurance. Aegon sought judicial review of the awards. However, it was held that the Insurance Ombudsman Bureau was not a public body for the purposes of Ord 53 and was consequently not amenable to judicial review.

In *Aegon*, the court's finding on the public law issue appears to represent a return to a restrictive approach to judicial review jurisdiction and a rejection of the Court of Appeal's decision in *Datafin*. In *Datafin*, the Takeover Panel, supported by a periphery of statutory powers and duties, was considered to be exercising a public function. The argument put by the court was similar to the response of the European Court of Justice in *Foster v British Gas*.[9]

In *Datafin*, the court's judgment reflected the constitutional reality that there is no clear dividing line between the public and private sphere in the modern State and indicated an understanding that, where self-regulatory institutions are preferred to regulation by governmental bodies, that factor should not, of itself, take them outside the reach of judicial review.

The *Aegon* decision has been subject to some criticism. The Ombudsman Bureau was a body performing functions which, although contractual in source, could be argued to be governmental in nature, that is, woven into a system of governmental control. While there are plausible arguments for some limit on the extent of judicial review for instrumental and efficiency reasons, it is arguable that the court in *Aegon* drew the line in the wrong place. From the judgment in *Aegon*, it is difficult to see in what circumstances an institution

7 *R v Disciplinary Committee of the Jockey Club ex p the Aga Khan* [1993] 2 All ER 853.

8 *R v Insurance Ombudsman Bureau ex p Aegon Life Assurance Ltd* (1994) *The Times*, 7 January.

9 [1990] ECR I-3313.

deriving its powers from contract, however 'public' its functions, will be amenable to judicial review.[10]

Most influentially, Lord Woolf has argued that, as:

> ... a matter of principle, the present approach of the authorities to religious and sporting activities and 'private' ombudsmen appears questionable. The controlling bodies of sport and religious authorities can exercise monopolistic powers, and the ombudsman is administering a system which provides an alternative method of resolving disputes to that provided by the courts. How then, as a last resort, can the courts be justifiably excluded?[11]

He argued that, as the boundary between public and private was indistinct and evolving, it should be *the nature of the activity* and not *the nature of the body* which should be the decisive factor in deciding whether those who would be affected should have the protection of public law; in effect, a return to the approach in *Datafin*. Lord Woolf's test would be twofold. An issue would be subject to public law if:

(a) it is one about which the public has a legitimate concern as to its outcome; and

(b) it is not an issue which is already satisfactorily protected by private law.

This seems a preferable approach, although much depends on how the first factor is defined. What is needed is a recognition that constitutional theory lies at the heart of public law jurisdiction and that principles derived from it should inform decisions as to where the boundaries lie in granting access to public law remedies and imposing public law control on particular bodies. As Cranston has pointed out, virtually no consideration has been given as to why the exercise of 'other' power in society should not be subject to review, given that its effects for individuals may have results comparable to that of public power.[12] Yet, the way in which such bodies perform their functions, and the way in which their terms of reference are framed and developed are a matter of concern for the administration of justice. In the event of such a body acting irrationally in their decision making, or flagrantly abusing the principles of natural justice, is it right that there should be no legal challenge?

Questions of a public law 'element'

It is possible that, although the body before the court is a public one, the issue may not be classed as one of public law. The question then arises as to what amounts to a public law issue? What is the nature of a public law element?

10 Gordon and Grodzinski, 'Insuring against judicial review' (1994) 144 NLJ 98.

11 Woolf, '*Droit public* – English style' [1995] PL 57.

12 Cranston, 'Reviewing judicial review', in Richardson and Genn (eds), *Administrative Law and Government Action*, 1994.

Much of the debate in this area has, at its centre, the use of contract in one form or another by the public body.

The difficulties are clearly illustrated in *Ex p Hibbitt*,[13] where it was held that the decision of the Lord Chancellor to award a contract for shorthand reporting of court proceedings to a new firm and not to Hibbitt, which had had the benefit of the contract for over 80 years, was not subject to judicial review. The court reasoned that there was no public law element in what was essentially a contractual decision. This was held to be the case, even though the Lord Chancellor had acted unfairly. Notwithstanding that it had been stated that tenderers for the contract would not be allowed to submit reduced bids, the four lowest, of which Hibbitt was not one, had been invited to do so. The court stated that judicial review was appropriate only where decisions are in some way underpinned by, or involve, some other sufficiently public law element, for which there is no universal test.

But, where a public body exercises power which affects the public interest or the rights or interests of individuals or organisations, ought this not to be subject to review of *how* the power is exercised? The court, in this case, failed to equate tendering conditions with a statement of policy. Therefore, legitimate expectations could not be relied on, as had been the case in *Ex p Khan*.[14] Yet, in *R v Enfield LBC ex p Unwin*,[15] judicial review and the principle of natural justice were held to apply to the removal of a contractor from a local authority approved list.

These cases raise important issues about tendering and the procurement process and the rationale of judicial review. However, the principles of judicial review have not been consistently applied to the exercise of contractual functions by public bodies. This is, in part, due to the absence of any concept of a 'public law contract' in English law.[16]

Hibbitt was distinguished in *R v Legal Aid Board ex p Donn and Co*.[17] The applicants, a firm of solicitors, had submitted a tender to the Legal Aid Board for a contract to represent plaintiffs in a multiparty action against the Ministry of Defence for damages arising from the Gulf War. The tender was refused and *Donn* sought judicial review, contending that there had been a procedural irregularity and want of natural justice in the decision making process. It was argued by the respondents, relying on *Hibbitt*, that there was an insufficient public law element – that the public importance of the work did not necessarily make the matter one of public law.

13 *R v Lord Chancellor ex p Hibbitt* (1993) *The Times*, 12 March. See Oliver, 'Judicial review and the shorthand writers' [1993] PL 214 and Blake, 'Access to justice: the public law element' [1997] PL 215.

14 See below, Chapter 7.

15 (1993) *The Times,* 16 February.

16 See Harden, *The Contracting State*, 1992.

17 [1996] 3 All ER 1.

The court stated that it was common ground that there was no universal test in answer to the issue of a sufficient public law element. It was a matter of overall impression and one of degree. It was held that, in this case, there was a vital public interest in the procedurally regular and fair conduct of the selection process. This requirement brought the process within the ambit of public law, given the purpose for which the Board was empowered to act and the consequences of their decision making process.

In *R v Walsall MBC ex p Yapp*,[18] the employees of the Building Works Division of the council sought judicial review of a resolution of the council to seek fresh tenders for the building works which had already been awarded to the council's own workforce following compulsory competitive tendering (CCT). The council objected that there was no public law element and that this was an abuse of process.

The Court of Appeal held that it was probable that the statutory obligation to use CCT imported a sufficient public law element, but that the applicants were not entitled to expect or assume as a matter of public law that the council was committed, as if by contract, to give all specified types of work to the Building Works Division.

Consider, now, *Mercury Communications*.[19] Mercury challenged a decision of the Director General of Telecommunications (DG) by way of ordinary action. British Telecom (BT) and the DG contended that determinations of the DG were governed solely by public law and could only be challenged by way of judicial review.

The House of Lords held that, in deciding whether an action was properly brought by way of private law or public law, the overriding question was whether the proceedings constituted an abuse of the process of the court, and it was particularly important to retain some flexibility as to the use of procedures. The fact that the DG held a statutory office and was performing public duties did not mean that his activities *could not fall outside* public law.

On the facts of the case it was found that the dispute arising out of the DG's determination was in substance and form a dispute about the terms of a contract between BT and Mercury, even if this were expressed in terms of a licence. The House of Lords went on to say that Ord 53 procedures were not so peculiarly suited to the dispute that it would be a misuse of process to allow it to continue under an ordinary action. The court affirmed Lord Diplock's recognition, in *O'Reilly*, that in the absence of explicit or implied provisions to the contrary, it was for the court to decide what exceptions there should be made to *O'Reilly* on a case by case basis.

The House of Lords also stated that, in the absence of a single procedure allowing all remedies – quashing, injunction and declaratory relief, and

18 (1993) *The Times*, 16 August.

19 *Mercury Communications v Director General of Telecommunications* [1996] All ER 575.

damages – some flexibility as to the use of procedures is necessary. Whilst this could arguably be taken as a recognition by the courts of the blurring of public and private under the changes to public services and utilities, unfortunately the uncertainty remains and applicants are likely to continue to be unsure as to which way to proceed.

Collateral exceptions to *O'Reilly*

In *O'Reilly*, the House of Lords held that a complainant could proceed *outside* of Ord 53, that is, by way of an ordinary action, where the claim of illegality arises incidentally or collaterally in determining some other issue, or more specifically where the action is for an infringement of a private right. Collateral challenge may be a constituent of a cause of action or may be used as a defence. The classic case is *Cooper v Wandsworth*, where the Wandsworth Board of Works demolished a house which Cooper had built. Cooper brought an ordinary action in trespass and claimed damages. The Board argued that Cooper had not given the required statutory notice of intention to build and that demolition was therefore lawful. The court held, however, that the action was unlawful because Cooper was entitled to notice of pending demolition *and* a hearing. His action in trespass was successful.

As Craig points out, the question of collateral issues is really a legal fiction, because what is central to the case is *the validity or otherwise of the action of the public body*. Only once this is determined can there be any settlement of any private rights. If an individual is claiming in trespass (as in *Cooper*), or alleging that a regulation or bylaw is invalid, the central point of the case is the decision or action of the public authority.[20] But the courts have not allowed the collateral exception with any consistency, as you can see in the cases that follow.

In *Cocks v Thanet* (1983),[21] Cocks founded his action under the Housing (Homeless Persons) Act 1977 in the county court for breach of statutory duty (a tort), which was the usual way to proceed in such cases. Under the Act, a local authority has a duty to inquire whether a person whom they believe to be homeless, or who might be made homeless, has a priority need and whether they are intentionally homeless. Depending on the outcome of their inquiries, the local authority then has either to give advice or provide temporary or permanent accommodation.

The court held that the duty to make inquiries was a public law matter and this was a condition precedent *prior* to the establishment of any private law right. As such, any alleged breach was to be decided under Ord 53. On

20 *Op cit*, Craig, fn 5, p 561, and Craig, '*Ultra vires* and the foundations of judicial review' (1998) 57 CLJ 63.

21 *Cocks v Thanet DC* [1982] 3 All ER 1135.

the face of it, this looks similar to the situation in *Cooper*. Both plaintiffs were challenging the exercise of discretion by way of tort. *Cocks* looks like a collateral challenge, but the court held that this was not so. What the court was really concerned with, but did not articulate, was to discourage applicants from challenging decisions made under the 1977 Act. This concern was brought more fully to light in *Puhlhofer* in 1986.[22]

Puhlhofer applied for judicial review of a decision of Hillingdon Council that his family were not homeless, thus there was no requirement for the Council to take any action. He argued that their accommodation was inadequate. The family had two children and were living in a single room with no washing or cooking facilities. Puhlhofer argued that this did not qualify as housing under the Housing (Homeless Persons) Act. The House of Lords held that the Act did not *qualify* accommodation with words such as reasonable or adequate, therefore whether the claimant was homeless or not was a question of fact for the local authority to decide, not the court. The House of Lords added that great restraint should be exercised when giving leave to proceed by judicial review:

> Where the existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision to the public body to whom Parliament has entrusted it save in cases where it is clear the public authority is acting perversely.

So, in effect, the court is saying that, in these cases, the applicant has the burden of showing that something exceptional has gone wrong.

Inconsistencies were also evident in *Wandsworth v Winder*.[23] Winder was a council tenant who was in arrears with the rent payments as he refused to pay increases imposed in previous years. The council brought proceedings for possession of the flat in the county court. In defence, Winder claimed that the resolutions passed by the council to increase the rent were *ultra vires*. Relying on *O'Reilly* and *Cocks*, the council countered that this was an abuse of process and that Winder should use Ord 53.

The House of Lords held that the case was different from *O'Reilly* because the tenant had a private contractual law right and he was a defendant in proceedings. There was no abuse of process, neither was this a collateral challenge (even though it clearly looked like one). The justification given by the court was that defence was a matter of right, whereas judicial review was a matter of discretion. Order 53 could not have intended to sweep away this protection, otherwise defendants would be at a disadvantage.

22 *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484; and see [1984] PL 16.

23 [1984] 3 All ER 976.

But this case is still dependent on the validity of the local authority action.[24] If the resolution is valid, no contractual right arises. The courts display a very fine balance of conceptual reasoning. What they seem to be saying is that the basis of the dispute in *Winder* was a private law right arising out of a tenancy agreement; a right which may be varied by a public law decision. This is distinguished from *Cocks*, where the private right depended for its existence on a public law matter.

The result is that it is difficult to determine what constitutes a collateral challenge. Whether something is to be categorised as a private law right or not appears to depend on the inclination or otherwise of the court to intervene.

Winder was followed in *Roy v Kensington*.[25] Roy was a general practitioner who practised medicine in the area administered by the Kensington and Chelsea Family Practitioner Committee. Under the relevant regulations, a doctor was not eligible for the full rate of pay unless the Committee considered that a substantial amount of time was devoted to work within the National Health Service. The Committee decided that this was not the case with Roy, and reduced his practice allowance by 20%. Roy sought a declaration by way of ordinary writ. The Committee argued that this was an abuse of process and that judicial review was the appropriate procedure.

The House of Lords held that, although a matter which depended exclusively on the existence of a purely public law right should, as a general rule, be determined by judicial review, a litigant asserting entitlement to a *subsisting* private law right was not barred from seeking to establish that by ordinary action. Roy was held to have a bundle of private law rights arising from the relevant legislation. These private rights dominated the proceedings and he could continue by way of ordinary action.

We are thus left with no certainty as to how to ascertain a public law element, public law function or public institution. The *Aegon* case, along with *Mercury Communications* and other cases, have served to highlight the inadequacies of the court's traditional approach to public law and the fact that important areas of practice may be outside the scope of judicial review for mainly technical reasons. Whilst a number of cases herald a retreat from *O'Reilly*, the future of that 'grandfather of all procedural exclusivity' is a little more problematic.[26] The question remains whether the distinction between public and private law procedures,[27] public and private institutions is

24 See, now, *Boddington v British Transport Police* [1998] 2 WLR 639, where the House of Lords held that the validity of bylaws could be challenged collaterally. See, also, Forsyth, 'Collateral challenge and the foundations of judicial review: orthodoxy vindicated and procedural exclusivity rejected' [1998] PL 364.

25 *Roy v Kensington and Chelsea FPC* [1992] 1 All ER 705.

26 *Ibid*, Forsyth, fn 24, p 369.

27 Because of the difficulties, Lord Woolf has proposed the introduction of a uniform procedure for all cases: *Access to Justice*, Chapter 18.

relevant to society today. What are the fundamental principles for administrative justice and the control of regulatory power, in whatever form?

THE EFFECTS OF ALTERNATIVE STATUTORY REMEDIES

Judicial review is said to provide a remedy of last resort, but it is also the primary constitutional remedy for ensuring consistency and fairness through the whole system of inferior courts, tribunals and public bodies.[28] It is not surprising that there are possibilities for vacillation, and the tension between these two factors is readily apparent in the inconsistency of the case law, where the question has arisen of when the courts can be used instead of any designated statutory system for redress of a complaint. As a general rule, where an adequate alternative remedy has been provided by Parliament, such as appeal, applicants should normally exhaust these prior to seeking judicial review.[29] The reason for this is an indication of respect both for the sovereignty of Parliament and the specialist expertise that statutory tribunals develop in their respective areas.

But, given the lack of a common and effective pattern of alternative grievance procedures, an obligation to exhaust alternative remedies may, in itself, cause obstacles to the attainment of administrative justice for potential applicants. Consequently, the courts have retained a discretion to allow judicial review in place of other remedies, but in exercising that discretion a number of factors will be taken into account.

The courts appears to consider three main factors, whether:

(a) the alternative statutory procedure will resolve the issue fully and directly;

(b) the alternative is slower or quicker than judicial review;

(c) the matter depends on some particular or technical knowledge which might be more readily available under an alternative procedure.

The uncertainty of the application of these factors has, to some extent, also been hampered by conceptualisations pre-dating the reform of Ord 53, when the existence of alternative remedies had differing effects depending on which public law remedy was being sought. Consequently, the results of some cases appear to depend not only on statutory interpretation but, on considerations of policy, convenience and social context. Although the courts make statements of general principle, they follow this by both theoretical and practical exceptions which almost entirely undermine the general principle.

28 Wade, 'Judicial review and alternative remedies' [1997] PL 589.

29 Lord Woolf, in *Access to Justice*, July 1996, has emphasised the importance of using other remedies before judicial review.

In *R v Chief Constable of Merseyside ex p Calveley* (1986),[30] five police officers were the subject of complaints made in 1981, but were not formally notified of the commencement of disciplinary proceedings until November 1983. At the hearing, the officers argued that the delay in notification was prejudicial to a fair hearing. The Chief Constable rejected this contention and found against them. The officers appealed to the Home Secretary under the relevant statutory procedure, but simultaneously sought judicial review to quash the Chief Constable's decision.

The general principle – that internal statutory procedures had to be exhausted before other avenues of redress could be sought – was argued. As the officers had not yet done this, judicial review should not be allowed. However, the Court of Appeal held that, in exceptional circumstances, the court could use its discretion and grant judicial review of disciplinary proceedings even though the applicant had not exhausted or pursued alternative rights of appeal. The court considered the present case was sufficiently exceptional to fall within the ambit of its discretion because the substantial delay in notification of disciplinary proceedings had prejudiced a fair hearing and was an abuse of process.

Contrast this with *R v Secretary of State for the Home Dept ex p Swati*,[31] where similar arguments were made, but with different results. Swati had been refused leave to enter the UK as a visitor for one week. As her reason for refusing leave, the immigration officer had simply stated the appropriate statutory formula, without justifying it. Swati sought judicial review of the decision. There was a statutory appeal system in existence, but to use this, Swati would first be required to leave the UK. In addition, the success rate for such appeals was very low and Swati had difficulty showing a *prima facie* case of illegality because he did not know the grounds on which the decision had been taken. Swati sought judicial review, and argued that all these factors amounted to unreasonableness.

The Court of Appeal held that the immigration officer did not have to state the facts or reasons for the decision and that, in the absence of special circumstances, the appeal procedures of the Immigration Act 1971 provided the appropriate remedy. No special features distinguished this case, therefore judicial review would not be allowed. Swati was caught in a double bind; in order to raise an arguable case he had to go behind the stated reason for the decision, but the court would not let him probe any further unless he could show that he had a good case.

Wade has argued that, regardless of the provision of statutory rights of appeal, judicial review should be available where there has been procedural

30 [1986] 1 All ER 257.

31 [1987] 1 WLR 477.

ultra vires, such as bias, failure to give a hearing, or there is no evidence.[32] In such cases, as in *Swati*, where there is little information, there is possibly a considerable risk of an arbitrary decision and a greater need for review, the principle being that the superior court should always monitor the elements of fairness in line with the primary constitutional safeguard. Statutory alternative remedies, such as appeal, are arguably more suited to consideration of minor errors of law in the exercise of discretionary power, taking account of irrelevant considerations and cases where the issue is one of merits.

In *Ex p Huntingdon*,[33] the Wildlife and Countryside Act 1981[34] provided that the validity of any order could not be challenged in any legal proceedings whatsoever until the order had been confirmed, and then only within 42 days of it coming into effect. Such an order relating to a public right of way was made by Cornwall County Council, but had not been confirmed by either the Secretary of State or by an inquiry, as required by the legislation. The applicants sought judicial review to quash the order, on the grounds that Cornwall County Council had failed to comply with the proper procedures for making the order.

The Court of Appeal held that Parliament had clearly intended that the avenue for redress was that set out in Sched 15 and this was exclusive. Accordingly, the court was precluded from considering any application to quash until after the order had been confirmed. Unless and until it was confirmed, there could be no legal challenge.

The issue was not so clear cut in *Ex p Baker*,[35] where the question arose as to whether a local authority was under a duty to consult the residents of a home for the elderly which the local authority was proposing to close. An additional question was whether the availability of an alternative remedy by way of application to the Secretary of State under s 7 of the Local Authorities Social Services Act 1970 (known as a default power) precluded judicial review.

Brown LJ stated that there was doubt in the present case as to whether the duty to consult was a social services function and that this was a question of law. He went on to say that which avenue of redress is preferable will depend ultimately on which is more convenient, expeditious and effective. Where a provision to apply to a minister exists, that will generally be the better remedy, particularly where the central complaint is, in reality, about the substantive merits of the decision. Where, on the other hand, an authoritative resolution of the law is required, as in the present case, then judicial review was more appropriate.

32 *Op cit*, Wade, fn 28, p 592.

33 *R v Cornwall CC ex p Huntingdon* [1994] 1 All ER 694.

34 Para 12, Sched 15.

35 *R v Devon CC ex p Baker* [1995] 1 All ER 73.

More recently, in *Re M (A Minor)*,[36] it was held that alternative remedies must be exhausted before parties seek judicial review. M, a child born with Down's syndrome, attended a mainstream primary school with 20 hours per week welfare support. In 1995, M's educational needs were reassessed with no specific provision made for further support. In October 1995, M's parent appealed under s 170 of the Education Act 1993, seeking an amendment. In January 1996, prior to any hearing by the special educational needs tribunal, which was not due to take place until some months later, M's parents sought judicial review to secure support pending the outcome of the tribunal's decision.

The Court of Appeal held that the judicial review process should not be allowed to supplant the normal statutory appeal procedure. Where an alternative procedure provides a satisfactory remedy, the courts will insist on the exhaustion of that remedy before judicial review can be sought.

Default powers/clauses

Default clauses allow a higher authority, usually a minister, to step in if a public authority is failing to perform the duties required of them. It is a statutory remedy which enables a complaint to be made to a minister. In effect, it corresponds to the remedy of mandamus in judicial review. Default clauses exist in a whole host of areas, from education, to trade and industry and to the environment, amongst others.

The traditional view of the relationship of a default power to the availability of judicial review was set out in *Pasmore v Oswaldtwistle*.[37] The case concerned a complaint about inadequate sewers. The existence of a default clause in the Public Health Act 1875 was held to prevent recourse to any other remedy:

> ... where a specific remedy is given by statute it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by statute.

The court was stating that it had no jurisdiction to intervene. In *Southwark v Williams*,[38] there was a reiteration of this principle to a more modern situation. Here, squatters complained against a possession order made by the council, alleging that the council was in breach of its statutory duty to the homeless. The court relied on *Pasmore* and held that judicial review was inappropriate.

36 [1996] ELR 135.
37 [1898] AC 387.
38 [1971] Ch 734.

However, the courts have not always adopted this strict construction. In *Watt v Kesteven CC*,[39] an education case, it had been held at first instance that a default power was exclusive and that the statute could not have intended to give parents an alternative cause of action. But, the Court of Appeal thought differently and stated that, in certain cases, there might be a cause of action, though not in this particular case. It was stated that it was necessary to consider the duty in question, and the facts, and then decide.

Rather confusingly, in *Bradbury v Enfield*,[40] Lord Diplock stated that default clauses could only deprive a citizen of access to the courts as regards acts of *non-feasance* – failure to perform a duty. In the case of *malfeasance* – performing a duty wrongly – then there would be a remedy. This is really case of 'hair splitting' and his Lordship gave no reasons, either of precedent or principle, for drawing this distinction.

We are thus left with an uncertain application of a rule which can bring into court all kinds of arguments that the general principle was intended to avoid, and some rather perplexing and unnecessary distinctions. Exceptions are now wide enough to undermine the general principle altogether. The courts may be looking for a way to draw a distinction between individual rights and broader policy issues.[41] This is a dubious and perhaps impossible exercise and can lead to all kinds of uncertainty, if not manipulation.

STANDING

Locus standi in English law

The rules of *locus standi* or standing have to be satisfied as a prerequisite to obtaining a remedy under Ord 53. The requirement is that complainants must have 'sufficient interest' in the case before the court. The question is whether the *particular* plaintiff is entitled to bring an action. Actions in public law can have wide ranging effects, so the courts use the concept of *locus standi* to limit which interests are to be the subject of challenge, in effect *selecting those interests which the courts consider worthy of protection*.

Prior to the reforms to applications for judicial review in 1977, there was no consistency between the remedies in terms of their requirements for *locus standi*, indeed, some were particularly restrictive, others less so. This contributed to the unnecessary complexity and uncertainty for litigants which

39 [1955] 1 QB 408.

40 [1967] 1 WLR 1311.

41 See *Ex p P* (1998) *The Times*, 31 March, where it was held that judicial review was not appropriate to a challenge to a local authority decision to provide accommodation for a number of Albanians seeking asylum on the east coast of England. Default powers were preferable as, *inter alia*, a review of the treatment of asylum seekers was in progress.

the reforms sought to mitigate. The Supreme Court Act 1981, s 31(3), now provides that 'the court shall not grant leave unless it considers the applicant has sufficient interest in the matter to which the application relates'. You will note that the subsection is expressed negatively, but leaves a discretion to the court. After a rather shaky start, the courts have interpreted the provision quite liberally, such that the present approach to the assessment of standing to an increasing extent involves consideration of the merits of the issue at the application stage, which can now involve a number of factors, prior to the full hearing.

The leading post reform case is *R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Businesses*[42] (the *IRC* case). Casual workers in the newspaper industry had been signing on using fictitious and cartoon character names, such as Mickey Mouse and Donald Duck, to avoid paying tax. The Inland Revenue Commission (IRC) made a deal with the relevant union, workers and employers that if these Fleet Street casual workers would fill in tax returns for the previous two years, then the period prior to that would be disregarded. The National Federation of Self-Employed and Small Businesses were aggrieved by this agreement and sought to challenge it. They brought an action under Ord 53 seeking a declaration that the arrangement was unlawful and an order of mandamus to compel the IRC to collect all back taxes.

There were three major points for consideration:

(a) when can a declaration be claimed?;

(b) is the test for *locus standi* the same for all remedies?;

(c) what is the test for *locus standi*? What amounts to sufficient interest?

The latter factor is where the most striking changes have occurred. Prior to the IRC case, it was assumed that standing was a threshold test in the sense that the court looked at the issue of what interest a complainant had in the decision irrespective of other issues. Only once this issue had been settled would the court move on to consider other factors in the case. This was the test that was adopted in the Divisional Court and Court of Appeal in the present case, but the House of Lords held that this was the wrong approach. They held that the question of standing cannot be determined independently of the merits of the case; standing must be considered in the legal and factual context.

This means that the court will look at the *substance* of the allegation or the issues of illegality in order to determine whether the applicant has sufficient interest. This has often been referred to as the fusion of standing and merits. If taken to its logical extent, the IRC approach would make it unnecessary to be concerned about standing as an independent doctrine. However, the courts are not willing to go this far without ensuring that some safeguards from

42 [1980] 2 All ER 378, CA; [1981] 2 All ER 93, HL.

inappropriate litigation for public authorities remain. Thus, the present approach of the courts is not without its uncertainties, due to differences in interpretation or construction of the powers and duties involved. Clearly, the court has substantial discretion in determining standing, a factor which is reflected in more recent case law.

Some of the most problematic cases on standing are where the applicant for judicial review is a representative body or pressure group. In this situation, the court has to decide whether the organisation can justly claim to represent the particular sectional interests involved. How representative of the public or section of the public is the group? Is there some other organisation which is more qualified to act, but has not done so?

In *Ex p GLC and Others*,[43] the Greater London Council (GLC) and the Child Poverty Action Group (CPAG) *both* challenged the refusal of the Chief Supplementary Benefit Officer to review files when it was revealed that a very large number of claimants had not received the benefit to which they were entitled. The GLC were held not to have standing, as they had no express or implied status to represent claimants, nor did they have the right to represent the public interest. The CPAG, on the other hand, was held to have standing as 'very much a body designed to represent the interests of unidentified claimants'.

However, a retreat from the liberalisation of standing seemed to take place in *Ex p Rose Theatre Trust Co*.[44] There, the theatre trust were held to have no *locus standi* since the decision was a government decision of the kind in which an ordinary citizen would not have sufficient interest to apply for judicial review. The mere gathering together of people with a common interest did not amount to standing. This decision has been regarded as unduly restrictive. It may have involved factors which were not made explicit at the time, such as the financial position of the developers and plans to change the structure of the foundations so as to preserve the theatre.

The *Rose Theatre* case was later distinguished in *R v Poole BC ex p Beebee*.[45] In 1989, Poole Borough Council granted itself planning permission for a housing development on land which was of special ecological interest. The Worldwide Fund for Nature (WFN) and the British Herpetological Society (BHS) sought judicial review of the decision on the grounds that the council had not considered the environmental impact. It was held that the WFN had no *locus standi*, but the BHS did have sufficient interest by virtue of its financial input into the site and the supply of information about the impact of the development on the environment to the council. It had close links, therefore, to the question before the court. On the substantive merits, the

43 *R v SS for Social Services ex p GLC* (1984) The Times, 16 August.

44 *R v SS for the Environment ex p Rose Theatre Trust Co* [1990] 1 All ER 769.

45 [1991] 2 PLR 27.

application was dismissed on the grounds that the relevant environmental matters had been considered.

More recently, in *Ex p Equal Opportunities Commission*,[46] the EOC was held to have standing, as it had a duty to promote equality of opportunity between men and women. Under the Employment Protection (Consolidation) Act 1978, full time workers had to be in continuous employment for two years to qualify for the right to compensation for unfair dismissal or redundancy pay. Part time workers had to work for five years to qualify for these same rights. In the UK, some 90% of part time workers are women and the EOC claimed that the different treatment of part time workers discriminated against women and conflicted with obligations under EC law – Art 119 (141) and equal pay and equal treatment directives. The House of Lords held that the EOC had sufficient standing, because of its statutory duty to promote equal treatment.

In *Ex p Greenpeace*,[47] Greenpeace was held to have sufficient interest to challenge the variation of existing authorisations for the discharge of liquid and gaseous radioactive waste from the Sellafield nuclear processing plant by virtue of its membership in the area, who might not otherwise have an effective means of bringing their concerns before the court. The court also took account of the fact that Greenpeace was a responsible and expert body with a genuine interest in the issues raised. They had also been actively involved in the consultation process relating to British Nuclear Fuel's application to operate the new plant.

However, underlining the discretion of the court, it was stated that it must not be assumed that Greenpeace, or any other interest group, would automatically be afforded standing in any subsequent application for judicial review in whatever field it and its members may have an interest. This will be a matter to be considered on a case by case basis at the leave stage, and if the threshold is crossed again at the substantive hearing.

The following year, in *Ex p World Development Movement Limited*,[48] WDM alleged that the authorisation of expenditure of £234 m on the Pergau Dam project by the Foreign Secretary was *ultra vires* s 1 of the Overseas Development Act 1980. As concerns *locus standi*, it was argued that WDM is an established pressure group with a long record of promoting aid to the Third World, but it could not claim to represent any client group affected by the decision. However, the court accepted that, in view of WDM's track record in the field, it had an interest in ensuring that aid money was spent lawfully. Furthermore, the court took account of the importance of the public interest aspect of the case, the seriousness of the allegations and the unlikely event that there would be any other responsible body able to instigate a challenge.

46 *EOC v SS for Employment* [1994] 1 All ER 910; and see comment [1994] PL 217.

47 *R v Inspectorate of Pollution ex p Greenpeace (No 2)* [1994] 2 All ER 329.

48 *R v SS for the Foreign Office ex p World Development Movement* [1995] 1 All ER 611.

This case appears to take the judgments in *Greenpeace* a stage further in giving explicit recognition to the *public interest element* of such cases. In its recent report on judicial review, the Law Commission has recommended that the High Court should be able to give leave where the public interest requires it. The Law Commission has also recommended that the Legal Aid Board should consider the wider public interest when deciding whether to grant legal aid.

Judicial review of Community acts and the EC dimension of standing[49]

As we have noted in the previous chapter, the institutions of the Community have only limited powers of rule making and individual decision and there are a number of ways in which the legality of Community measures may be challenged.[50]

Indirect challenge may occur by means of a *plea of illegality* under Art 184 (241); or an action for *damages* may put in issue the legality of a measure; or a reference from national courts for a *preliminary ruling* under Art 177 (234) may be directed to the validity of a Community act.

Here, however, we are mostly concerned with the circumstances where Community secondary legislation may be challenged *directly* before the ECJ. There are two ways in which control is exercised directly over Community institutions:

(a) by ensuring that the institution has the power to issue the act concerned, that it has been passed according to the correct procedures and exercised for the right or proper purposes. This constitutes a check on the institution's *activities* and is provided for under Art 173 (230) (an action to annul);

(b) by checking the institution's *inactivity* to ensure that it does not fail to act when it is under a duty to do so. This is provided for under Art 175 (232) (an action for inactivity).

Both Arts 173 (230) and 175 (232) were amended by the Treaty on European Union (TEU) (the Maastricht Treaty), which itself embodied certain judgments of the ECJ.

Article 173 (230), as amended, provides:

> **(para 3)** The Court of Justice shall review the legality of *acts* adopted jointly by the European Parliament and the Council, of acts of the Council and the Commission and of the European Central Bank, other than recommendations

49 The new numbers of EC Treaty Articles according to the Treaty of Amsterdam appear in brackets.

50 For a definitive account, see Steiner and Woods, *Textbook on EC Law*, 1998, Pt 3.

> and opinions, and acts of the European Parliament intended to produce legal effects vis à vis third parties.
>
> The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.
>
> **(para 4)** Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.
>
> Before an action to annul can proceed to consideration of the merits of the challenge, the applicant must have *locus standi* and must have brought the action within the time limits.

Reviewable acts are not confined to regulations, directives and decisions, but include all measures which are binding in law, whatever the form. So the ECJ has always been prepared to look behind the label to the substance. Reviewable acts have included minuted discussions and a registered letter.

Article 175 (232), as amended, deals with actions for *inactivity*, or *failure to act* on the part of the European Parliament, the Council, the Commission and the European Central Bank.

Who has the right to bring proceedings before the European Court of Justice?

Privileged applicants

There is no problem of standing for those bodies sometimes referred to as 'privileged applicants'. These include Member States, the Commission, the Council, and since amendment of Art 173 (230) by the TEU, the European Parliament.

It does not matter that a Member State is challenging some act of a Community institution which relates to another Member State. For example, in *Italy v Commission*,[51] the Italian Government challenged a decision of the Commission addressed to British Telecom. Member States also frequently attack measures of the Commission and Council. The Council has *locus standi* in relation to the acts of the Commission and vice versa. Parliament also now has express standing to sue where this is necessary to protect its prerogative powers, such as a right to be consulted. Regrettably, the European Parliament does not have a general right to challenge acts of the Council or Commission, which diminishes to some extent its supervisory role.

51 [1985] 2 CMLR 368.

NON-PRIVILEGED APPLICANTS

The *locus standi* of individuals is much more limited. As Art 173 (230) makes clear, provided that it is within the time limit, no problem arises where the measure sought to be challenged is addressed to the applicant. For example, a common instance is where the Commission has issued a decision declaring the applicant to be infringing the competition law of the Community. In this situation, the addressee/applicant has a straightforward, direct interest.

For a non-addressee, though, there is a requirement to show 'direct and individual concern'. Here, the ECJ has adopted a restrictive approach, but has not pursued a consistent line, being anxious, on the one hand, to allow individuals or companies an opportunity to seek annulment of the acts of Community institutions in the interest of justice, yet, on the other hand, being wary of encouraging a flood of challenges. One conclusion is clear: it is *very difficult for an individual or company to satisfy the test of 'direct and individual concern'*.

A majority of cases under Art 173 (230) have involved what is known as 'anti-dumping' legislation, which has elements of both regulations and decisions. 'Dumping' is where an exporter in a third country sells goods into the European Community at a lower price than is charged in the exporter's home market. To protect against this form of unfair competition, the Council can impose duties on the goods imported to counter the effect of the lower prices. Outside this 'anti-dumping' situation, applicants have succeeded in relatively few cases.

For an application to the ECJ under Art 173 (230) to be admissible, three criteria must be satisfied: the measure being challenged must be *equivalent* to a decision; it must be of *direct* concern; and it must be of *individual* concern. Each of these factors will be dealt with in turn.

The measure must be equivalent to a decision

If the measure is described as a decision, the court will presume that that it what it is, and there will be no problem. But where the act is described as a regulation, the ECJ will look at the *effect* of the measure, its nature and content, rather than the label. True regulations are of general application, whereas the essential feature of a decision is that its application is limited and concerns designated individuals or companies. If a measure is called a regulation, but has limited application, it may in substance be a 'covert' decision, that is, equivalent to a decision.

In the *International Fruit* case,[52] the applicants were held entitled to challenge a regulation. The Commission had introduced a system of issuing licences for the import of dessert apples based on weekly data which set out the licences applied for in each Member State. At the time the Regulation was adopted, the number of applications was fixed and no new ones could be added. On the basis of the global amount applied for, the Commission decided the percentage to be allowed to each individual applicant. A Dutch apple importer objected to a reduction of its allowance. The ECJ held that the Regulation had to be regarded as a bundle of individual decisions, each of which, although in the form of a regulation, affected the legal position of one of the applicants. Thus, the decision was of individual concern to the Dutch importer and as it directly affected the applicant, it was also of direct concern.

In the *Japanese Ball Bearing*[53] cases, four major producers of ball bearings were held entitled to challenge a Council anti-dumping regulation because, although the measure was of general application, some of its articles specifically named the applicants. The measure was termed 'hybrid'. Although it was of general application, it was in the nature of a decision for designated individuals.

Direct concern

Direct concern raises issues of cause and effect. An individual or company will only be directly concerned if there is a direct link between the decision and its application to them. There must be no margin for the discretion of another body, such as the government of a Member State, to intervene in the way the measure is implemented. Thus, where a Community institution grants a discretionary power to another authority (as it frequently does), the mere fact that the applicant would be affected if the power were exercised does not mean that he has the standing to challenge the decision granting the power.

In *Alcan v Commission*,[54] under the relevant provisions, Member States could apply for a quota of aluminium imports at a reduced rate of duty. The Belgian Government made a request for such a quota, which was rejected in a decision by the Commission. The question was whether Alcan and two other aluminium refining companies in Belgium could challenge this decision.

The ECJ held that, even if the quota had been granted, the Belgian Government would not have been obliged to allow the quantity in question to be imported at reduced rates. In other words, the Commission would merely have given authorisation; it was the Belgian Government that would have had

52 *International Fruit Company v Commission* [1971] ECR 411.

53 *Toyo Ball Bearing Co v Council and Commission* [1979] ECR 1185.

54 [1970] ECR 385.

a discretion whether or not to make use of it. If, however, the power granted is not discretionary, as in the *International Fruit* case, those affected will be directly concerned.

The Court has laid less emphasis on the requirement for direct concern than that of individual concern. If the more difficult obstacle of the latter can be overcome, it seems that direct concern will almost be assumed.

Individual concern

This requirement usually has been interpreted very restrictively by the ECJ, although a more liberal approach may now be being adopted. The question considered focuses on the legal rights of those affected by the measure and asks whether they are affected as members of an open or closed category. An open category is where the membership is neither fixed nor determined when the measure comes into force; a closed category is where the membership is fixed or resolved.

The classic test for individual concern was stated in *Plaumann v Commission* (the *Clementines* case).[55] The act in question was a decision of the Commission, addressed to the German Government, which refused permission to lower duty on imported clementines. Plaumann argued that, as a large scale importer, they were individually concerned. The Court disagreed, holding that, although Plaumann was affected, it was only as a member of a general class: any other importer of clementines would be affected in the same way:

> Persons other than those to whom a decision is addressed may only claim to be directly concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of a person addressed.

There was nothing to distinguish Plaumann, and the company consequently lacked the standing to bring proceedings. If, however, the act had applied to those who had imported a given quantity of fruit during a stipulated period prior to the enactment of the measure, the category would have been closed (for example, the *International Fruit* case referred to above, p 151).

In other words, at the time the decision is made, it must be known or ascertainable exactly who is affected and it must apply to them and no one else. In practice, the test is easier to state than apply, since the ECJ has never set out the peculiarly relevant characteristics an applicant has to demonstrate. It is sometimes difficult to reconcile the reasoning in some of the ECJ judgments. From the cases decided, it is insufficient that business interests are

55 [1963] ECR 95.

adversely affected. Neither will it be enough to show that interests are affected in a different way or more seriously than other traders. The only common thread that runs through the relatively few successful cases under this head is that the measure which the applicant seeks to challenge, although addressed to another person, *refers specifically to the situation of the applicant*. It must affect him as if he were the person to whom the measure is addressed, and it must affect him alone or as the member of a fixed and closed class.

The *Plaumann* formula was applied in *Bock v Commission*,[56] where the applicant was one of a limited category of importers of Chinese mushrooms affected by a decision of the Commission which was addressed to the German Government, authorising it to prohibit Chinese mushroom imports. At the date of the act, the number and identity of importers was already fixed and ascertainable. This factor differentiated them from all others, and was as if they were the person addressed.

Special considerations

Despite the generally restrictive approach of the ECJ, there seem to be a number of additional, underlying considerations which can influence the court, but which are not always expressed. These bear much more relation to the approach now taken by the English courts to standing, but it would be far too premature to state that the ECJ is in the process of relaxing its previously restrictive stance on the issue. The first factor is whether there is any alternative remedy, such as referral from the national court under Art 177 (234), open to the applicant. Secondly, the court may take account of whether there is any alternative applicant who would have an interest in challenging the measure. Thirdly, the ECJ may consider whether the applicant has a strong case on the merits and whether these raise issues of general importance.

Each of these factors may not be conclusive in themselves, but may tip the balance if found together. In *Parti Ecologiste – Les Verts v European Parliament*,[57] the European Parliament adopted a decision to use public money to subsidise the election expenses of parties fighting in the forthcoming European elections, but the decision discriminated against parties not already represented in the Parliament. In other words, the parties already in Parliament had awarded themselves the bulk of the money and had no interest in challenging the decision. Parties not already represented were affected only as members of an open category and could not claim to be individually concerned; but, since there was no other adequate alternative

56 [1971] ECR 897.

57 [1986] ECR 1139.

remedy available, the ECJ granted standing and went on to annul the decision.

Another novel consideration arose in *Metro v Commission*.[58] Here, the Commission addressed a decision to SABA, a German manufacturer of electronic equipment, which confirmed that SABA's conditions of sale did not infringe EC competition law. Metro challenged this and were held to be individually concerned, since it was their complaint to the Commission about refusal of SABA to recognise Metro as a distributor that had instigated the investigation into SABA's conditions of sale, which led to the decision. Metro were thus to be regarded as party to the proceedings and consequently had standing to challenge any determination made.

In a report for the intergovernmental process that culminated in the Treaty of Amsterdam, the ECJ noted the uncertainty of the availability of Art 173 and questioned whether it provided sufficient protection against infringements of rights from the activities of the Community. However, despite the opportunity, no changes were made under the Treaty.[59]

Article 175 (232) (actions for inactivity)

Articles 173 (230) and 175 (232) are, in many ways, complementary, although there are some inconsistencies between the two provisions. Article 175 (232) has, as yet, a rather untapped potential[60] to control the two principal law making bodies of the EC – the Council and the Commission – by the Parliament.

Article 175 (232) provides that Member States and other institutions of the EC (including the Parliament) may bring an action before the ECJ where the European Parliament, the Council, or the Commission has failed to act, in infringement of the Treaty. The TEU also provided for the European Central Bank to sue and be sued within the area of its competence. Before an action can be brought, the institution complained against must be called upon to act and given two months to comply. If this fails, an action may be brought within a further two month period.

As with Art 173 (230), individuals have only limited standing under Art 175 (232). They may bring proceedings where the institution complained against has failed to *address to themselves* any act other than a recommendation or opinion. There is no express *locus standi* to challenge a failure to address an act to *another* person. But, the ECJ has indicated that an individual should have the right to bring an action in circumstances where, if the institution had

58 [1977] ECR 1875.

59 *Op cit*, Steiner and Woods, fn 50, p 472.

60 *Op cit*, Steiner and Woods, fn 50, p 482.

acted, the measure would have been of direct and individual concern to the applicant. This was implied in *Bethell v Commission*.[61] In that case, a Euro MP attempted to force the Commission to take action against a number of European airlines for anti-competitive practices. The Court held his claim to be inadmissible, because he had failed to show that the Commission had omitted to adopt in relation to him *a measure which he was legally entitled to claim.* So, in the context of Art 175, the equivalent of a decision of direct and individual concern under Art 173 is a decision which the applicant is legally entitled to claim, that is, *de facto* the addressee.

Individuals who do not take up their rights to challenge EC decisions by bringing direct actions in the ECJ cannot later challenge them by way of a reference from a national court for a ruling on a preliminary point of law (Art 177). This was decided in *TWD Textilwerke Degendorfe v Germany*.[62] The German Government was ordered to seek restitution of money from the company which had been unlawfully granted as State aid. The company were advised that they could challenge the decision by direct action in the ECJ. No such proceedings were brought. When the German Government complied with the decision some six months later, the company brought proceedings for judicial review against the relevant minister. The ECJ held that a decision which had not been challenged by a direct action within the limitation period became definitive. The time limits applied equally to Member States and individuals, because the imposition of limitation periods safeguarded legal certainty by avoiding the situation whereby EC acts could be challenged indefinitely.

Article 184 (241)

It may be useful here, for the sake of completeness, to outline briefly the use of Art 184 (241), which is an *indirect* form of challenge to EC measures. The purpose of Art 184 (241) is to allow a party to question the legality of a general act on which a subsequent measure (for example, a regulation or decision) or failure to act is based. It is, in some ways, similar to the procedure in English law where a challenge is raised collaterally to the validity of a statutory instrument or bylaw in a prosecution for its infringement. Article 184 (241) can also be seen as a means by which the underlying act can be challenged indirectly, free of time limits, in a way that is similar to the way in which questions of EC law may be raised indirectly in the context of domestic proceedings before national courts.

A regulation or decision is normally based on some general authorising or underlying act which may, itself, be challengeable. But the party involved

61 [1982] ECR 2277.

62 (1994) *Financial Times*, 15 March; and [1995] 2 CMLR 332.

may not be aware of any illegality of that underlying act until affected by some subsequent measure issued from the 'tainted source'. By this time, the time limit of two months within which the original act could have been challenged may have elapsed. Art 184 is generally likely to be invoked to support a challenge under Art 173 (230) to the validity of a measure based on the underlying allegedly invalid act. If the parent act is found to be invalid, the subsequent measure will be inapplicable. It is not a means of circumventing the time limit or standing restrictions of Arts 173 (230) and 175 (232), but is an important supplement.

Standing and Art 184 (241)

Although Art 184 (241) appears to apply to 'any party', there are doubts as to whether it actually extends to 'privileged applicants'. It has been argued that, since Member States and the other institutions of the EC are entitled to seek annulment of any act under Art 173 (230), to allow them to invoke Art 184 (241) would enable them to challenge acts which they should have challenged within the time limits. However, in *Italy v Council and Commission*,[63] the view was taken that *Member States* should have *locus standi* under Art 184 (241), since the wording of the provision was not restrictive and the illegality of the general provision might not become apparent until applied subsequently in a particular case. So, the question is open. But, Art 184 (241) can never be used merely to circumvent time limits, it can only be invoked as an incidental issue. This provides safeguards against abuse.

ISSUES OF JURISDICTION

Here, we attempt to provide guidance through the issues of jurisdiction. The important thing to remember is that policy beliefs as to the desirable scope of judicial review have been crucially important in shaping the outcome of cases and it is difficult try to find any conceptual coherence or consistency in judicial reasoning. As we have stated before, the political and social context of each case is of overwhelming importance, and this makes generalisation difficult.

In order to clarify the issue of jurisdiction, it may be worth going back to the basic question of what mechanisms can be used to challenge, in the courts, a decision of a public authority which is considered to be legally incorrect? There are two possibilities: appeal and judicial review.

63 [1996] ECR 777.

Appeal

Appeal exists *only* where it is *specifically provided by statute*; thus, we can only make use of it if we can find a statutory right of appeal covering the decision. As you should already be aware, the provision of appeal rights in the UK is very uneven. Whether an appeal exists or not depends largely on historical accident. The scope of appeal (that is, the power of the court to intervene) will depend on the wording of the statute. Some appeals are on 'the merits', where the appellate body must re-examine the whole dispute, including arguments of fact, and take a fresh decision as to the outcome. But more often appeal is limited to *a point of law*, so that the appellate body *cannot* re-examine disputes of fact. Such a right of appeal is provided to the High Court from most tribunals and from the decisions of some ministers by s 11 of the Tribunals and Inquiries Act 1992, as well as by some other specific legislation.

Sometimes, the courts have adopted a broad interpretation of error of law, but on other occasions they have been reluctant to intervene unless there has clearly been a wrong approach to the legal issues involved, or if some general principle of legal importance is raised. It is also important to remember that the other grounds for succeeding on appeal on a point of law will be that there has been a breach of the principles governing the exercise of discretion or of natural justice.[64]

Judicial review

Where there is no statutory right of appeal, use has to be made of the inherent common law power of the court to grant judicial review of a decision. No specific statutory authority is necessary for this, although in some areas of public policy the courts have been reluctant to exercise their reviewing powers. As you know, the main basis of review is that a body has acted *ultra vires*, that is, outside its powers. Much of the case law has developed around so called judicial or quasi-judicial bodies, such as tribunals, and in relation to these a different terminology may have been used. Rather than saying that such a body has acted *ultra vires*, we say that it *went outside its jurisdiction*, although we still mean it acted outside its powers.

The problem is that it is not enough merely to show that there has been an error of law. Traditionally, only certain errors of law have been seen as taking a body outside its jurisdiction; these are called *jurisdictional errors* or *errors going to jurisdiction* and render a decision void. To add to the complexity, a body may, on occasion, make an error of law and yet still remain within its jurisdiction; this is called an *intra vires* error, 'mere' error, or *error within jurisdiction*. In the absence of any provision for appeal, an *intra vires* error can

64 See below, Chapters 7 and 8.

only be challenged by using the remedy of certiorari on the ground that there is an *error of law on the face of the record*. For this to be possible, the error must be apparent from the documents incorporated in the decision. Fortunately for applicants, what may be regarded as constituting the record is now given quite a wide interpretation. However, because of developments in case law discussed below, it is likely that findings of error of law within jurisdiction will be rare.

Vires and jurisdiction

In the majority of cases, an error has to be one which takes the body outside its jurisdiction. What errors have this effect? This is somewhat complicated and uncertain.

Until quite recently, the most accepted explanation of which errors or matters should be regarded as jurisdictional was the 'preliminary' or 'collateral fact' doctrine. A body could take itself outside its jurisdiction by deciding *wrongly a question on which its jurisdiction depended*. For example, in *White and Collins v Minister of Health*,[65] the minister was empowered to acquire land which did not form part of a park. The question of whether a particular piece of land was part of a park or not was a *preliminary* question to the exercise of the decision to acquire it. The problem is that there is no coherent answer to the question of *what is a preliminary matter and what is not.*

The major case in this area was *Anisminic v FCC*.[66] The accepted view of this case is that the House of Lords decided that *any serious* error of law amounted to jurisdictional error. This was hailed as a great simplification of judicial review, making review for error on the face of the record obsolete and providing a new, all purpose remedy. However, a narrower version of the ratio can be discerned to the effect that a body will act outside its jurisdiction if, through misconstruction of its powers, it inquires into something different from what the statute established as its field of inquiry.

There was much academic writing of the case and differing views of the scope and meaning of the decision led to some confusion in later cases.[67] Moreover, the wide version of *Anisminic* was used in attempts to evade restrictions on appeal in courts and judges were reluctant to allow this. Thus, in *Re Racal* ,[68] some members of the House of Lords, in particular Lord Diplock, considered that, in relation to tribunals and other administrative bodies, any error of law would take them outside jurisdiction. However, the same would not apply to inferior courts. Though this is a nonsense in

65 [1939] 2 KB 838.

66 [1969] 2 AC 147.

67 Note Lord Denning and Lane LJ in *Pearlman v Keeper and Governors of Harrow School* [1979] QB 56.

68 *Re Racal Communications Ltd* [1981] AC 374.

conceptual terms, it arguably has some pragmatic justification, for the danger of errors of law being made by tribunals is, by their nature, greater than error being made by the courts. But, some doubt was cast on this approach in *O'Reilly v Mackman*, and it was not followed by a Divisional Court in *Ex p Tal*,[69] which concerned the decision of a Coroner's Court. However, the wide definition of jurisdictional error by tribunals and other public authorities was accepted.

There have been two, more recent, important decisions of the House of Lords in this area. In *Page*,[70] a lecturer at Hull University argued that the decision of the University Visitor that he should be made redundant was contrary to his terms of employment. The courts made general statements concerning the scope of jurisdictional review. Lord Browne-Wilkinson, in particular, stated that the distinction between errors of law within jurisdiction and errors of law that took a body outside jurisdiction was now obsolete. In general, any error of law made by an administrative tribunal or inferior court in reaching its decision could be quashed for error of law. The basis for this was the *ultra vires* doctrine. Parliament only conferred power on the basis that it was exercised on correct legal propositions.

However, the error had to be one which affected the actual making of the decision and the decision itself, so the presumption that any error of law was reviewable was rebutted. Furthermore, it appears that review may vary according to the institution under review.

In *Ex p South Yorkshire Transport*,[71] an investigation by the Monopolies and Mergers Commission (MMC) into the merger of two bus companies was challenged.

Under the 1973 Fair Trading Act, reference could be made to the MMC where a merger resulted in the supply of over 25% of the services of any description 'in a substantial part of the UK' being carried on by one person. The bus services under investigation covered an area which was under 2% of the UK and which contained just over 3% of the total UK population. South Yorkshire Transport therefore argued that the jurisdictional condition relating to 'a substantial part of the UK' had not been fulfilled.

The court held that the term 'substantial' was open to a range of meanings, and it was up to the court to decide where in the range of possible meanings the term was to be placed. Where, however, the particular term was so inherently imprecise that different decision makers might reach different conclusions when *applying* it to the facts of a particular case, the court will only intervene if the application of the term is irrational.

69 *R v Greater Manchester Coroner ex p Tal* [1985] QB 67.

70 *Page v Hull University Visitor* [1993] 1 All ER 97.

71 *R v MMC ex p South Yorkshire Transport* [1993] 1 All ER 289.

This, then, is the current state of law in relation to errors of law made by public authorities. It must be stressed once more that the attitude of the court in a particular case will depend *more on context* than abstract principle, and the case law remains open enough to allow the judiciary considerable leeway. It is also important to note here that the courts have made little attempt to connect systematically other grounds for review (errors of fact, breach of natural justice and unlawful exercise of discretion) with those discussed above.

OUSTER CLAUSES

This is an area where the cases on jurisdictional error are still of some practical importance. Ouster clauses are clauses provided by statute which purport to exclude the courts from reviewing the decisions of a public body. There are two conflicting principles at work in this area: parliamentary supremacy and the general rule of construction that the jurisdiction of the courts can only be ousted or restricted in narrow circumstances and by clear words. It is possible to distinguish four different types of clause:

(a) total ouster or fully preclusive clauses;

(b) finality clauses;

(c) time limit clauses;

(d) conclusive evidence clauses.

Total ouster clauses

These are clauses which state that a decision of a public body is *not to be challenged in any court of law*. This type of clause is now fairly rare. In addition, s 14 of the Tribunals and Inquiries Act 1992 provides that any such clauses existing in pre-1971 legislation shall not prevent certiorari or mandamus. But, there are important, fairly recent, examples in the British Nationality Act 1981, s 44, and the Interception of Communications Act 1985, s 7(8), although it is not clear what the effects of these particular clauses are in their particular contexts.

In *Anisminic*, the House of Lords held that a total ouster clause prevented review for *intra vires* error, but not for jurisdictional error. The logic was that a jurisdictional error made the decision *void*; it never had any legal validity, therefore, there was no decision on which the clause could bite. *Anisminic* was to be regarded as the high water mark of judicial intervention. The logic of *Anisminic* could be applied to all types of exclusion clauses, but the courts have not, as is often the case, taken any consistent approach.

Finality clauses

These clauses state that the decision of a particular body *shall be final*. They do *not* prevent judicial review, *only* appeal, so there is no need to show jurisdictional error. This was clarified in *Re Racal*.[72] Decisions concerning finality clauses are now regarded as uncontroversial.

Time limit clauses

This type of clause is quite common in planning and housing legislation and can also be found in public utility regulation.[73] They provide a right of challenge within a limited period only:

> ... review is allowed within a period of six weeks of the decision, after that shall not be questioned in any legal proceedings whatsoever.

In *Smith v East Elloe*,[74] this type of clause was held to prevent review even for jurisdictional error. Then *Anisminic*, although it did not formally overrule *East Elloe*, cast doubt on the correctness of the decision. The issue was faced squarely in *Ex p Ostler*.[75] In that case, a local inquiry was held into the siting of a proposed bypass. Ostler did not attend, because he had no objection to the planned route. The scheme was approved and the six week period for challenge expired. A few months later, Ostler found out that a covert agreement about an access road, which was made prior to the inquiry between the Department of the Environment and a brewery, would affect his property. If Ostler had known about this at the time of the inquiry, he would have raised an objection there. He sought certiorari to quash approval of the scheme.

The Court of Appeal held that the time limit clause prevented review and attempted to distinguish *East Elloe* from *Anisminic* on a number of grounds, none of which was entirely convincing. For example, it was stated that the proceedings in *Anisminic* were judicial, whereas in *East Elloe* and similarly in *Ostler* they were administrative. This is not really justifiable; Ostler had failed to object at a public local inquiry, which is a highly judicialised proceeding.

What lies at the bottom of this case is an unarticulated reason of policy. To allow Ostler's challenge would have upset preparations which were at a late stage; 80% of the land required for the project had been compulsorily purchased and 90% of the buildings demolished. Ostler eventually received compensation through the Parliamentary Commissioner for Administration's (PCA) finding of maladministration. It is obviously unreasonable to allow

72 [1981] AC 374.

73 Eg, Telecommunications Act 1984, s 18.

74 [1956] AC 736.

75 *R v SS for the Environment ex p Ostler* [1977] QB 122.

challenge to public body decisions of this type for an unlimited period. Planning authorities need to be able to rely on orders being conclusive. But there is an issue of fairness to the applicant here. The solution to this problem would be better availability of damages. *Ostler* has now been followed in a number of cases, most recently in *Ex p Huntingdon*,[76] so it seems that it can be regarded as precedent in this area.

Conclusive evidence clauses

These clauses provide that a certificate produced by the relevant public authority *shall be conclusive evidence that either the provisions of an Act have been complied with or that certain facts exist*. Not much had been heard of this type of clause until the *Central Bank of India*[77] case, where a decision of the Registrar of Companies to register a charge on the assets of a company was challenged. The system of registration of charges was established so that potential lenders can see whether or not their security is worth anything and whether there are any other charges which take priority. The legislation provides that the Registrar's certificate is conclusive evidence that the requirements of the Act have been complied with.

It was argued that the Registrar had made an error of law and therefore *Anisminic* could be relied upon. Although the court accepted a broad interpretation of *Anisminic*, they felt that, in the circumstances, the court was prevented from looking into the allegation of unlawfulness. They considered, though, that allegations of fraud might be an exception. The decision in *Central Bank of India* was clearly founded on the need for certainty with a system of registration; to allow challenge to the Registrar's decision would undermine the scheme.

A more liberal attitude was shown by the ECJ in *Johnston v RUC*.[78] In that case, women reserve constables in the Royal Ulster Constabulary (RUC) challenged a decision not to allow them to use guns and to dispense with their services, contrary to the EC Equal Treatment Directive. The Secretary of State issued a certificate that national security and the protection of public safety was involved, and the court should not intervene. The ECJ, however, was not prepared to accept the word of the Secretary of State at face value and looked at the evidence to support this contention. Finding no such evidence, they held that there had been unlawful sex discrimination and that the certificate issued by the Secretary of State did not preclude judicial review, arguing ,in addition, that persons who were aggrieved must have an effective judicial remedy.

76 [1994] 1 All ER 694.
77 [1986] 1 All ER 105.
78 [1986] 3 All ER 135.

You can see from this brief review of some of the cases concerning ouster clauses that judicial practice fluctuates from area to area. No principled distinctions are drawn between the cases. For example, it is difficult to justify the difference between the result in *Central Bank of India* and *Anisminic*; there is a need for certainty in both situations and both concern commercial matters. As for errors of law, if anything, the error in *Central Bank of India* is less defensible than that in *Anisminic*.

You should also note other means of trying to preclude review beside the use of ouster clauses, such as the provision of alternative remedies, standing requirements and the provision of wide discretion.

CHAPTER 7

DISCRETIONARY POWER AND ITS CONTROL BY THE COURTS: THE PRINCIPLES OF JUDICIAL REVIEW

INTRODUCTION

Until now, we have been examining the hurdles to attaining a judicial review hearing. We now turn to consideration of the principles of judicial review, by which we mean the grounds on which judicial review may be brought. Inherent in this is the way in which the judges handle the control of discretionary power and we shall be examining the principles which the courts have developed to control the way in which discretionary powers are exercised to ensure that such power is exercised legitimately. We shall find that the perspective of the courts, or the judiciary, springs from their traditional Diceyan view of their role, which is that of protector of the individual, rather than protector of the public interest against the State. As we outlined in Chapter 1, this is a major failing in our public law. Public law is concerned with the legitimate exercise of power and, at its broadest, it is about policy outcomes. As part of that, it has to deal with a mass of issues about how decisions are made: who makes the decisions, what rules or criteria are followed and how those decisions are influenced.

The traditional intellectual techniques of law have a very significant contribution to make in that policy development, both in terms of rigour and practicality. Lawyers develop expertise in clear logical thinking, they can analyse and dissect propositions and develop policy schemes based on carefully defined principles. So, through devising carefully crafted arguments, they can make a unique contribution.

The focus for public law and lawyers should be on policy formulation and outcomes because we live in a world of almost limitlessly contestable policy advice. For example, the Child Support Agency has to set its policy before it gets down to making decisions on individual questions about paternity and maintenance. Before a doctor can make a decision about whether an individual is suitable for a kidney transplant, there are numerous decisions to be made about policy on health priorities and spending[1] – or indeed before a decision is made about giving one child expensive treatment for leukaemia, as in the case of *Ex p B*.[2] Many examples are to be found in the press about health care decisions and the allocation of health resources.

1 *R v North Derbyshire HA ex p Fisher* (1997) *The Times*, 2 September.

2 See discussion above, Chapter 1.

Again, in another context, before tomatoes which have been genetically engineered, to prevent them going mushy, can be sold in this country, there are numerous decisions which have to be made at both UK and European level, although arguably, there are not enough hurdles in place.

THE NATURE OF DISCRETION

We shall begin by considering the nature of discretion and then examine how one influential commentator has suggested it can be controlled. The first point to recognise is that discretionary power is an important and endemic feature in all modern States, whether it is exercised by public officials acting in a judicial or administrative capacity.

The main source of discretionary power is, of course, the legislature. Parliament, by statute, delegates powers to a subordinate authority, which may be a minister or one of a whole variety of public bodies. The wording of the statute tells whether or not there is discretion. Typical expressions are: 'the minister in his discretion may do X if he thinks it reasonable to do so'.

Discretion may be contrasted basically with two things:

(a) with a *duty*. Here the public body has *no choice* as to what to do if particular statutory conditions are present;

(b) with *rules*. Although there is a tendency to talk about rules and discretion as opposites, they should more correctly be regarded as different points on a continuum. This is because even rules need an element of interpretation; they cannot simply be applied to a given situation because they have an overtexture. The language in which rules are written is necessarily vague, so that applying rules to a given situation involves judgment in deciding what the rule means in relation to a particular set of facts.

For example, government has laid down rules or regulations about when local authorities may award grants for higher education. One rule states that a student may only be awarded a grant if he/she has been *ordinarily resident* in the UK for three years. Doubt about what was meant by 'ordinarily resident' arose in *R v Lancashire CC ex p Huddleston*.[3] Even though there was a rule, a degree of judgment had to be exercised in deciding what was the interpretation of the statutory term.

Although rules and discretion are not diametrically opposed, there has been a great deal of discussion about their relative merits. Rules tend to produce what is known as *proportional justice*; like cases are treated alike and tend to produce consistency. Discretion, on the other hand, tends to produce *creative justice*; cases are tailored to meet individual circumstances and so

3 [1986] 2 All ER 941.

allow for flexibility. Taken to their extreme, both rules and discretion can lead to arbitrary decisions, the former to rigidity, the latter inconsistency. What is really required is the identification of the optimum point on the spectrum to achieve a balance between rules and discretion and which, as near as possible, ensures consistency and flexibility in meeting particular circumstances. This, of course, is easier said than done.

The work of KC Davis[4]

Much of the modern interest in discretionary justice is due to the work of Davis, who has set out a framework for the legitimate exercise of discretionary power. Davis defines discretion in the following way:

> A public officer has discretion whenever the effective limits on his power leave him free to make a choice between possible courses of action or inaction.

This is a wide definition in that it stresses the *effective* limits rather than the *legal* limits of an official's power. This is because, in practice, much of the discretion which actually exists may not be specifically authorised by law. As we have already commented, the essential element in discretion is that there exists a freedom of choice for the person exercising it; there is an opportunity to choose between alternative courses of action.

However Davis's definition is somewhat simplified. Galligan has pointed out that we must also take into account one of the most rudimentary requirements of accountability, that, in exercising discretionary powers, officials should comply with standards of rationality. In other words, decisions should be made for reasons which are rational in terms of our understanding. Rationality is therefore a crucial element in discretion and its control. It follows that choices must be *reasoned*, and discretion consists not in the authority to choose amongst different courses of action but *to choose amongst different courses of action for good reasons*.[5] The course of action cannot be separated from the reasons and therefore the standards on which it is based. If standards are settled in advance, the decision must be made according to the terms in them and an appropriate course of action will follow.

So, fundamentally, discretion is the authority to settle upon reasons for a decision, not to act either without reasons or according to reasons which fall below the standards or requirements of rational decision making. If that element is complied with, the exercise of public power can be seen to be legitimate.

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4 Davis, *Discretionary Justice: a Preliminary Inquiry*, 1969.

5 Galligan, *Discretionary Powers: a Legal Study of Official Discretion*, 1986.

Davis points out that, although discretionary powers are an essential feature of modern government, they have not been subject to adequate consideration. The result has been that government contains vast areas of *unnecessary and uncontrolled discretion*. This produces arbitrary decisions, that is, decisions which are made without reasons or for reasons that are not properly related to the object of the discretionary power. There is, therefore, a lack of predictability and proportional justice. The aim of Davis is to find the optimum balance between rules and discretion. He suggests that there are three techniques which can be adopted to control discretionary decision making. These are *confining, structuring and checking* discretion.

Confining

Davis sees it as futile to demand that statutory delegation of power to public authorities should be in narrow terms only. He argues that it is necessary to give public bodies a wide discretion at the outset because legislators do not always agree on what they want a body to do and cannot deal in any detailed way with specialist matters or problems that might arise. So, rather than enforcing narrow statutory delegation, Davis suggests *confining discretion through a process of administrative rule making*. This would be modelled on the American Administrative Procedure Act (APA), which sets out a sophisticated process of consultation and participation, where agencies are required to publish drafts of proposed rules and receive comments.[6] Davis stresses that rules must be *open* in order to attain predictability and consistency in decision making.

Rules are used, therefore, first to *confine* discretion by cutting down any unnecessary discretion as solutions are developed to any problems that occur. It is an *on-going process*, particularly in the first instance, as rules are adapted and developed. The extent of discretion is confined as policy is formulated.

Structuring

Having eliminated unnecessary discretion, how can the exercise of the discretionary power that remains be improved? Davis suggests *structuring* it – regularising it and ordering it – so as to produce the highest quality of justice available. This can be done by requiring the public authority to produce open plans; that is, stating what the policy will be when exercising discretion in particular circumstances or situations. In addition, the authority should be required to state what criteria will be taken into account or disregarded in the exercise of discretion. Davis also points out that the requirement to give reasons for decisions also structures the exercise of discretion. The giving of

6 See below, Chapter 8.

reasons would mean that decisions would tend to be more rational, better thought through and justifiable in an open way. These processes not only assist the development of principles of good administration, but make more resources available to those who might seek to challenge a decision by building up a body of information about the decision making process to which all parties can refer.

Checking

Judicial review is an obvious way of checking for arbitrariness, but it is only *one* way; other means may be of more practical importance. As we have seen in Part I, there may be internal review procedures, where decisions are checked by a supervisory member of staff. Appeal to a tribunal may be provided, or there may be other forms of grievance procedures available, such as the ombudsmen. Because of the lack of a coherent overall system of review of public decision making in the UK, Davis specifically recommends the setting up of an administrative tribunal system such as that in Australia.

To summarise at this point, we are concerned to provide conditions for the attainment of two fundamental ideals:

(a) the reduction of arbitrariness by the elimination of decisions which cannot be rationally justified in relation to broad policies. The aim is to increase accountability, predictability and proportional justice;

(b) improved potential for democratic participation and individual choice through policy making procedures which are open and allow the publication of rules standards and criteria against which a decision can be checked.

In the UK, there has been a great deal of rule making, but for the most part it has tended to be for internal bureaucratic reasons rather than for democratic participatory and accountability purposes. There has been scant regard for proper consultation, openness and intelligibility. There may be practical constraints to the implementation of structuring, confining and checking techniques in some areas, but it is possible to consider in what ways Davis's arguments can be applied in general terms.

CONTROL OF DISCRETION BY THE COURTS

We now turn to consider how the courts have developed principles to control the exercise of discretionary power. The first ground is based on the premise that, where Parliament has given a decision maker, be it an individual or a public authority, a discretion to do something, then that body must in fact be the one to exercise the discretion. Where this is not the case, there may be a challenge on the grounds of fettering of discretion.

Fettering discretion

Fettering can occur in any one of three different ways:

(a) where the public authority has fettered its discretion by *self-created rules of policy* which prevent it from considering the merits of the individual case before it.

Most examples of discretionary power are so broad that the development of policies and rules is a bureaucratic necessity to enable the public body to operate. As Davis has pointed out, if these are published and developed openly, then they are a desirable and good thing. But rules and policies may be so rigid as to prevent any discretion being exercised at all in relation to each individual case. Consequently, the element of flexibility and individuation is lost.

The question then is, *when will the formulation of rules by an authority, which confine and structure discretion, become an unlawful fetter?*

The classic approach of the courts was formulated by Banks LJ in *R v Port of London Authority ex p Kynoch*:[7]

> There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy without refusing to hear an applicant, intimates to him what its policy is, and after hearing him will in accordance with its policy decide against him, unless there is something exceptional in his case ... if the policy has been adopted for reasons which the tribunal might legitimately entertain, no objection could be taken to such a course. On the other hand, there are cases where a tribunal has passed a rule or come to a determination not to hear an application of a particular nature by whomsoever made. There is a wide distinction to be drawn between the two classes ...

So, it appears to be permissible for a body to have a policy which it applies, *unless* there are exceptional circumstances; but it is not permissible to have a policy which prevents the authority from considering the merits of a particular case or situation.

The principle set out in *Kynoch* was approved by the House of Lords in *British Oxygen v Board of Trade*.[8] The case concerned the Industrial Development Act 1966, which empowered the Board of Trade to make grants to companies for plant and machinery. The Board adopted a policy not to make grants for items costing less than £25 each. British Oxygen had spent over £4 million on cylinders costing £20 each, but the Board of Trade refused their application for a grant. British Oxygen argued that the adoption of an apparently rigid rule not to allow one particular type of application was an unlawful fetter on the discretion of the Board.

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7 [1919] 1 KB 176.

8 [1971] AC 610.

Lord Reid, with whom the other three judges agreed, held that the Board of Trade had not unlawfully fettered their discretion. The court approved *Kynoch*, but stated that it cannot be applied literally in every case; it will depend on the context:

> The general rule is that anyone who has a statutory discretion must not shut his ears to an application ... There may be cases where the Board should listen to arguments against the policy ... what it must not do is refuse to listen at all ... a large authority may have had to deal already with many similar applications and then it will have evolved a policy so precise that it could be called a rule. There can be no objection to this, provided the authority is always willing to listen to anyone with something new to say.

Therefore, a public authority may have a quite detailed and specific policy which it applies as long as it considers the merits of individual cases to see if the policy should be modified, whether an exception should be made to it, or whether further, more detailed policy making should take place. This is a realistic approach, given that policy making is inevitable to enable the exercise of discretionary powers. It means that public bodies will have to reassess their policies as they deal with individual cases. This can foster a critical, reflexive attitude; a form of on-going rule making. Moreover, it can provide some scope for the development of procedures which allow interested parties an opportunity to suggest changes to policy.

The *British Oxygen* approach seems to be the one that is *most influential* with the courts; however, there are a number of difficulties that have arisen in some cases.

In *Sagnata Investments v Norwich Corporation*,[9] the local authority had a discretion to grant permits for amusement arcades under the Betting, Gaming and Lotteries Act 1963. Sagnata's application for a licence was refused on the grounds that the local authority had adopted a policy that amusement arcades in the city centre would not be permitted because of their potential detrimental effect on young people. The Court of Appeal held that this was an unlawful fetter and added that policies should not be given any more weight than other relevant factors. This particular perspective amounts to a diminution of the emphasis to be accorded to policies, and could possibly be restrictive on the development of policy and rule making.

In *Re Findlay*,[10] the Home Secretary announced a new parole policy to the party conference and then to Parliament. For prisoners convicted of certain serious offences, there would be no parole unless a minimum sentence period had been served. This was challenged. Following *Sagnata*, it was argued that it was only acceptable to have a policy if, in making a decision, all relevant factors and considerations had been taken into account. The policy was merely one factor and must be given no greater weight than any other. It

9 [1971] 2 QB 614.

10 [1985] AC 318.

would be inadequate to consider merely whether an exception should be made to the policy as this would involve giving the policy an *unlawful priority*. The Court of Appeal was split between this approach and that of *British Oxygen*.

The House of Lords held that it would only be an unlawful fetter of discretion if the policy was irrebuttable and precluded consideration of other factors. It was held that this was not the situation in the present case. The House of Lords approach clearly followed *British Oxygen*, though it left room for the adoption of the more restrictive approach if the statutory context showed that every case must be considered without a pre-applied policy.

Whilst welcome in the interests of administrative justice, the question must be raised as to whether the *British Oxygen* approach is adequate to ensure accountability and legitimacy of decision making. How can we ensure that a public body has *actually* considered whether to make an exception to a policy, rather than just rubber stamping it? How can unlawful fettering be shown? In practical terms, it may be very difficult to demonstrate that the individual circumstances of an application have been taken into account fully by the decision making body.

(b) Another way in which an authority may unlawfully fetter its discretion is by *entering into a contract*, the terms of which prevent it exercising its discretionary powers.

Obviously, public authorities continually make contracts which will, by definition, restrict their powers in some way. But the courts have held that the authority must not bond itself in such a way as to prevent the exercise of a discretionary power which is of *primary* importance. The question is, how is a power of primary importance defined, and who defines it?

In *William Cory and Sons v London Corporation*,[11] the Corporation had made a contract with Cory to remove refuse from the City of London by the company barges. During the operation of the contract, the Corporation passed new bylaws which imposed obligations on Cory to use new barge coverings. These were more stringent than those required by the terms of the contract and were likely to incur an expenditure of £400 per barge. Cory argued that this amounted to rescission of the existing contract by anticipatory breach, claiming that there was an implied term in the contract to the effect that the Corporation would not use its powers to enact any new provisions with more onerous conditions. However, the court held that no such term could be implied, as this would be an unlawful fetter on the discretionary powers of the authority to make new bylaws.

Cases following the *Cory* line can run contrary to the bargaining and negotiation which, in practice, goes on between local authorities and

11 [1951] 2 KB 476.

contractors, and which may, in strict legal terms, infringe the principle of non-fettering. However, on occasion, the court has taken a different approach and has asked whether the contractual obligation is a valid exercise of power. If held that it is, then it may be permissible to fetter the discretionary power. In *Ex p Beddowes*,[12] the council resolved to sell a block of flats, which were part of an estate, to a private company. Conditions in the contract included covenants that the remainder of the estate was to be used for owner occupation. Before the contract was finalised, the control of the council changed and the contract was challenged on the grounds of fettering.

The majority considered that, although an authority cannot extinguish its statutory powers by way of covenants, the contract was valid. The reason was that the council had the power to impose restrictive covenants; here, they had done so for a proper housing purpose which was consistent with the objective of the legislation.

(c) Subdelegation and acting under dictation.

In the absence of a statutory power to delegate, a public authority entrusted with a discretionary power is *required to exercise it itself*.

Unlawful subdelegation

In *Ellis v Dubowski*,[13] the local authority, which was empowered to issue licences to cinemas, subject to various conditions, stated that no films would be shown that had not been approved by the British Board of Censors. This was held to be unlawful, as this would divest the local authority of its discretion and in effect hand it over to the Censor Board instead. However, in the *Blackburn*[14] case, it was held lawful to have a general policy of showing films approved by the Censor Board as long as the local authority retained its discretion to depart from this in individual cases if a specific objection were made.

It is important to recognise that there are statutory exceptions to the principle of non-delegation. For example, under s 101 of the Local Government Act 1972, local authorities have wide powers to delegate functions to committees, subcommittees, officers and other local authorities. Also note the special position of civil servants, who are generally regarded not as a delegate but as the *alter ego* of their minister and may therefore exercise powers given to ministers.[15]

12 *R v Hammersmith and Fulham LBC ex p Beddowes* [1987] 1 All ER 369.

13 [1921] 3 KB 621.

14 [1976] 1 WLR 550.

15 *R v Skinner* [1968] 2 QB 700.

ACTING UNDER DICTATION

This category may sometimes be indistinguishable from unlawful subdelegation. There are two main types:

(a) where a decision is determined by a body other than that to which the power to make a decision was given. In *Lavender v Minister of Housing and Local Government*,[16] the minister had refused planning permission, on appeal, for the extraction of gravel from a certain area, on the grounds that high quality agricultural land should not be used for this purpose, unless approved by the Minister of Agriculture. In this case, the latter had objected. The court quashed the decision of the Minister of Housing and Local Government on the grounds that he had acted under the dictation of the Minister of Agriculture and had therefore failed properly to exercise his discretion.

In *Ex p Madden*,[17] the Police Complaints Board adopted a policy that it would not recommend disciplinary proceedings to be taken against police officers if the Director of Public Prosecutions had decided that there was insufficient evidence to justify prosecution. The court held that this was unlawful; the Board was set up to consider complaints and should not treat as binding the decisions of another person or body.

(b) Where an independent public body takes into account government policy in reaching a decision. This is particularly important in relation to non-departmental government bodies, including regulatory public bodies such as Oftel, Ofgas, etc. A particular theme of the cases is that there has been government pressure to influence public sector borrowing.

Laker Airways v Dept of Trade[18] provides an illustration of the issues involved. The somewhat complex background to the case was as follows. Under the Civil Aviation Act 1971, the Civil Aviation Authority (CAA) administered licences to operators providing flights from the UK. The CAA were obliged to perform their functions with regard to certain criteria, the most important of which was that at least *one airline not controlled by British Airways* should have the opportunity to participate in providing air transport services. At that time, British Caledonian had been established to provide this second force. The minister had various powers in relation to the CAA:

(a) the minister could decide appeals;

(b) in limited circumstances, the minister could issue directions to override statutory requirements;

16 [1970] 3 All ER 871.
17 [1983] 1 WLR 447.
18 [1977] QB 643.

(c) *most importantly*, the minister could give guidance to the CAA under s 3(2) of the Act on the exercise of its functions, which the CAA were under a duty to obey. Such guidance had to be approved by resolution of both Houses of Parliament.

In October 1972, the CAA granted Laker a licence to fly 'Skytrain' to New York. British Caledonian appealed to the minister, but this was rejected. In reliance on this, Laker invested in aircraft and trained crew. Before Skytrain could actually go into operation, Laker was also required to obtain what was called a 'treaty designation' under the Bermuda Agreement and an approval of this from the US President. This would allow his service to fly in and out of the USA. The 'treaty designation' was granted in March 1974, but it awaited the signature of the US President.

In December 1974, British Airways applied to the CAA for revocation of Laker's licence because of falling demand and rising prices. But after a hearing, the CAA rejected BA's application. In the meantime, there had been a change of government and in July 1975, the new minister announced a change in policy. In future, competition would not be allowed between UK airlines on long haul routes and Skytrain would not be allowed to commence operating. The US authorities were informed of the change of policy and they withdrew the 'treaty designation' before the President had approved it.

In 1976, the new policy was implemented by the minister purporting to issue guidance to the CAA under s 3(2) of the Act by instructing the CAA not to allow competition on long haul routes. The CAA were also told to review existing licences and to take appropriate action. This meant a revocation of Laker's Skytrain licence. The guidance was subsequently approved by both Houses of Parliament, although some reservations were expressed from the House of Lords.

Laker sought a declaration that the minister had acted *ultra vires*. Lord Denning held that the so called guidance was *ultra vires* and in conflict with the legislation. It was not guidance at all, but an order or command, and so outside the minister's powers. The action of the minister also contradicted the competition provisions of the statute. Guidance could explain, amplify or supplement statutory provisions, but not overrule them. Lord Roskill agreed that guidance could not compel a particular decision, merely provide assistance in reaching it. The court stressed two main points:

(a) to allow guidance to be used as the minister had attempted to use it would remove the normal right to a hearing and the right of appeal before a licence was revoked;

(b) such guidance would prevent the CAA from carrying out its quasi-judicial functions, as it was similar to a tribunal, independent from government.

The *Laker* case implied that there are restrictions on the extent to which central government can attempt to impose policy on other bodies unless statutory powers to issue directions exist and are used. *Laker* was useful in forcing intervention into the open and for preventing ministers circumventing procedural protections, such as a right of appeal, before the revocation of a licence.

It can be argued that the Court of Appeal was far removed from the problems and realities of aircraft licensing, as they failed to understand the nature of the CAA. It was not a quasi-judicial body independent of government, but a new form of regulatory agency attempting to combine judicial and executive functions in an area set out by government policy. The predecessor to the CAA had been the Air Transport Licensing Board, which had failed because there were no means of providing a framework of guidance. The minister therefore had to impose policy by either allowing appeals or refusing designation. The result was confusion and no consistent principles or rules could be developed. The government at the time of *Laker* always intended to have a major say in airline competition and guidance was a means of setting their policy out openly. The Court of Appeal also misunderstood the statutory provisions; the intention was not to have competition on every route, but merely a second force airline. This was already provided by British Caledonian.

After *Laker*, the provision for guidance became redundant; instead the CAA is engaged in rule making, produced and published after fairly widespread consultation. These do not have to be laid before Parliament. This position is regularised in the Civil Aviation Act 1980, which removed the power of the minister to issue guidance. In addition, s 69 of the 1980 Act requires the CAA to publish periodic statements of licensing policy after consultation with such persons as appear to it to be representative of the air transport industry and its users. The procedures of the CAA are exemplary, but there is still a problem of relations with government.

The *Air Canada*[19] case

In 1979 and 1981, the British Airports Authority (BAA) heavily increased landing charges at Heathrow Airport. This was challenged by 18 airlines on the ground that the increased charges were implemented as a result of pressure from the Secretary of State based on the general policy of government and, in particular, on the need to reduce public borrowing. This was alleged to be *ultra vires*, because the power to issue directions under the Airports Act 1975 could only be used to implement the purposes of the Act, not for the purposes of influencing the public sector borrowing requirement.

19 *Air Canada v Secretary of State for Trade* [1983] AC 394.

This case was potentially very important, but it never reached the courts on the main issue. It went to the House of Lords on the issue of discovery of documents where it was held that the applicants were not entitled to the relevant material. They were thus unable to produce evidence to support their challenge, which was based almost entirely on fettering grounds.

Estoppel or misleading advice

During the course of their work, employees of public authorities frequently make statements or representations, or give advice concerning the application of legislation to a certain situation or the interpretation of a particular statute. As a result, the question that can then arise is in what situation, if any, can these representations be held to be binding, if they are subsequently found to be incorrect?

In answering that question, there is a need to distinguish several issues which have been confused by the courts from time to time.

The basic principle, established in *Re 56 Denton Rd*,[20] is that if the representation made by the public authority is *valid*, that is, *intra vires*, it will be binding *unless* the authority had said that it was provisional, *or* there is a statutory provision giving power to review.

However, in *Rootkin v Kent CC*,[21] it was held that this was law only where the local authority was under a duty to act, *not* where it was exercising a discretionary power.

Rootkin's daughter had been allocated a place at a school originally estimated to be over three miles away from her home, and she was granted a discretionary bus pass. The route was then remeasured and found to be less than three miles, so the pass was withdrawn. Rootkin applied for judicial review, arguing that he had relied on the availability of the bus pass when deciding to which school he should send his daughter.

The court held that a discretionary decision of an authority *can* be reviewed, even in the absence of statutory authority, where it was based on a mistake of fact. It was a general principle of law that the doctrine of estoppel cannot be used against a public body for the purpose of preventing them from exercising their statutory discretion. The decision to remove the pass was not, therefore, *ultra vires.*

This is a doubtful decision, but it does illustrate the problem of what amounts to a valid decision in this area. There are *two basic factors* which must be present for a representation to be *valid* and, therefore, *binding:*

20 [1953] Ch 51.

21 [1981] 1 WLR 1186.

(a) the officer acting for the public body, giving the advice or making representations, *must* have the *authority* to do so;

(b) the decision resulting from the representation must be *intra vires* (within the powers) of the public body.

If a representation is made by an officer who *lacks the authority* or the decision itself is *ultra vires,* it will *not* be binding.

By way of example, in *Southend Corporation v Hodgson*,[22] a company bought land for use as a builders' yard, on the understanding that no planning permission was required. They checked with the borough surveyor, who said that there was already an existing right of use for the purpose of the company. This was incorrect, and the local authority served an enforcement notice to prevent the land being used as a builders' yard. It was held that the enforcement notice was valid, as no undertaking from a surveyor could fetter the discretion of the authority.

The area became confused when Lord Denning attempted to extend estoppel to cover misleading advice from government. In *Robertson v Minister of Pensions*,[23] an undertaking, from the wrong government department, that Robertson could receive a pension, was held to be binding. This was later repudiated in *Howell v Falmouth Boat Construction*,[24] where Lord Simonds said that the illegality of an act is the same whether or not the applicant has been misled by an assumption of authority on the part of a government official. However, in *Lever Finance v Westminster LBC*,[25] the Court of Appeal reverted to the *Robertson* line by holding that an assurance by a borough architect, that planning permission was not required, was binding.

To some extent, the position has now been clarified in the leading case of *Western Fish Products v Penwith DC*.[26] The facts are similar to those of the *Southend* case. In *Western Fish* it was held that a planning officer, even if apparently acting within the scope of his authority and purporting to make a decision, could not bind his council, as estoppel could not be raised in such a way as to prevent the exercise of a council's discretion. The court stated there were two exceptions to this where:

(a) the power was delegated to the officer, or there was some evidence of delegation. In such a case, the *Re 56 Denton Rd* principle would apply, because the decision would be valid;

(b) a mere procedural requirement had been waived by the official rather than his having made any substantive assurance.

22 [1961] 1 QB 416.
23 [1949] 1 KB 227.
24 [1950] 2 KB 16.
25 [1970] 3 All ER 496.
26 [1981] 2 All ER 204.

Where representations are made in these types of situations, it is worth noting that there are two other potential courses of action:

(a) it may be possible to sue in tort for negligent misstatement on the principle in *Hedley Byrne v Heller*,[27] asserting private rights so that there is no need to use Ord 53;[28]

(b) it may be possible to make a complaint to one or other of the ombudsmen. A substantial number of reports from the Parliamentary Ombudsman and the Local Ombudsman are concerned with misleading advice.

For example, a pensioner was informed by letter that he no longer needed to pay rent as this would be paid under the Housing Benefit scheme. This was confirmed by phone, but was incorrect. As a result, the pensioner became in arrears and was threatened with eviction. The Department of Social Security refused to compensate, as the claimant had received all the payments to which he was entitled. Both the chair of the Appeals Tribunal and the claimant's MP pressed for an *ex gratia* payment, but the department refused. When the Parliamentary Ombudsman undertook an investigation, however, the department paid up.[29] Similarly, students who have had their grants withdrawn through maladministration have been paid compensation after involvement of the Local Ombudsman.

There have been two more recent cases on estoppel worthy of mention. In *Camden LBC v SS for the Environment*,[30] in a letter signed by the head of planning of the council, the applicant was informed that a variation to an application for planning permission for a roof extension was minor and did not require permission. Building work was started, but the applicant was served with an enforcement notice preventing construction. It was held that the council were estopped by the terms of the letter from asserting that planning permission was required. The officer who wrote the letter had actual or ostensible authority to take such a decision and the council were bound by the representations made.

In *Matrix Securities v IRC*,[31] the applicants had devised a complicated scheme for the development of an enterprise zone. Outlining the scheme in a letter, they sought assurances from the local inspector of taxes about allowances to be set against tax. The inspector gave tax clearance to the scheme without qualification. Later, the Financial Institutions Division of the Inland Revenue effectively revoked the tax clearance. The applicant sought

27 [1964] AC 465.

28 This approach was confirmed in *Lambert v West Devon BC* (1997) *The Times*, 27 March, where it was held that a planning applicant advised by a senior member of the local authority that he could proceed with building work before his application had been properly determined, was entitled to rely on that advice and a *Hedley Byrne* type of duty of care was created.

29 Case C-701/84.

30 (1993) 67 P & CR 59.

31 [1993] EGCS 187.

judicial review on the grounds that this was unfair and amounted to an abuse of power by the Inland Revenue.

The House of Lords held that, in reality, the proposal of Matrix was a sophisticated tax avoidance scheme. The applicant's letter to the local inspector had omitted a vital piece of information and the Revenue were not estopped or acting unfairly in withdrawing clearance. The Financial Institutions Division had discovered the mistake of the local tax inspector and had given immediate notice that they could not approve the scheme before any money had been invested by the public. The court held that:

> It was one thing to hold the Revenue to a clearance that had been acted on in good faith, but quite another to permit the correction of an action before it had been acted on. If, however, the applicant had been entitled to rely on the clearance by the inspector and had spent money in promoting the scheme before clearance was withdrawn, then fairness would demand that the applicant should be reimbursed for out of pocket expense, and it could be regarded as an abuse of power for the Revenue not to do so.

Furthermore, Matrix knew or, by reason of Revenue circulars, *ought* to have known, that clearance could only be obtained in a particular way and at a particular level. Purported clearance obtained in a different way had no effect and would not bind the Revenue.

The relationship between fettering, estoppel and legitimate expectation

It appears, then, that the courts may be attempting to balance the interests of the public authority with those of the individual on a basis of fairness. In certain circumstances, the courts have been prepared to impose procedural duties on public authorities where they have changed their policy. We shall be dealing with legitimate expectation in much more detail in the following chapter, but a brief comment is appropriate here because of links with estoppel and situations where representations are held to be binding.

Briefly, it has been held that, in some circumstances, individuals or groups of individuals will have a legitimate expectation of being notified or consulted before there is any policy change. This may arise from an undertaking on the part of the public authority to consult, as in the *Liverpool Taxi*[32] case or, because of a past practice of consultation, as in the *GCHQ*[33] case.

In *Ex p Khan,*[34] the court appeared to widen this approach. The applicants had obtained from the Citizen's Advice Bureau a copy of a circular setting out

32 *R v Liverpool Corpn ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

33 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

34 *R v SS for the Home Dept ex p Khan* [1985] 1 All ER 40.

the criteria and guidance used by the Home Secretary in exercising discretion as to whether to allow entry into the country of children for adoption. The applicants met these criteria, but the child they wished to adopt was refused entry. The grounds on which the Home Secretary based his decision were different from those set out in the circular.

A majority of the Court of Appeal held that this was unlawful; the Secretary of State could only change policy where an overriding public interest required it and where an opportunity for representations to be made had been given. Thus, the majority held that, if an authority has a published policy, it must provide an opportunity for consultation before it is changed. This seems to apply not only to situations where a hearing has been promised, but wherever there is to be a change of substantive policy.

However, there is another way of looking at this. The court also considered that the circular had set out the relevant considerations in the *Wednesbury* sense, therefore the Secretary of State had taken into account irrelevant considerations in not following them.

In *Ex p US Tobacco*,[35] it was held that the Secretary of State had acted unfairly in concealing from the applicants information which led to a change in policy which affected their business. However, the applicants' legitimate expectation extended only to *procedural* concerns and not to any *substantive* undertakings. The Secretary of State could not fetter a discretion conferred on him by statute. Provided he acted rationally and fairly, he was entitled to change his policy.

The approach of balancing interests with reference to fairness also seems to be the one underlying judicial statement in *Matrix*, although legitimate expectation was not referred to explicitly in that case. Another factor to be taken into account in these cases is any lack of complete disclosure of the facts, and hence good faith, by any of the parties involved.

Relevancy, improper purposes, unreasonableness/irrationality

We now turn to the grounds for review under which the courts hold that discretionary power has been misused in some way. The starting point must be the classic statement of Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury Corporation*,[36] the case which introduced the concept of '*Wednesbury* unreasonableness'. Briefly, the facts were that the owner of a cinema sought to challenge a condition imposed by the local authority in its grant of a licence, under the Sunday Entertainment Act 1932, concerning performances on Sundays. The condition was that children under 15 years of

35 *R v SS for Health ex p United States Tobacco International Co* [1992] 1 All ER 212.

36 [1948] 1 KB 233.

age, whether accompanied by an adult or not, could not be admitted to the cinema on Sundays. The court refused to declare that condition *ultra vires*. What is important is the judgment of Lord Greene, which set out the grounds for control of discretionary powers:

> When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case ... the court must not substitute itself for that authority.

The court can only interfere with an act of executive authority if it is shown that the authority has contravened the law. He then went on to describe how such a contravention might arise. Discretion must be a real exercise of discretion. There must not be bad faith, or disregard of public policy and further:

> ... the court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless *come to a conclusion so unreasonable that no reasonable authority could ever have come to it.*

So, on the facts of the *Wednesbury* case itself, the test was not whether the court agreed that the condition to exclude young persons under age 15 was a reasonable condition, but only whether the decision had been properly arrived at and was not so unreasonable that no reasonable authority could have imposed such a condition.

Since that judgment, of course, Lord Greene's words have been relied on in a wide variety of cases and it has now come to mean that, in scrutinising decisions and actions of public bodies, the courts apply the principles of *relevancy*, *improper purposes*, and *unreasonableness.* It has also resulted in the development of two different, but accepted, meanings of '*Wednesbury* unreasonableness'. The first has been characterised as the 'umbrella' meaning, where the term includes relevancy, improper purposes, and *mala fide* or bad faith. The second is the 'substantive' meaning, which applies to the final part of Lord Greene's definition – where a decision is so unreasonable that no reasonable public body could have made it.

The *GCHQ* case[37] presented a further definition, when Lord Diplock sought to clarify the grounds of judicial review in the following terms:

> Judicial review has, I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first

37 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

> ground I would call 'illegality', the second 'irrationality', and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community ...

Under Lord Diplock's heading of illegality[38] would come bad faith, jurisdictional error, failing to take into account relevant factors, ignoring relevant factors and acting for an improper purpose – part of Lord Greene's *Wednesbury* unreasonableness. As for his head of irrationality, Lord Diplock said that:

> I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Craig[39] has argued that Lord Diplock's particular classification of illegality and irrationality as grounds for review nicely points up the distinction between the different levels of review and the intensity of review. On the one hand, the courts may intervene because a decision maker has used his discretionary power for a purpose not allowed by the statute. This would be a first level intervention in Craig's terms and comes within 'illegality'. On the other hand, the court may intervene because a decision maker has exercised a power in a manner which the court believes is unreasonable or irrational – a second level intervention, because here the court is coming close to looking at the nature of the decision itself.

This is important because, as Craig comments, while:

> ... the main focus of control was at the first level, the impression could be maintained that the courts were applying parliamentary intent in the sense of delineating the purposes for which such discretionary power could legitimately be used. If the controls at the second level are expanded, then it becomes much more difficult to preserve this rationale for judicial intervention. The court's role shifts inevitably towards ensuring principles of fair administration.

Intensity of review is relevant in considering the argument that the courts apply a more stringent approach to the exercise of a power depending on the nature of that power itself. This is very much in line with part of Laws' argument in his article 'Is the High Court the guardian of fundamental constitutional rights?',[40] where he draws on two House of Lords' decisions in

38 It also includes 'simple' *ultra vires*, where an authority purports to do something which it has no power to do.

39 Craig, *Administrative Law*, 1994.

40 Laws, 'Is the High Court the guardian of fundamental constitutional rights?' [1993] PL 59.

support of his argument. In *Brind*,[41] their Lordships made it clear that, if the exercise of a discretionary power impinged upon a fundamental right, then the courts would require an important competing public interest to be shown in order to justify this intrusion. In contrast is the approach taken in *Ex p Hammersmith and Fulham LBC*,[42] which involved the issue of 'charge capping' of local authorities by central government (an example for Laws of a case where the issue involved economic policy, where the judges should not apply so rigorous a test in scrutinising executive action). This was indeed the approach of the House of Lords. For the court, the case raised a matter of national economic policy to be decided by politicians and debated in the House of Commons, not a matter for the courts to review in terms of unreasonableness. Lord Bridge held that, while the court could intervene if the minister had acted illegally, that is, on relevancy or improper purposes grounds, it should be wary of intervening on grounds of irrationality unless there were evidence of manifest absurdity or bad faith.

It should be borne in mind that the case law is complicated by the fact that individual cases, not surprisingly, are often argued and decided on more than one ground and, of course, the ratio of individual cases may be interpreted differently in later cases. It is, however, important to consider how the courts have utilised these mechanisms of control in individual cases, particularly in the light of different policy matters.

Illegality: relevancy and improper purpose (first level control)

The body concerned must take into account relevant factors and discount irrelevant factors. In some instances, the statute which confers the power may indicate what factors must be taken into account in exercising that power. But that may not always be the case and it may not be easy to decide what the relevant matters are when they are not expressly stated in the relevant statute. The court may clearly have to exercise its own discretion in such cases.

In defining what is or is not relevant, or what is an improper purpose, the court may be in danger of substituting its own policy view for that of an elected authority, a danger to which the judiciary often point. Lord Greene, in *Wednesbury*, said that the court must not substitute its own view for that of the authority. In *Luby v Newcastle-under-Lyme Corporation*,[43] the court was asked to consider a claim that a local authority policy in relation to the level of council house rents was invalid because the council took no account of the circumstances of individual tenants in fixing rents. Diplock LJ held that the court should not substitute its view for that of the local authority. The local

41 [1991] 1 All ER 721.
42 [1991] 1 AC 521.
43 [1964] 2 QB 64.

authority had decided against a differential charging policy, and while reasonable men could differ as to whether or not it was the right policy, it was not one which was so unreasonable that no reasonable authority could have come to it.

Cases where the courts have been drawn into contentious areas of political dispute abound in this area of law. The earliest in a long line is that of *Roberts v Hopwood*,[44] in 1925, a case to which Lord Greene referred in *Wednesbury*. *Roberts v Hopwood* can be analysed in terms of relevancy: the council had taken account of irrelevant factors ('socialistic philanthropy and feminist ambition') and failed to take into account relevant factors, namely, the market rates for labour in the area, and the burden which would be placed on ratepayers by the introduction of the proposed minimum weekly wage for both men and women. The case could also be analysed as an improper purpose case: the power was to pay wages, not to make gifts. It can be seen as the first of a line of local government cases where the financial impact of council policy on the ratepayer was seen as an important relevant factor to be taken into account.

In *Prescott v Birmingham Corporation*,[45] the court adopted a notion of 'fiduciary duty' which councils impliedly owe to their ratepayers and which can override any other relevant considerations. This idea of fiduciary duty exerted a strong influence in local government cases for some time.

Perhaps the most famous case in which the claims of fiduciary duty had an important influence on the decision was *Bromley LBC v GLC*,[46] where the court was asked to rule on the exercise of discretionary powers by the GLC under the Transport (London) Act 1969 (the wording of which was described by Lord Diplock in the House of Lords as 'somewhat opaque and elliptical'). The GLC had statutory powers to promote the provision of 'integrated, efficient and economic transport facilities and services for Greater London'. The Act set up the London Transport Executive (LTE) to implement transport policy and it also gave the GLC somewhat complex statutory powers to make grants to the LTE to cover the latter's deficits. The Act also referred to the requirement of the LTE to break even. After an election, the Labour controlled council sought to fulfil its manifesto promise to cut fares by 25%. This resulted in a huge deficit to be made up by an additional rate demand – made worse by the fact that the decision to implement this policy meant that the council would lose a further £50 m from central government grant. Bromley, one of the councils whose ratepayers would be asked to pay an increased rate, challenged the GLC's decision as *ultra vires*. Both the Court of Appeal and the House of Lords found in Bromley's favour. Although the eight judges came to the same decision, they arrived at it by different reasoning. One of the

44 [1925] AC 578.

45 [1955] 1 Ch 210.

46 [1982] 1 All ER 129.

grounds for finding against the GLC was that it had not taken account of its fiduciary duty to its ratepayers.

The decision has been criticised, *inter alia*, because of the judicial emphasis on the word 'economic' and on the particular interpretation given to its meaning. It has been argued that the words 'efficient' and 'integrated' were not given sufficient weight. Had they been considered, then matters of social policy, environment, and strategic planning could have become relevant factors. This type of argument raises the question as to whether *ex post facto* control by the courts is an appropriate mechanism when issues such as this are to be decided. An equally important role for public law is to devise mechanisms to ensure adequate public participation on policy issues beyond the blunt instrument of the ballot box.

The supremacy of fiduciary duty seems now to have declined. In *Pickwell*,[47] the court declined to intervene in somewhat similar circumstances to the earlier local authority cases, and the judgments are interesting because of the way in which these earlier cases are handled. Both the judges interpreted *Roberts v Hopwood* and *Prescott* as improper purpose cases and stated that here, there was no evidence that the facts of *Pickwell* gave rise to the same considerations. On fiduciary duty, the court felt that it was only *one* among a number of factors which had to be taken into account, including a local authority responsibility to provide services and consider the interests of its workforce. The court is not concerned with whether due or proper weight is given to a material consideration; the weight to be given to such a matter is for the body exercising the discretion to determine. The only other way in which the challenge could have succeeded was by showing that the decision was so unreasonable that no reasonable authority could have come to that decision. On the facts, the court did not accept that that was so.

Improper purpose

Sometimes the court is asked to adjudicate where there may be more than one motive, commonly described as 'mixed motives'.[48] This point was considered more recently by Glidewell J, in *R v ILEA ex p Westminster CC*,[49] where the issue arose out of expenses incurred by the Inner London Education Authority (ILEA) in connection with a publicity campaign. The relevant powers were contained in s 142(2) of the Local Government Act 1972, which allowed expenditure on publishing 'matters relating to local government'. The ILEA, who were opposed to government policies on limiting public expenditure, retained an advertising agency to mount a media and poster

47 [1983] 1 QB 962.

48 See the old case of *Westminster Corpn v London and North Western Rly Co* [1905] AC 426.

49 [1986] 1 All ER 19.

campaign to 'inform' the public about the government proposals (a lawful purpose) and to 'persuade' the public to support the ILEA in its campaign against the proposals (an unlawful purpose). In his judgment, Glidewell J referred to guidance given by academic writers and said that he should ask himself whether the lawful purpose is 'the true and dominant one' and 'whether the unauthorised purpose has materially influenced the actor's conduct'. If it had, then the power had been invalidly exercised, because irrelevant considerations had been taken into account. It was then a question of fact for him to decide whether the unlawful purpose of persuasion had materially influenced the ILEA's decision. On the facts, he felt that it had, and that it was 'a, if not the, major purpose of the decision'. Accordingly, he declared the decision *ultra vires.*

A case where relevancy and improper purpose were grounds for review in a politically contentious context is the *Pergau Dam* case,[50] where the Divisional Court granted a declaration that the Foreign Secretary had acted unlawfully in deciding to grant aid for this project. The decision was held to be unlawful on the grounds that, although the Foreign Secretary was entitled to take into account political and economic considerations such as the promotion of regional stability, good government, human rights, and British commercial interests, he was not entitled to grant aid to a project which was so economically unsound that it did not meet the criterion for such aid, which was to provide finance for sound development projects, and which did not fall within the purpose of the Act[51] of 'promoting the development' of an overseas country.

Substantive unreasonableness

Having considered relevancy and acting for an improper purpose, we now turn to what we might call 'pure' unreasonableness. As stated by Lord Greene, this was the final residual ground for setting aside an exercise of a discretion. If the authority had passed the first two tests, namely, those concerning relevant and irrelevant considerations, a decision might still be set aside if the body has come to a conclusion so unreasonable that no reasonable authority could ever have come to it. As Craig describes it, this is the safety net part of the test which comes into play if all else fails. It is important to recognise that this is an instance where the court intervenes on *substantive* rather than *procedural* grounds.

The definition given by Lord Greene is tantamount to an action of lunacy. As Lord Scarman said, in *Nottinghamshire CC v SS for the Environment*,[52] the

50 *R v SS for Foreign Affairs ex p World Development Movement Ltd* [1996] 1 WLR 386.

51 Overseas Development and Co-operation Act 1980.

52 [1986] 1 All ER 199.

decision has to be so absurd that the decision maker 'must have taken leave of his senses' for a challenge to succeed. Consequently, it is not a ground that succeeds very often. Many commentators, including Craig, argue that unreasonableness really serves no useful purpose because the first two grounds, relevancy and improper purpose, are sufficient, and that decisions could be taken on those grounds.

The courts have consistently stated that, in considering challenges on the ground of unreasonableness, they must preserve the distinction between a decision on the 'merits' (is this a decision which I would have come to?) and review of the 'legality' (is this a decision which a reasonable person could have come to?). The former question may be appropriate in appeal proceedings, but is regarded by the judges as going beyond their proper jurisdiction in proceedings for judicial review. They are aware of the dangers of unreasonableness being used as a means of challenging political values and of the courts being used as a means of settling disputes about political ideology.

Unreasonableness in this substantive form has been argued in many cases, along with the other grounds of relevancy, etc, but frequently the courts have discussed the test of unreasonableness, only then to hold that, on the facts, the test has not been met in particular circumstances, or to emphasise the difference between review and appeal. Clearly, it is difficult for an applicant to win on this ground alone, because the court has to be persuaded that the minister, for example, has acted completely irrationally – as noted earlier, 'taken leave of their senses'. Not surprisingly, the courts are reluctant to come to that conclusion, save in extreme circumstances. The test of unreasonableness is thus a narrow one: it is a means to limit review.

An example of a case where improper purpose and reasonableness were both argued is *Wheeler v Leicester CC*.[53] The city council administered a local recreation ground and had powers under public health legislation to set apart pitches and allow exclusive use of these pitches to a club, subject to such charges and conditions as the local authority thought fit. Leicester Rugby Club had use of some pitches for its second team matches. Three members of the club were invited to go with an English team to tour South Africa. The council supported the Gleneagles Agreement, a Commonwealth agreement of that time to withhold support for and discourage sporting links with South Africa. The council stated that it also had regard to s 71 of the Race Relations Act 1976, which imposed a duty to promote good relations between people of different racial groups. A quarter of the population of Leicester was Asian or Afro-Caribbean and the council saw the club as an ambassador for the city. The council put four questions to the club about its attitude to the tour of South Africa and indicated that it would only find the response acceptable if all four questions were answered in the affirmative. In reply, the club said that

53 [1985] 2 All ER 1106.

it agreed with the council in condemning apartheid, but that it was not unlawful for the players to take part in the tour, nor was it contrary to the rules of the club or the Rugby Football Union (the game's governing body in England). The players went on tour and the council passed a resolution banning the club and its members from using the recreation ground for 12 months. The club applied for an order to quash the council's decision.

The House of Lords found that the city council had abused its statutory powers and the decision was *ultra vires*. Lord Roskill found that the council were entitled to pay regard to the Race Relations Act but were unreasonable in the *Wednesbury* sense for coming to the decision to withdraw the use of the ground. He noted that he was differing from the four judges who had heard the case in the Court of Appeal and the Divisional Court, all of whom had not felt able to hold that the club's action was *Wednesbury* unreasonable. (The council was also, Lord Roskill believed, procedurally unfair, because it had not accepted the reasonable response from the club.)

Lord Templeman stated that the laws of this country were not like 'the laws of Nazi Germany' and the council could not use its power to punish a club which had committed no wrong. They had, thus, used their powers for an improper purpose.

If you examine the judgments, the case appears to be more like a *de novo* appeal. There was a lack of principle to justify the court's decision: the judgments are very short, and more like mere assertions than reasoned justifications. The council were attempting to balance their duties. Their reaction may well have been an over-reaction, but was it really like sacking a teacher for having red hair?[54] Was it so unreasonable a decision that no authority could have come to the same conclusion?

Contrast this with *Nottinghamshire CC v SS for the Environment*.[55] The council tried to challenge guidance on local authority expenditure issued by the Secretary of State and on which the payment of support from central government depended. It was argued that the effect of this guidance on different authorities was so disproportionate that the Secretary of State had acted unreasonably. Lord Scarman stressed that the guidance was approved by Parliament, and on constitutional grounds it was not appropriate for the courts to interfere on the basis of unreasonableness, unless the consequences of the guidance were so absurd that the Secretary of State must have taken leave of his senses. The present situation was a matter of political judgment. *Wheeler* was distinguished as being decided on the basis of improper purposes, which is an interpretation from Lord Templeman's speech but not that of Lord Roskill. (The other three judges in *Wheeler* had expressed their agreement with Lords Roskill and Templeman.)

54 The famous example given in *Short v Poole* [1926] Ch 66 by Warrington LJ.

55 [1986] 1 All ER 199.

One case where unreasonableness was successful is that of *Backhouse v Lambeth LBC*,[56] a case which involved somewhat bizarre facts. In brief, the council resolved to get round the provisions of the 1972 Housing Finance Act, which required them to increase council house rents, by putting all the increase on to one, unoccupied, council house. So, they resolved to increase the rent on this house from £7.00 a week to £18,000 a week. Melford Stevenson J held that the resolution was *ultra vires*, as it was one which no reasonable local authority could have made.

Perhaps surprisingly, the Court of Appeal found *Wednesbury* unreasonableness in the case of *West Glamorgan CC v Rafferty*.[57] There, the council had sought a possession order against gipsies occupying a council owned site on the grounds that they were causing a nuisance. The council had, for over 10 years, been in breach of its duty under s 6 of the Caravan Sites Act 1968 to provide adequate accommodation for gipsies in its area and had not on this occasion made any arrangements for alternative accommodation. The court held that this constituted *Wednesbury* unreasonableness. Ralph Gibson LJ commented that the court was not precluded from finding a decision to be void for unreasonableness merely because there were admissible factors on both sides of the question. He seemed to feel that the council had not given sufficient weight to its legal duty to provide gipsy sites. In that case, the test of unreasonableness was not so strict, and it shows clearly why review on this ground can properly be described as substantive. The court was second-guessing the authority's view of the situation.

It has to be said that, in a later case involving eviction of gipsies (*R v Avon CC ex p Rexworth)*,[58] the *Rafferty* decision was distinguished and, on similar facts, the decision went the other way. The council was aware of its shortcomings in not providing sites, and was trying to find some. It had to balance its duty to gipsies with its duties to other highway users; but, in that case, there was substantial obstruction to the highway and possible danger was being caused.

Lord Diplock, as we have noted, used the word 'irrationality' rather than 'unreasonableness'. Since the *GCHQ* case, the courts seem to have used both words interchangeably and do not appear to have applied a different test depending on how they characterise it.

What is important to understand, however, is that unreasonableness/irrationality in public law terms is different from unreasonableness in ordinary language and in other areas of law. In public law, it has a particular, narrow meaning. The courts themselves have not

56 (1972) *The Times*, 14 October.

57 [1987] 1 WLR 457.

58 (1988) 87 LGR 470.

always observed the difference, however, and *Tameside*[59] is an example of how the judiciary may sometimes be tempted to apply the narrow test of *Wednesbury* unreasonableness inappropriately in a case of statutory construction. *Tameside* is also worthy of note in relation to the *dicta* on the status of an electoral mandate, particularly when this is contrasted with the approach adopted on this point in the *GLC* case.

To recap, judges regularly insist that, to meet the test of unreasonableness, it must be shown that the decision is one to which *no reasonable body could have come, not that it is a decision which the court thinks is unreasonable.* This is to inject an element of objectivity into the court's decision making and to try to ensure that it is not trespassing on the merits. It has been said that this formulation allows the decision maker a *margin of discretion* into which the courts will not trespass. If a reasonable authority in the same situation could have come to the same decision, then the court will not interfere. The scope of this margin of discretion cannot be determined precisely, nor in advance, and much will depend on the circumstances of the case before the court. One factor which the courts take into account is the importance of the interests affected.

A recent case where an important interest was at stake was *Ex p Smith*,[60] where the Court of Appeal was asked to rule on unreasonableness and human rights. This case was brought by four individuals who had all been dismissed from the armed forces under a Ministry of Defence policy, published in March 1994, which prohibited homosexual men and women from serving in the armed forces and which was made under prerogative powers (just like the *GCHQ* case). None of the four had committed any offence against the general criminal law, nor any offence against the special law governing his or her service. They had exemplary service records and, as Bingham MR said in his judgment, 'all of them had looked forward to long service careers, now denied them'. They were dismissed simply because of their sexual orientation – an absolute ban. Here we have a case where an important right was at stake: the right to livelihood. They challenged the legality of their discharge, and thus indirectly, the legality of the policy which required them to be discharged. They used the following arguments:

(a) that the policy was irrational;

(b) that it breached the ECHR; and

(c) that it was contrary to the European Council directive on the equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions.

They accepted that the exigencies of service life meant that they might not be able to enjoy the same freedoms of those in civilian employment as to

59 *SS for Education and Science v Tameside MBC* [1977] AC 1014.

60 *R v Ministry of Defence ex p Smith* [1996] 1 All ER 257; and see Norris, '*Ex parte Smith*: irrationality and human rights' [1996] PL 590.

homosexual activity and manifestations of homosexual orientation, but they sought to challenge the blanket, non-discretionary nature of the policy.

The statutes governing the armed forces are reviewed every five years so that policies like this one in relation to homosexuals are reconsidered from time to time. At the time the case was brought, a Parliamentary Select Committee had considered submissions that homosexual orientation alone should not be a bar to membership of the armed forces. But, the Committee had accepted the argument that the Ministry of Defence presented to it at the time that 'the presence of people known to be homosexual can cause tension in a group of people required to live and work sometimes under great stress and physically at very close quarters, and thus damage its cohesion and fighting effectiveness'. Sir Thomas Bingham MR, in his judgment in the case, said that the Select Committee, in accepting this argument, 'undoubtedly reflected the overwhelming consensus of service and official opinion in this country'. He accepted, however, that in other areas of national life opinion had shifted. For example, in July 1991, the Prime Minister had announced that neither homosexual orientation nor private homosexual activity should henceforth preclude appointment even to sensitive posts in the home Civil Service and the diplomatic service. The Lord Chancellor had made similar announcements in relation to judicial office, and the majority of police forces follow the same policy.

Bingham MR also went on to review the situation in the armed forces of other countries. As he said, 'very few NATO countries bar homosexuals from their armed forces' and that did not appear to prevent close co-operation between those forces and our own. In the course of 1992–93, Australia, New Zealand and Canada had relaxed their ban on homosexuals in their armed services, and had, instead, introduced codes of conduct which defined what conduct would be unacceptable. In the USA, however, a report in 1993 had made it plain that military opinion remained overwhelmingly against allowing homosexuals to serve, but the lawfulness of the policy seemed to be in question. The Master of the Rolls quoted the US Government submission in a 1995 case, where it said that it 'recognised that a policy mandating discharge of homosexuals merely because they have a homosexual orientation or status could not withstand judicial scrutiny'. Bingham MR said that he was reviewing the context because he viewed the progressive development and refinement of public and professional opinion at home and abroad as an important feature of the case. A belief which represented unquestioned orthodoxy in Year X may have become questionable by Year Y and unsustainable by Year Z. Public and professional opinion are a continuum. But the lawfulness of the policy and thus the discharge of the four appellants fell to be judged as at the date on which they were discharged – at the end of 1994. Although he did not, at that stage, make it explicit, it is clear that these were the kind of factors the Master of the Rolls thought were relevant in deciding on the reasonableness of the decision.

He then went on to examine in detail the three arguments put by counsel for the appellants.

(a) Irrationality

Here, the Master of the Rolls accepted the submission that the court could only interfere with the exercise of an administrative discretion on substantive grounds where it was satisfied that the decision was unreasonable in the sense that it was *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.' This is now a familiar approach. Bingham MR accepted that this principle could be distilled from earlier cases. In *Brind*, for example, Lord Bridge had said that, while the court could not apply the ECHR, it was not powerless to prevent the exercise of administrative discretion in a way which infringed fundamental human rights. The court can start from the premise that any restriction of such a right (to freedom of expression in that case) requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it:

> The *primary* judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a *secondary* judgment by asking whether a reasonable minister, on the material before him, could reasonably make that primary judgment.

In the present case, Bingham MR acknowledged that the appellants' rights as human beings were very much in issue and that the issue was justiciable. While the court did not have the constitutional role to regulate the conditions of service in the armed forces, it did have the constitutional role and duty of ensuring that the rights of citizens were not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision makers, it must not shrink from its fundamental duty to 'do right to all manner of people'.

Counsel for the appellants had dealt with the reasons which had been advanced on behalf of the MOD thus. First, on 'morale and unit effectiveness', he argued, *inter alia,* that it was the character, ability, and personality of the individual concerned that was important and that many homosexuals had served in the forces successfully. If there were inappropriate behaviour, then this could be dealt with effectively on an individual basis. Secondly, on the role of services as 'guardian of recruits under the age of 18', any individual behaving inappropriately could be punished or disciplined. He ridiculed the suggestion that homosexuals were less able to control their sexual impulses than heterosexuals. Thirdly, on the 'requirement relating to communal living',

lack of privacy in service life was a reason for imposing strict rules and discipline, but not a reason for banning the membership of any homosexual. His main argument was against the blanket, absolute, nature of the rule. Other personal problems such as alcoholism, compulsive gambling or marital infidelity were dealt with by the service authorities on a case by case basis; here they were imposing a non-discretionary ban.

Bingham MR acknowledged that these arguments had a great deal of force, *but* he then went on to say that the existing policy could not be considered an irrational one, since it was supported by both Houses of Parliament, and by professional defence advisers. Changes made by other countries were very recent and too early to yield much valuable experience. 'The threshold of irrationality is a high one. It was not crossed in this case.'

(b) The ECHR

Article 8 provides:

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

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

Because the ECHR was not enforceable in the domestic courts, the relevance of that Article in the present case, said Sir Thomas Bingham, was as a background to the complaint of irrationality. The fact that a decision maker failed to take account of convention obligations when exercising an administrative discretion was not of itself a ground for impugning that exercise of discretion. It could only be considered as part of the irrationality ground.

He accepted that to dismiss a person from his or her employment on the grounds of a private sexual preference and to interrogate him or her about private sexual behaviour did not appear to show respect for that person's private and family life. It did therefore contravene the right under Art 8(1) (Counsel for the MOD had argued that the policy did not interfere with any right under Art 8 – Bingham MR said that argument did not strike him as persuasive!). There might also be evidence that the restriction was not *necessary* in the terms set out in Art 8(2). But, the court could not receive evidence on this, nor make a decision on it, since it was for the European Court of Human Rights and not the UK court to decide the issue. 'As it is, it may be necessary for the appellants, if all else fails, to incur the expense and

endure the delay of pursuing their claim in Strasbourg.' So, in *Smith*, it could not be a separate ground for review – despite the best efforts of counsel in the case.

(c) The Equal Treatment Directive

Bingham MR did not accept that the terms of this could be extended to cover discrimination on grounds of sexual orientation and so found against the appellants on that ground.

The other two judges in the Court of Appeal agreed with Sir Thomas Bingham. Henry LJ agreed with the formulation for irrationality put by counsel for the appellants and accepted by Bingham. It could not be said that, at the end of 1994, it was legally irrational to continue the existing policy, despite a changing scene. In his view, what was needed was a further review which would allow proper appreciation to be given both to the impact of a total ban on the human rights of those individuals affected, and to any practical justification for that ban and the evidence supporting it. Thorpe LJ also supported the formulation for unreasonableness. He agreed that it was important to emphasise the human rights dimension in considering unreasonableness in such a case. The Secretary of State should have regard not only to advice from senior officers who have responsibility for maintaining effective armed units but also to other factors, including human rights and treaty obligations. (Senior officers, he said, will have given their lives to the service. They will have developed strong emotions of loyalty and pride along the way. There may be a natural instinct to contend for the needs of the service as they perceive them in disregard of human rights protection.) Again, Thorpe LJ stressed the evolving nature of attitudes: 'What may be unjustifiable in 1995 may have been perfectly justifiable in 1991.' Although he was of the opinion that the current policy was ripe for review and for consideration of its replacement by a strict conduct code, he concluded that the appellants' attack on the rationality of the Secretary of State fell a long way short of success. It would be quite impossible to say that the court was entitled to interfere with the Secretary of State's application of a policy which clearly command a wide measure of general support. It could not possibly be labelled as falling outside the significant margin of appreciation vested in the Secretary of State.

On the ECHR point, both the judges agreed with the Master of the Rolls that this point could not be considered even hypothetically by the court, since the relevant evidence could only be heard by the European Court of Human Rights. Their constitutional role did not allow them to evaluate the Art 8 issue.

The position has now changed. The Human Rights Act 1998 now incorporates the Convention into UK domestic law. What impact might it have on a case such as Smith in the future? Breach of a right in the ECHR will

now be a ground for judicial review. It will be unlawful for a public authority to act in a way which is incompatible with a Convention right and judicial review proceedings may be brought by the victim or potential victim of the unlawful act.

If *Smith* were brought after implementation of the Act, the court would be obliged to ask whether, under Art 8, the policy was necessary for the reasons set out in Art 8(2); was it, for example, required to fulfil a pressing social need?[61]

In interpreting Convention rights, the court must take account of any judgment, decision, declaration or advisory opinion of the ECHR, an opinion or decision of the Commission, or a decision of the Committee of Ministers. In these instances, our judges will be applying a jurisprudence developed elsewhere in Europe. In *Smith,* the court itself would require the kind of evidence to be brought before it that it was arguing should be placed before the Select Committee when it next reviews the policy. Thorpe LJ had been particularly scathing of the arguments put forward by the MOD and spoke of the 'complete absence of illustration and substantiation by specific examples'. He seemed to be saying that, if senior officers were advising the Select Committee or the minister of the dangers of revoking an absolute ban, then specific evidence should be brought forward. 'Those who question the reality of the current policy in modern times and those who are directly damaged by its application are entitled to substantiation by specific example.'

In other words, the court would not be examining whether the minister could have arrived at the policy rationally on the advice before him; the court itself would be examining the reasons and evidence for the policy – exercising a primary judgment about the policy.

The court itself will be making the decision, not ruling at second hand on whether a minister has made a credible decision within the 'margin of appreciation', that is, within the range of reasonable decisions. The court will be making a direct decision itself. It *should* mean that human rights will be better protected. We shall have to wait and see.

Proportionality

This, too, is an area where the effects of European jurisprudence are being felt in our courts. The concept of proportionality is a common feature of the jurisprudence of civil law countries and it is a principle well known in the legal reasoning of both the European Court of Justice and the European Court of Human Rights. The doctrine provides that a court of review may intervene if it considers that the harm which would come from a particular exercise of

61 See, also, the discussion in Le Sueur and Sunkin, *Public law*, Chap 24.

power is disproportionate to the benefit sought to be achieved – there must be a reasonable relationship between the end to be achieved and the means used to achieve it. The Council of Europe, in its recommendations for administrative authorities in exercising a discretionary power says, *inter alia*, that such an authority must maintain 'a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues'.[62] That is a useful definition, since it emphasises the point that the exercise of discretionary power frequently involves the balancing of interests, in much the same way as the judiciary are faced with a balancing exercise when scrutinising whether an original discretionary decision is within an acceptable range, as in *Ex p Smith*, above.

Some commentators argue that a plea of proportionality can only arise in cases where other, existing, grounds would also succeed; on grounds of improper purpose or unreasonableness. It has been suggested, for example, that *Roberts v Hopwood* could have been decided on proportionality. As has already been discussed, the case is normally considered one of relevancy or improper purposes, but in his judgment, Lord Atkinson said that there did not appear to be 'any rational proportion' between the wages the council were paying and what might be considered reasonable wages.

Craig's analysis of the processes underlying any test of proportionality is a helpful one.[63] For him, the application of proportionality involves a number of tasks. For example, the relevant interests have to be identified, a weight or value attached to those interests, and a decision taken as to whether there can be a trade-off between certain interests. (On this latter point, many would argue that there cannot be a trade-off of an individual fundamental right against the interest of the general good, only between competing individual rights.) Finally, a decision is made on the facts as to whether or not the public body's decision was proportionate. It is only at this point that the test of proportionality is actually applied; the other tasks are conditions precedent to that test.

Craig suggests that the way in which the test of proportionality is applied could depend on the nature of the point at issue. For example, the court could ask itself whether or not the measure being challenged is the least restrictive which could be adopted in the circumstances. This might be the appropriate test if a fundamental right were at stake. Or, for example, the court could examine the relative costs and benefits of the measure. It is up to the court to decide how to frame the question, and then, in turn, to decide how strictly to apply it. He identifies three different categories of case where proportionality might be applied.

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62 Council of Europe Recommendation No R(80) 2, see *The Administration and You: a Handbook*, 1996.

63 *Op cit*, Craig, fn 39, p 415; and see Jowell, 'Is proportionality an alien concept?' [1996] 2 EPL 401.

First are cases *where the exercise of discretion impinges upon a recognised fundamental right*. Here, he argues, proportionality is more likely to be applied, because it will be generally accepted that interference with such a right should be kept to a minimum. While there may be circumstances where the right has to be limited, there is a presumption that this should be only to the extent that is absolutely necessary. In this type of case, it is easier for the court to apply proportionality, because the weighting of the interest has already been done and the court then has only to ask itself whether the interference was the least restrictive action that was possible.

Second are cases *where the penalty inflicted is deemed to be disproportionate to the action being penalised.* The Bill of Rights of 1689 recognised that penalties should not be excessive, and this is a generally accepted principle of any legal order: 'Let the punishment fit the crime.' The decision in the case of *Barnsley MBC ex p Hook,*[64] while not resting on the issue, does illustrate how the concept of proportionality is embedded in our legal thinking. In that case, the local authority revoked a market trader's licence because of a trivial incident (he had been found urinating in the street after the market had shut, and had entered into an altercation with a council employee). The decision to revoke the licence was set aside on the grounds of bias in the appeal procedure, but Lord Denning, in a typically colourful judgment, referred to old cases which showed that the court could intervene if the punishment were altogether excessive and out of proportion to the occasion. He thought it quite wrong that the council should have inflicted the grave penalty of depriving Mr Hook of his livelihood and would have set it aside on that ground. In this type of case, of excessive punishment, it is again relatively easy for the court to apply a test of proportionality.

Third are all other cases *where a discretion has been exercised after the balancing of particular interests* and it is challenged because an applicant argues that the decision as to where the balance should lie was disproportionate in some way. Here, the court faces a harder task, and it is a task for which the judiciary have shown limited enthusiasm. To ask the court to take on this role raises questions in the minds of some as to whether or not judges are equipped to assess the relative importance of competing interests in cases involving policy. If they do so, are they not simply second-guessing the decision maker and therefore stepping beyond the limits of judicial review? Can they make the kind of judgment which is required about different policy options and do they have available to them the level of information necessary to make an informed judgment? There are others who argue that it is entirely appropriate that the courts should scrutinise administrative policy choices, through a 'hard look' approach.[65] What is required is a mechanism to ensure, not that the courts can weigh up the different options, but that the decision

64 [1976] 1 WLR 1052.

65 Harden and Lewis, *The Noble Lie: The British Constitution and the Rule of Law*, 1986.

maker is required to satisfy the court that she or he has properly considered them and reached an objectively justifiable decision. This is the point made by Sir John Laws which we have already discussed in Chapter 1, and it is an argument which we find convincing.

The task should not be underestimated, however, since the issues raised in one case may take the court into a wide range of policy choices. A case where a number of policy issues *could* legitimately have been considered by the court, but where they were not, is that of *Bromley LBC v GLC*, a case we have discussed above, p 185, in relation to fiduciary duty. Here, as we noted, there were a number of competing interests, which would include those of the ratepayers, the electors, public transport users, the environment, the tourist industry, and employers in London. The Court of Appeal and the House of Lords chose to concentrate on the financial interests of the ratepayers. The Court of Appeal considered the interests of the electorate, but went on to reject them, and refused to accept the arguments of counsel for the GLC that transport policy should be considered as a social policy involving the GLC in weighing up a number of factors beyond financial considerations. Had they accepted this argument, the court could then have required the GLC to show how it had balanced the various factors and come to the decision that the benefit of cheap public transport fares justified the considerable extra financial burden on ratepayers. This approach by the court would have had the effect of imposing greater rigour on public decision making and would have gone some way towards greater openness and accountability in policy making.

As one commentator said at the time, it was strongly arguable that the appellate judges in the *GLC fares* case failed fully to appreciate the scale of the changes brought about by the relevant transport legislation. The new financial and administrative infrastructure vested in local authorities greatly enlarged discretionary powers to discharge their responsibilities for planning and policy making across a broad range of local transport issues 'which extended far beyond the traditional parochial concerns of running municipal bus services on ordinary business principles'.[66] That the courts preferred to decide the case on a narrow construction without looking to these wider policy issues is not surprising, but it does point to the difficulties which some of the judiciary, at least, will find in adjudicating in this type of area and it goes some way to explaining their reluctance to accept proportionality as a ground for review.

Proportionality has been argued explicitly in some cases, notably in *Brind*,[67] which clearly falls into the first category described above. One of the arguments put by counsel was that the action of the Home Secretary, in prohibiting the broadcasting of direct statements by representatives of

66 Dignan, 'Policy making, local authorities and the courts: the GLC fares case' (1983) 99 LQR 605.

67 [1991] AC 696.

proscribed organisations in Northern Ireland, was disproportionate to the needs of the situation. The court held that proportionality was simply one aspect of the ground of irrationality. For Lord Bridge, the court was entitled to start from the premise that any restriction of the right to freedom of expression is required to be justified, and nothing less than an important competing public interest would be sufficient to justify it. The primary judgment as to whether the public interest justifies a restriction is the minister's, but the court was entitled to exercise a secondary judgment as to whether a reasonable minister could reasonably make that primary judgment. On the facts of *Brind*, Lord Bridge found that the minister *ha*d acted reasonably. He added that he did not see how the doctrine of proportionality could advance the appellant's case, but he agreed that the doctrine might be developed in future cases. In the same case, Lord Roskill accepted Lord Diplock's statement that a new ground for review might be developed in future on a case by case basis. Proportionality seemed a likely possibility with the increasing influence of Community law on our domestic law, but he did not feel *Brind* was the case where the first step could be taken. Lord Ackner said that 'using a sledge hammer to crack a nut was simply a picturesque way of describing the "*Wednesbury* irrational" test'. If it were not, and if it were a separate test, in his view that would lead the court to an inquiry into the merits. Lord Lowry agreed with Lord Ackner. He felt that to admit proportionality would itself be an abuse of the judges' supervisory jurisdiction, because judges were not, generally speaking, equipped by training or experience to decide administrative problems where the interests are evenly balanced. For him it would jeopardise stability and certainty and, furthermore, lead to many more applications for judicial review, because it would present more opportunity for aggrieved parties to 'try their luck' with judicial review applications.

A further case that was heard at the time that *Brind* was in the Court of Appeal and where proportionality was argued was *Ex p Colman*.[68] This case concerned a medical practitioner who wished to challenge the guidance issued by the General Medical Council (GMC) as to the advertising of medical services. Under the guidance, doctors can disseminate factual information about themselves in other doctors' surgeries, local libraries and information centres, but may not advertise the information in the press. Colman wanted to practise holistic medicine outside the NHS and wanted to advertise in the press. He challenged the GMC guidance on a number of grounds, including unreasonableness and proportionality, but lost. On proportionality, applying the dicta in Brind in the Court of Appeal, it was held that it should not be treated as an independent head of review but as an aspect of unreasonableness.

68 *R v General Medical Council ex p Colman* [1990] 1 All ER 489.

So, to review the situation on proportionality. Lord Diplock proposed it as the next development, but in cases so far the courts have drawn back from taking the next step.[69] Their reluctance to do so is justified by the contention that proportionality leads to a review of the merits of a decision. This seems to us to be based on a misunderstanding. While proportionality would certainly involve the court in making a decision about the substance of the matter, that is, substantive review, this does not, of itself, mean that the court has to make a decision about the merits of the issue. The task for the court would be to examine the nature of the decision to see whether or not it was a decision which was rational in the sense that it could be objectively justified.[70] The court would not have to take the further step of saying whether or not it agreed with the decision, which would, of course, be taking it to the merits.

It may be that in those continental systems where individual rights are spelt out explicitly, it is clearer that the proportionality doctrine does not involve review of the merits and, as already discussed, the Human Rights Act may bring about some change. As it is, our ground for substantive review demonstrates little intellectual rigour. Unreasonableness as it presently stands is unsatisfactory and inadequate. As Jowell and Lester have put it:

> Intellectual honesty requires a further and better explanation as to *why* the act is unreasonable. The reluctance to articulate a principled justification naturally encourages suspicion that prejudice or policy considerations may be hiding underneath *Wednesbury's* ample cloak.[71]

The present formulation is not unwelcome in other quarters, however. Lord Irvine, the current Lord Chancellor, writing before the Labour Government came to power, argued that any extension of the *Wednesbury* grounds to enable judges to interfere more readily with the decisions of elected public authorities would be inconsistent with the constitutional imperative of judicial self restraint.[72] If reform is to come, it will have to come through the usual processes of incremental decision making by the judiciary; no government of any colour will voluntarily provide a rod for its own back by strengthening and extending the reach of judicial review. We shall have to see whether the operation of the Human Rights Act effects a wider development of judicial review by familiarising the judiciary with the process of the explicit balancing of conflicting interests. Given that they will have to do this where individual rights are at stake, will it encourage them, in time, to take on a more expansive role in cases where public policy is at issue?

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69 Although they have been prepared to use the principle in cases where the question related to the appropriateness of a criminal penalty. See, eg, *R v Brent LBC ex p Assegai* (1987) 151 LG Rev 891.

70 This is Sir John Laws' argument: see discussion above, Chapter 1.

71 Jowell and Lester, 'Beyond *Wednesbury*: substantive principles of administrative law' [1987] PL 368.

72 Irvine, 'Judges and decision makers: the theory and practice of *Wednesbury* review' [1996] PL 59.

CHAPTER 8

FAIRNESS

OVERVIEW OF PROCEDURES

In this chapter, we are going to look at procedures which are important in attaining fairness, not only procedurally, but substantively. The first point to make is that we are still dealing with discretionary powers, so do not put out of your mind all that we have covered so far; those principles are still relevant throughout the rest of the book.

THE NATURE AND IMPORTANCE OF PROCEDURAL CONCERNS

Procedures are a way of structuring, confining and checking discretionary powers.[1] In addition, the development of procedures can be said to have two other important objectives: these are the *effectiveness* and *legitimacy* of decision making or administrative action. In a democracy, there is no point in developing procedures which do not deliver these two aims.

Procedures are essential if decisions about policy are to be fair and effective. In other words, some end result, policy outcome or goal is wanted, so ways of achieving that have to be considered. The least cost way of reaching the required result will usually be looked for, but that does not necessarily mean the least cost in *economic* terms, though of course that will be a concern. What are being sought are the *overall* benefits and deficiencies in terms of all economic, social and political factors.

So, procedures for achieving this need to be devised. One aspect of this process will, of course, be consideration of the effectiveness of the procedures themselves. It is no good having procedures that are cumbersome, inefficient, cause undue delay or additional expense, for that might defeat the purpose of the procedure or the object of the exercise. So a balance needs to be struck; *the quality of the final decision can be quite considerably affected by the quality of the process by which it is made*. If there is a good quality, effective procedure in place, it is much more likely that a good quality end or policy outcome will be achieved.

However, 'one size does not fit all'; one form of procedure is not necessarily suitable for all tasks. This means that different kinds of procedures

1 See Davis, *Discretionary Justice; a Preliminary Inquiry*, 1969.

have to be designed for different kinds of ends or policy situations. This can be problematic and is not always given the consideration it should, particularly in the UK. A mismatch of procedures and policy goals can result in a lack of effectiveness *and* legitimacy.

Let us look at a couple of examples of procedures, designed for different kinds of outcomes. First of all, a relatively simple example, the criminal trial. Here, the issue turns on disputed questions of fact. Here, it is arguable that the *effectiveness* of a trial is equal to finding out the truth of what happened. *Legitimacy* is concerned with ensuring that both sides are able to put their case adequately. To try to meet these requirements in the UK we have developed an adversarial process of defence, prosecution, cross-examination, etc, in order to try to establish issues of fact and, consequently, of guilt or innocence.

But, what if the issue is more complicated than that, what if the situation requires more than a consideration of disputed facts and involves value judgments about a number of policy choices? In that situation, there may be more than one perfectly reasonable answer, more than one 'truth'. For example, consider the issue of the siting of a nuclear power plant, or a toxic waste dumping site. For those kinds of situations we have devised the public inquiry.[2] However, there is more than one view of the purpose of a public inquiry.

The traditional view is to see the public inquiry as a way of informing the minister responsible of all the matters likely to affect the decision. Effectiveness in this case is, therefore, equated with the provision of all relevant information. In many ways, this is just a development of the first example of the criminal trial type of procedure with added ingredients. This view of the purpose of procedures is reflected in many of the judgments made in the cases on consultation which are discussed below, p 230 *et seq*.

There is, however, an alternative conception of the purpose of the public inquiry, and that is that the inquiry is actually to *test* competing objectives. Rather than seeing it as the minister's function to decide policy, the inquiry can be conceived as a means to choose between policies. This requires much more sophisticated procedures and, at the very least, would mean that a minister would have to provide *a reasoned justification for policy choices and a more thorough consultation process or opportunity for participation*. This perspective equates much more closely with the view of administrative justice we have sought to put forward here.

The aim is to give all competing conceptions a fair hearing, to ensure legitimacy. Clashes of these two conceptions are often evident in public inquiries.

2 See the discussion above, Chapter 4.

A recent example of the clashes can be seen in *Ex p Greenpeace*,[3] one of three cases brought by Greenpeace concerning particular action by British Nuclear Fuels Ltd (BNFL). BNFL had completed a new plant in 1992 and applied for new authorisations for the discharge of radioactive waste into the sea and air in order to commence operations. The Inspectorate of Pollution and the ministry responsible prepared draft authorisations, which they made available for public consultation over a 10 week period. They received 84,000 responses, including those from Greenpeace and the local authority concerned, Lancashire County Council. The minister concluded that *no new matters had been raised by the consultation process* since the public inquiry into planning permission held over 10 years previously in 1982 and refused to hold a public local inquiry. The new authorisations were duly granted.

Greenpeace and the council contended that the decision not to hold an inquiry was flawed, since the Secretary of State had to consider not only whether he had sufficient information to reach a decision on contentious issues, but also the public interest. This could only be served by the testing of material at an inquiry. Furthermore, they argued, he was under a legal duty to provide and make available an environmental impact assessment under relevant EC directives which had come into force since the grant of planning permission and which applied to the operation of the plant rather than just its construction.

The court held that the Secretary of State had adequately and properly addressed the matters relevant to his decision, since the consultation procedures adopted met the necessary requirements. The Secretary of State had acted lawfully within the wide powers conferred by Parliament. The construction of the plant and its operation were one project which pre-dated the EC directive.

In this case, you can see quite clearly the differing conceptions of the role of consultation procedures and the court supporting the traditional view, taking a deferential approach to the exercise of discretionary powers. Greenpeace wanted to test competing objectives; the government sought only to justify the role of the minister in policy making.

So, effectiveness and legitimacy are two sides of the same coin. The question of the legitimating function of procedures covers individual justice at one end of the scale (the criminal trial) and social justice (the legitimate exercise of public power) at the other. Our courts and our tradition of law have been far more prepared to emphasise the importance of procedures at the *individual justice* end of the scale than at the *social justice* end. English law has tended to add on to the form of procedures for individual justice rather than be innovative when dealing with public choices. In other words, the UK has tended to use the same mould for what are essentially *different* situations and sometimes the end result is neither well crafted nor satisfactory.

3 *R v SS for the Environment ex p Greenpeace* [1994] 4 All ER 352.

This is, perhaps, a very abstract presentation of the importance of procedural concerns, so consider the following illustration of the issue from the two examples given below of quite different approaches taken in two cases, one from the UK, the other from the USA.

The familiar case of *Cooper v Wandsworth*,[4] once again. demonstrates the point here. You will remember that statute required that, before beginning work on a building, seven days' notice had to be given to the Wandsworth Council Board of Works. In default of such a notice it was lawful for the Board to demolish the building. Cooper started to build a house, without giving notice, and the Board sent workmen round to pull it down. Cooper, not surprisingly, was upset and sued in tort for trespass and for damages. The statute governing the power of the council made no mention of any procedural requirements that the Board had to go through before it exercised its power to demolish. But the court held that the Board should have observed the rules of natural justice and given Cooper a hearing before exercising their power. How did the court come to this decision, as the action which the Board took was perfectly valid, it was not *ultra vires*?

From the judgments, it is clear that the emphasis was on *individual property rights*, and a conceptual assimilation to one of punishment for an offence. It was stated that the Board had power not only to determine policy, but there was a punitive element as well, in that it could demolish for non-compliance with the requirement for notice. The court said that such a power could be used arbitrarily; therefore, there was a need to consider its limitations in the light of the public interest. If someone is to be punished, the rules of natural justice must be observed. The court consequently transported individual rights into policy decision making. Cooper was a good decision, but essentially, it did not depart from the traditional *gesellschaft* (that is, individualistic) notion of law.

The court decision focused on an extension of individual rights, the right to be heard. The remedy was by way of private law. This *use of private law forms in public law* operates traditionally in English law where the *public interest* in rational administration *coincides* with an *individual interest*. Cooper illustrates this well, and frequently, this perspective still holds today.

We can contrast this with the way that public interest in rational and legitimate administration is dealt with in the USA. *Weyerhaeuser Co v Costle*,[5] although not an important case in itself, illustrates well the different approach taken there.

The case concerned judicial review of an Environmental Protection Agency (EPA) policy which aimed to limit polluted effluent. Just as Cooper had done, the polluters alleged that their rights were infringed. The court

4 (1863) 14 CB (NS) 180.

5 590 F 2d 1011 (1978).

recognised that the EPA had been given the power to decide policy in an area which was subject to a high degree of scientific uncertainty and technicality and that the court's function was not to weigh afresh the available evidence and substitute their own judgment for that of the agency, as that would impede the objectives of the Act. But, the court held that they could review the EPA's decision making procedures carefully, because:

(a) there was an expectation that, in carrying out what were essentially legislative tasks (rule making), the agency should ensure that the process had the degree of openness, explanation and participation required to cut to a minimum arbitrariness and irrationality;

(b) such procedures maximised the susceptibility of the decision making record to judicial review.

The reasoning was very different from that in *Cooper*. In short, in *Weyerhaeuser*, the court was willing to entrust the agency with wide ranging regulatory discretion in relation to its statutory mandate, so long as it was assured that the process by which decisions were taken in regard of rules or policy provided *a degree of public awareness, understanding and participation commensurate with the complexity and intrusiveness of the resulting regulations.* The more the public's rights were infringed, the more the degree of scrutiny by the courts.[6] This emphasises the role of procedures in negating arbitrariness and irrationality in policy and promoting a legitimate end product. Public purpose is paramount in *Weyerhaeuser*. In *Cooper*, procedures were directed to individual rights which *coincidentally* served a public purpose.

Can we justify taking a similar approach to the USA? In his article, 'The reformation of American administrative law', Stewart[7] talks about the different views of public interest and purpose and their implementation. He, like Davis, stresses that the existence of discretion is a major challenge for public law and argues that there have been two main ways which have attempted to ensure that discretionary powers are exercised in a fair and acceptable manner.

First, there is the *transmission belt* theory, where reliance and responsibility are placed on representative institutions to whom decision makers are accountable. The limits of this are clearly apparent in relation to the British system of ministerial responsibility and governance. It is a view that can be regarded as inadequate for a modern State in a complex and changing world.[8]

6 Consider and note here the tentative suggestions of Sir John Laws in relation to human rights; and his requirement for objective justification of decisions.

7 Stewart, 'The reformation of American administrative law' (1975) 88 Harv L Rev 1667.

8 See the example of the Scott Inquiry.

Secondly, there is the theory that places reliance on *expertise*; decision makers must be experts. Habermas[9] refers to this as 'depoliticisation'. The problem here is that many decisions and much discretion are concerned with value choices which are not solely a question of expertise and technology. For example, it is possible to apply an economic analysis to the question of whether or not to build a motorway or a nuclear power plant or proceed with developments in biotechnology, it must also be decided what *value* is to be placed on environmental or other social factors.[10] For example, is any inherent risk worth taking? The answer is that there is *no clear rational choice* without greatly improved access to information.

Stewart argues that, where there are these kinds of policy problems and the issue is what to do in the absence of any consensus on objectives or certainty about facts, the procedures that agencies follow are not really a legal process, but a *surrogate political process.* As such, legitimacy has to be of the same kind as that required by the democratic legislative process.

Thus, in the design of procedures, it is not enough to concentrate on individual interests (as is the situation in the UK); procedures have to do more than that, they have to be part of the political process, if they are to function fairly – effectively and legitimately. Our courts and our legislature have not yet wholly grasped this point.

In summary, procedures can fulfil a number of different functions, which require different levels of complexity and design:

(a) they can protect individual rights;

(b) they can serve the public interest where objectives have been agreed. In this case, procedures are seen as instrumental to rationality; or

(c) they can act as a mechanism for determining or questioning objectives and policies. In this case, procedures are what Stewart terms a *surrogate political process*.

Bear all the above points in mind as procedures for the giving of reasons, natural justice and consultation in English law are discussed. Consider if the right balance between the requirements and interests of the administration and those of the public have been achieved in the UK. If not, consider how they might be.

THE DUTY TO GIVE REASONS

The issue of a duty to give reasons is of crucial importance in public law. The giving of reasons is a prerequisite of objective and justifiable decision making.

9 Habermas, *Legitimation Crisis*, 1976.

10 Any application of the concept of proportionality raises similar issues; see the discussion above, Chapter 7.

In the field of natural justice, a right to a hearing may include the right to have a reasoned decision. We have already noted that two judges, Woolf and Laws, have recognised in their extra-judicial writings that the requirement for decision makers to give reasons is of vital importance and the fact that we have no general duty to give reasons is recognised as one of the major flaws in our public law.

A duty to give reasons is important on two principal grounds. The first concerns the individual. Here, there are both instrumental and non-instrumental reasons. From an instrumental point of view, knowledge of the reasons for a decision is crucial in mounting a challenge against the actions of a minister or other body and, at the same time, the requirement to give reasons might improve the quality of decision making. Non-instrumentally, it is part of the requirement to show concern and respect for an individual. Decisions which affect individuals, but which are arbitrary and unexplained, deny those individuals their fundamental rights.

The second ground relates to fundamental constitutional concerns. We need only remind ourselves of basic principles of the Constitution to recognise that the giving of reasons is a prerequisite of accountability. The doctrine of ministerial responsibility may now only be of symbolic importance, but it is still the doctrine which is used to justify our system as one of accountable government. At the heart of the doctrine of ministerial responsibility is the notion that ministers must come to Parliament and explain, give reasons for their decisions and actions, so it seems to be a central constitutional principle that public bodies ought to give a reasoned justification for their decisions. Given the developments in the modern State, there should be the means to ensure that this principle is upheld and the imposition of a general duty to give reasons on decision makers is obviously one such mechanism. We could compare it with the 'hard look' doctrine in the USA. We should note, too, that we are unusual in not having a general statutory duty – most advanced industrial democracies have a general duty to give reasons in their public law somewhere, for example, US Administrative Procedure Act Title 5, Ch 5, Sec 557, and see Art 190 (253) in relation to European Community law.

While the absence of a general duty to give reasons represents a major deficiency in our public law, there are some instances where a duty is imposed. A duty does exist under statute in some instances, and some cases suggest that the judiciary may be moving towards imposing a duty in particular cases.

The only general statutory duty is laid down in s 10 of the Tribunals and Inquiries Act 1992. This states that tribunals listed in the Act, and ministers acting after a statutory inquiry, must give reasons for decisions on request. But we should notice that this is restricted to certain bodies and processes; it does not apply to every public body making decisions. In some areas, there may be specific statutory duties to give reasons for adverse decisions; for

example, in land use planning: where a local planning authority refuses to give planning permission, it must state clearly and precisely its full reasons for the refusal (SI 1988/1813, reg 25).

Given the patchy nature of statutory requirements, we would want to consider whether the courts have attempted to fill this gap in our public law. Until recently, the answer was that they had not, although *Padfield*[11] had suggested a possibility. Here, a minister had refused to refer a complaint to a committee which was set up under statute to deal with complaints about the operation of the milk marketing scheme. The minister had set out his reasons for refusal and the House of Lords found against him. It was argued on behalf of the minister that, since the decision could not be questioned if no reasons were given, the fact that he had given reasons should not put the minister in a worse position. But, in the House of Lords, Lord Reid said:

> ... I do not agree that a decision cannot be questioned if no reasons are given. It is the minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that had been the effect of the minister's refusal, then it appears to me that the court must be entitled to act.

At the time, this part of the decision was hailed as a great breakthrough on the issue of reasons and there was clearly potential to generate a general duty to give reasons from that case. (On the substantive point, the minister referred the dispute to the committee and then ignored their recommendations!)

The subsequent history of this case is enlightening. In *Secretary of State for Employment v ASLEF*,[12] two railway unions threatened industrial action. The Secretary of State could apply to the National Industrial Relations Court (NIRC) for a secret ballot to be held where it appeared to him that there were reasons for doubting that the workers wanted to take part in the action. The Secretary of State did not give any reasons for so thinking. Lord Denning acknowledged that earlier cases, notably, *Padfield*, had stressed that 'in the ordinary way, a minister should give reasons, and if he gives none the court may infer that he had no good reasons. Whilst I would apply that proposition completely in most cases and particularly in cases which affect life, liberty or property', he did not think it should apply in all cases and, in his view, it did not in that case.

Finally, in *British Airways Board v Laker Airways*,[13] Lord Diplock stated that the statements made in *Padfield* were nothing more than a restatement of the *Wednesbury* test.

Later, in *Lonrho*,[14] the House of Lords again refused to extend the doctrine. This case involved the refusal of the Secretary of State for Trade and Industry

11 *Padfield v Minister of Agriculture* [1968] AC 997.

12 [1972] 2 QB 455.

13 [1985] AC 58.

14 *Lonrho plc v SS for Trade and Industry* [1989] 2 All ER 609.

to refer a bid to the Monopolies and Mergers Commission. As is customary, no reasons were given. Lord Keith said that the only significance of the absence of reasons is that, if all the other known facts and circumstances appear to point overwhelmingly in favour of a different decision, a decision maker who has given no reasons cannot complain if the court draws the inference that he had no good reasons for the decision.

In EC law, a duty to give reasons is imposed on European Community authorities by Art 190 (253) and in the *Heylens*[15] case, the ECJ attempted to provide an optimal procedural guarantee for Community citizens through arguing that where it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend the right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself, or in a subsequent communication made at their request.

Until recently, there was no sign of the English courts showing such a positive attitude. However, in a series of recent cases, the courts seem to be showing a more positive attitude, at least in cases where important individual rights are at stake. The starting point seems to have been *Cunningham*.[16] Here *Cunningham*, a prison officer, was dismissed after allegedly assaulting a prisoner. The Civil Service Appeal Board recommended his reinstatement, but the Home Office declined to accept the recommendation. The Appeal Board then awarded him a sum in compensation which, it was accepted, was substantially below what he would have received from an Industrial Tribunal. The Board gave no reasons, and he challenged the decision on this ground. Although, in previous cases, the courts had decided to impose a duty to give reasons on the Board, in this instance they did not. The decision seems to have been influenced by Lord Donaldson's and Leggatt LJ's views that the decision was irrational, in the *Wednesbury* sense, but all the judges were prepared to base the requirement on procedural grounds and legitimate expectations. The explanation for this is put, colourfully, by Lord Donaldson:

> ... the Board should have given outline reasons, sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the Board to the status of a free wheeling palm tree.

15 *UNECTEF v Heylens* [1989] 1 CMLR 901.

16 *R v Civil Service Appeal Board ex p Cunningham* [1991] 4 All ER 310.

We ought to note a decision given at roughly the same time, *Ex p Cheblak*,[17] which involved the attempt to deport the applicant on the grounds of national security during the Gulf War. The applicant claimed that the evidence showed he was opposed to terrorism and that, in effect, the security services, M15 in this instance, had made a mistake in his case. One of the grounds for the application for judicial review was that the Secretary of State did not give sufficient reasons for his decision to allow Cheblak to see whether it could be challenged. The court dismissed this argument fairly quickly but, as Lord Donaldson pointed out, the applicant could avail himself of the non-statutory procedure whereby a panel advised the Secretary of State on the deportation. After the advice of this panel was received, the Home Secretary revoked the deportation order. It later became evident that the applicant's worries about the evidence gathered by MI5 were shared in Whitehall, as it was reported that an inquiry into the Gulf War detentions had been instituted. This case might well be explained on the grounds of having been decided in wartime, as it seems the courts, in subsequent cases involving the expulsion of aliens, have taken a more critical look at Home Office procedures.

Perhaps as surprising was the case of *R v Independent Television Commission ex p Television South West Broadcasting* (TSW),[18] in which TSW had failed to retain its franchise when these were re-allocated by the Independent Television Commission (ITC). TSW challenged this refusal in the courts. In the first instance, the judge did not allow the application to go forward. TSW then renewed their application in the Court of Appeal, who overturned the decision, ordering the ITC to hand over a document which set out the ITC's reasons for refusing TSW's bid. Lord Donaldson commented that, without information on why the ITC took its decision, the court was 'groping in the dark'. After receiving the document, TSW were able to take the case to a substantive hearing in the Court of Appeal and then to the House of Lords. Although the applicants lost their case in the House of Lords, Lord Templeman commented that, although the ITC were not expressly bound to give reasons for their decisions, it would have been better if they had given reasons in writing, rather than an oral interview. Lord Templeman is far from creating a general rule, since his view rests on the unique position of TSW, namely, that they had held the licence since 1981 and were the highest bidders.

TSW and *Cunningham* may mark the beginning of a new approach. Further support for this is seen in the prisoners' cases. This is one area, incidentally, where decisions of the European Court of Human Rights have had an important influence. The most recent area of change revolves around the procedures for release of life prisoners.

17 *R v SS for the Home Dept ex p Cheblak* [1991] 1 WLR 890.

18 (1992) *The Times*, 30 March, HL.

Broadly, persons convicted of certain crimes may be sentenced to life imprisonment, usually on the grounds of mental instability or for the protection of the public. For the crime of murder, a life sentence is mandatory. Although expressed as being for life, the sentence is made up of two parts: a determinate term (the tariff), to inflict punishment; and a further, indeterminate, term which reflects the potential danger they offer to society. The length of the tariff is determined by the Home Secretary after taking advice from the judiciary. The indeterminate element is periodically reviewed by the Home Secretary who may, acting on the advice of the Parole Board, decide to release a life prisoner on a recallable licence. Life prisoners had no right to know the tariff period, nor to know the reasons on which the Home Secretary and the Parole Board based their decisions.

In so far as discretionary life prisoners are concerned, these procedures have been held, by the European Court of Human Rights, to constitute a breach of Art 5(4) of the European Convention on Human Rights. In response to these cases, the government created new procedures for the Parole Board under ss 32 and 34 of the Criminal Justice Act 1991; and the courts, in a number of cases, have decided that prisoners are entitled to know the length of the tariff period and to see reports put before the Parole Board which were adverse to release.

But, those cases deal only with discretionary life prisoners, who constitute some 20% of the lifer population. Similar issues have been raised as regards mandatory life prisoners, notably in the important House of Lords' decision in *Doody*.[19] There, the court held that, as regards the penal element of the sentence, fixed by the Home Secretary, the prisoner was entitled to know what factors the Home Secretary had taken into account in making his decision, as well as the advice from the judiciary as to what that term should be, including the reasons for the decision. In his judgment, Lord Mustill held that reasons were required not only to enable the individual to be able to mount an effective attack on the decision, but also on grounds of openness in decision making and fairness to the individual concerned. He accepted that fairness requires that an individual should be able to make representations on her or his own behalf and it would normally be difficult to do that unless the individual knows the case which they have to answer. So here, we have a trend which argues for reasons as part of fairness or natural justice.

This was the approach adopted, too, in *R v London Borough of Lambeth ex p Walters*,[20] where it was held that, notwithstanding the fact that there was no statutory requirement to give reasons in the legislation concerned, the council was required to give reasons for a housing allocation decision as part of a duty to be fair.

19 *Doody v SS for the Home Dept* [1993] 3 All ER 92. For comment, see Craig, 'Reasons and administrative law' (1994) 110 LQR 12.

20 (1993) *The Times*, 6 October.

There have been limits put on this approach, however. In *R v Higher Education Funding Council ex p The Institute for Dental Surgery*,[21] the dental school challenged the research rating given to it by the HEFC. There, it was held that the decision of the Funding Council could not be challenged on the ground of unfairness due to lack of reasons, since that particular procedure did not give rise to such a duty.

Justice[22] has called for reform on the grounds that those who exercise administrative authority should be ready to give an account of what they do. When they make decisions which affect individuals, they should justify and explain their actions. In their view, the judges had missed so many opportunities to develop a common law principle that it now required legislative intervention. They argued that a statutory formulation should follow the Australian example and enable the citizen to request a written statement which sets out the findings on material questions of fact, refers to the evidence or other material on which those findings are based, and gives the reasons for the decision. Finally, they recognised that the general duty would have to be subject to exceptions (for example, where considerations of defence or national security obtain, or in relation to material protected by legal privilege). They also make the point that measures would have to be taken to ensure that the individual citizen is made aware of this right to request reasons.

As we know, another reform proposal has come from Sir John Laws in his article 'Is the High Court the guardian of fundamental constitutional rights?'. He links it to his argument about 'substantial objective justification' – that if a decision affects an individual's fundamental rights, then the decision maker must show substantial objective justification. And to do this, reasons must be given. The court will require the reasons as an integral part of the judicial review process – and not merely as an obligation that may be owed to an applicant according to whether there happens to be a statutory duty (as in planning cases) or where a legitimate expectation has been generated. He argues that, once it becomes clear that the court will require reasons to be given to it in all cases involving fundamental rights, decision makers will begin to see that there is little point in withholding reasons from potential applicants at an earlier stage. So, in that way, he believes the practice of giving reasons will become established. He may be a touch optimistic in that?

As to the current position, it seems that, while the courts may in fact be well on the road to imposing a duty to give reasons where an important individual interest is at stake, the courts are shying away from imposing the sort of general duty on decision makers which we would argue is required on wider constitutional grounds, and it is possible that this can only be achieved if a statutory duty were imposed on the lines proposed by *Justice*.

21 [1994] 1 All ER 651.

22 Justice-All Souls, *Administrative Justice: Some Necessary Reforms,* 1988.

It must also be recognised that implicit in this discussion is the requirement that reasons must be adequate – the court will want to satisfy itself that the reasons are adequate to support the decision which has been made. There are links here with the type of substantial evidence approach which operates in the USA. The rule in the USA, set out in the Administrative Procedure Act, states that, in certain types of proceedings, trial type adjudications, a reviewing court shall hold unlawful and set aside agency actions, findings, and conclusions which are unsupported by substantial evidence. The classic definition of what is meant by substantial evidence is found in *Consolidated Edison*: '... such relevant evidence as a reasonable mind might accept to support a conclusion.' The court examines the whole record and weighs conflicting facts to decide what the weight of evidence is; the court does not simply say that if there is some evidence to support a finding then that is enough – they actually evaluate the evidence.

Substantial evidence is part of a 'hard look' doctrine, whereby the courts try to ensure that the agencies have taken an intensive look at all the arguments submitted to them and have come up with a rational decision. We can see that there is a link with the cases on duty to give reasons. If, in order to be adequate, the reasons given have to deal with the arguments about fact, the link with the duty to give reasons is plain. In Britain, the courts have been very wary of reviewing the evidential findings of the lower courts/administrative bodies, for the obvious reason that that would take them close to the merits, though there has been some recognition that there is a role for the review of evidence. What we may have is a 'no evidence' rule rather than a substantial evidence rule; that is, a court will hold that a decision taken on the basis of no evidence is *ultra vires*.

NATURAL JUSTICE

The giving of reasons has a role to play in the concept of natural justice which we should now consider in detail. Natural justice is usually taken to consist of two broad principles: the right to an adequate hearing (*audi alteram partem*) and the right to an impartial decision maker – the rule against bias (*nemo iudex in causa sua*).

One justification for these so called rules is that the correct procedure ensures that the aims of the statute are best fulfilled – that there is a connection between the giving of procedural rights and the substantive justice of the outcome, the instrumental justification. Alternative, non-instrumental justifications point to aspects of the rule of law which are fulfilled by those elements of natural justice which ensure the impartiality of decision making and to human rights theories which would argue for natural justice as a protection of human dignity and autonomy.

It is an area where the courts have had the greatest opportunity to mould administrative procedures and it is important to note at the outset that this does not necessarily mean that procedures should be designed on the adversary model.

Two questions arise straight away: what do the rules entail? When do the rules of natural justice apply?

Concentrating on the right to a hearing, which tends to be the one of most practical importance: the ideal type of hearing right would probably entail notification of the date and time of the hearing, notification of the detailed case to be met:

(a) time to prepare own case;

(b) access to relevant information;

(c) right to present case orally or in writing;

(d) right to cross-examine witnesses;

(e) right to representation – by a lawyer;

(f) right to a reasoned decision.

The second question is: when do the rules apply? In other words, when do the courts say that a decision maker should observe the rules of natural justice? The short answer to both questions is that it will depend on the issue at stake and the weight which the court attaches to the various interests. Let us examine some of the cases.

At one time, the answer to the question of when do the rules apply would have been relatively simple. It would have depended on the type of function being exercised – if it were *judicial*, then the rules would apply, if it were administrative, then they would not apply. That was before the case of *Ridge v Baldwin*[23] in 1964.

So, the starting point for the modern law on natural justice is the case of *Ridge v Baldwin*. Ridge was the Chief Constable of Brighton who had been tried for conspiracy (to obstruct the course of justice) and acquitted. Throughout his trial he had been suspended. When he applied for reinstatement, the local Watch Committee, which was the police authority in those days, held a meeting, considered the statements that Ridge and the judge had made at the trial and proceeded to dismiss him. He had been given no notice that his dismissal was to be discussed, nor given an opportunity to put his case to the Watch Committee before they made the decision. The decision of the Watch Committee was challenged in court. The House of Lords held that Ridge was entitled to notice of the charge and an opportunity to be heard before being dismissed.

The case is important because of the discussion of the general principles of

23 [1964] AC 40.

natural justice. Lord Reid analysed the previous authorities and held that, to draw a distinction on grounds of *type of function* was wrong; each case should be looked at individually. Unfortunately, their Lordships did not lay down any general principles for later courts to follow. Lord Reid discussed the growth of ministerial and departmental functions and said that the previous approach was inapplicable to the fabric of bureaucratic/administrative decision making. But typically, he gave no clear indication of how the courts should rectify the deficiency. In reality, the courts not only look at a number of factors including the implications of the decision for the applicant, the benefits to be gained from requiring procedural safeguards, and the costs to the administration. Ironically, the decision in *Ridge* itself was still premised on the inference that the Watch Committee were acting judicially.

Since *Ridge*, two lines of development have been followed:

(a) the first is the concept of fairness, stemming from the case of *Re HK*;[24]

(b) the second, stemming from the case of *Schmidt v Home Office*,[25] is the concept of legitimate expectation.

FAIRNESS

Re HK (an infant)

The case concerned a power, under s 10 of the Commonwealth Immigrants Act 1962, to refuse entry to Commonwealth subjects; but the power could not be exercised in respect of 'any person who satisfies the immigration officer that he is the child under 16 years of age of a Commonwealth citizen who is resident in the UK'. The immigration officer in this case decided that HK was over 16 and refused entry. HK applied for habeas corpus and certiorari, claiming that the immigration officer was in breach of natural justice because he had not given HK an adequate opportunity to remove the impression that he was over 16. The court held there had been an absence of natural justice, but each judge had a different perception of 'fairness'.

Lord Salmon held that natural justice applied, but what he said related to bias and unreasonableness. Lord Brain treated fairness as substantive and said that the immigration officers had to reach a fair decision. Lord Parker held that the immigration officer had a duty to act fairly, not merely impartially, and must give the immigrant an ample opportunity to put his or her view. So he was looking at fairness in a *procedural* sense.

The concept of fairness, or a duty to act fairly, has great potential in both a

24 [1967] 2 QB 617.

25 [1969] 2 Ch 149.

useful and a harmful way. It is useful because it presents the opportunity to rethink procedural requirements for administrative decision making, free from the residual constraints of the judicial model. It is potentially harmful, because fairness can be both substantive and procedural and there is a danger of confusing the terms and so ignoring or condoning inadequate procedures where a 'fair' result on the merits has been achieved. Also, because fairness is such a vague term, it might encourage an ad hoc judicial approach – a subjective assessment of each case as it arises.

For all its defects, natural justice as traditionally conceived contained some fairly clear principles which imposed defined requirements on the decision making process, for example, notice of the charge and a hearing.

The question is, should we still be using the words 'natural justice', or should we more properly be referring to fairness or a duty to act fairly? And, indeed, do they mean the same thing, or does natural justice imply stricter requirements than 'fairness'? Here, the old distinction between judicial and administrative functions may still have some utility.

In *McInnes v Onslow Fane*,[26] this issue was considered. The case itself concerned an application to the British Boxing Board of Control for a manager's licence. The applicant was refused a licence without being told why. His counsel argued that the Board should have reached a preliminary decision and told him, allowing him time to comment before they reached their final decision, so giving effect to the requirements of natural justice, and that there should have been an oral hearing with the opportunity for adjournment to deal with the counter-evidence.

There, the judge, Megarry VC, said that, if one accepts that the term 'natural justice' is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as 'judicial', 'quasi-judicial' and 'administrative'. Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation, the more appropriate it is to reject an expression which includes the word 'justice' and to use, instead, terms such as 'fairness'. This may point to an issue raised in Craig,[27] that the rules of natural justice are conceptually adjudicative in approach, whereas fairness might imply other non-adjudicative procedures like conciliation, mediation or managerial direction.

Other cases, however, including the judgments in the *GCHQ* case, for instance, indicate that the terms may be used interchangeably and mean the same thing. Megarry VC rejected these claims for natural justice and said the Board was under no duty to give reasons for its decisions. He gave two arguments for not requiring a duty to give reasons on grounds of natural

26 [1978] 3 All ER 211.

27 *Op cit*, Craig, fn 19.

justice. First, it would have a wide ranging effect on other bodies who issued licences. Secondly, resort to the courts would be made more possible – with the potential of opening the floodgates: 'Bodies such as the Board were performing a public service and it was up to the courts not to hinder them.'

The most important case is this area now is of course, *Doody v SS for the Home Dept*,[28] where the House of Lords acknowledged the link between fairness and a duty to give reasons. *Doody* concerned the procedure by which the Home Secretary fixes the 'penal' element of a mandatory life sentence. One of the points at issue was whether such a prisoner was entitled to be told the reasons why the Home Secretary had departed from the recommendation of the judiciary in relation to what that penal term should be. Lord Mustill, delivering the judgment of the House of Lords, made clear the importance of the concept of fairness in influencing the decision that the Home Secretary should give reasons. He set out the following propositions:

(a) 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;

(b) 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;

(c) the principles of fairness are not to be applied 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;

(d) 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;

(e) 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;

(f) 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.

He went on: 'The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest; indeed, rather the reverse. This being so, I would ask simply: is a refusal to give reasons fair? I would answer without hesitation that it is not.' This approach has been

28 [1993] 3 All ER 92.

followed in recent cases; see, for example, *R v London Borough of Lambeth ex p Walters*.[29]

You will remember, too, that Lord Woolf[30] has approved the approach to fairness in *Doody*. He has pointed out that *ultra vires* is largely a fairy tale and that what the courts should be considering is whether powers have been exercised fairly and reasonably. While he acknowledged that Lord Mustill referred to the presumed intention of Parliament (that there should be fair procedures), Lord Woolf argues that the language of Lord Mustill's speech as a whole strongly suggests that his primary concern was with establishing a regime which was fair. Lord Woolf clearly approved of that approach.

Let us consider the confusion of substance and procedure. Before the duty to act fairly appeared in *Re HK*, the question had arisen whether a breach of duty to give a hearing should make the decision void if, in practice, a hearing 'would have made no difference'; that is, the decision was substantively fair, even if not procedurally fair. In *Ridge v Baldwin*, the possibility had been left open that it might have been unnecessary for the Watch Committee to have given Ridge a hearing if, on the merits of the case, it would have been unreasonable in the *Wednesbury* sense for the Committee to have done anything but dismiss him following a hearing, had one taken place. (If the Watch Committee could not reasonably have done anything else other than dismiss Ridge, then there would have been no duty to give a hearing.) In other cases, the Privy Council had twice rejected the view that a breach of the duty to hear could be disregarded if the eventual decision reached had been correct.

In some cases, however, the courts had taken a different view. One of these is *Glynn v Keele University*.[31] It had been a long, hot summer and the students had been enjoying themselves at the end of term. Some of them, Mr Glynn included, were enjoying themselves so much that they were found sunbathing naked within the grounds of the university. The University Vice Chancellor had power under the University statutes to discipline students and he sent a letter to Mr Glynn informing him that he was to be fined £10 and excluded from living on the campus for the following academic year – his final year. These penalties were imposed without giving him a chance to put his side of the case. The judge in the case held that the VC should, as a matter of natural justice, have sent for Glynn and given him an opportunity to present his own case before the decision was reached as to whether to inflict a penalty and as to what the penalty should be. But he then went on to say that he would exercise his discretion and not grant a remedy to Glynn, because the offence was one of a kind which merited a severe penalty according to any standards current even today, and the position would have been no different

29 (1993) *The Times*, 6 October.

30 Woolf, '*Droit public* – English style' [1995] PL 57.

31 [1971] 1 WLR 487.

if the VC had given him a hearing, because Glynn would not have been able to put forward any specific justification for what he did.

This sort of reasoning encourages decision makers to ignore procedural fairness entirely; all that matters is to achieve an acceptable result. This shows a complete lack of comprehension of what the procedural structuring of discretion is for, which is the legitimate use of public power by promoting constitutional principles of openness, accountability, rationality, and participation.

So far, the cases we have examined concern individuals, but the courts have recently been prepared to apply natural justice to the relationship between government organisations.

In *Norwich CC v SS for the Environment*,[32] it was said *obiter* by the Court of Appeal that, before a minister could exercise a default power to take over a local authority's functions in relation to the sale of council houses, he had to give notice to the local authority of what he intended to do and listen to any representation they might make to him.

Again, in *R v SS for Environment ex p Brent LBC*,[33] the statute empowered the minister to make regulations which authorised various discretionary reductions of the rate support grant. There had been consultation and negotiation about the regulations before the enactment of the parent Act, but the essence of the complaint was that the minister had refused to listen to representations made by the local authority *after* the enactment of the authorising legislation, before the actual regulations were issued.

The Court of Appeal held that this was a breach of natural justice and the fettering of discretion by the adoption of a rigid policy. The court rejected the argument that a hearing would not, in practice, have made any difference: 'We are not prepared to hold that it would have been a useless formality for the Secretary of State to have listened to the representations. If our decision is inconvenient, it cannot be helped. Convenience and justice are often not on speaking terms.' It is difficult to see how such an argument could have been accepted, since this would simply have strengthened the case that there was no genuine exercise of discretion.

This relationship between the natural justice principle, that there must be a hearing before a decision is made, and the principle that discretion must be genuinely exercised and not fettered in advance, is clear in theory and exemplified in *Brent*. However, the courts have not pursued the implications of this link because, we suspect, it makes it clear that natural justice is not just about individual rights, but about legitimate procedures for policy making; an idea with consequences the courts are reluctant to accept.

32 [1982] 1 All ER 737.

33 [1983] 3 All ER 321.

The Court of Appeal in the *Brent* case did, however, adopt a set of concepts for classifying decision making in licensing and analogous cases. It is a threefold classification, first put forward in *McInnes v Onslow Fane*,[34] and which replaced the old dichotomy between rights and privileges:

(a) there is the decision which takes away some existing right or position, as where a licence has been revoked. (Here, there would be strong procedural rights.) In *Brent*, the court held that the case came into the first category; the Secretary of State was depriving the local authority of a vested right to the support grant;

(b) there is the decision which merely refuses to grant the applicant a right or position that is being sought (where there would be few procedural rights);

(c) there is an intermediate category, which might be called the expectation cases, which differs from (b) above only in that the applicant has some legitimate expectation, from what has already happened, that his application will be granted.

So, now, there are three categories and the ambit of procedural protection has increased to cover the case where there is legitimate expectation of receiving or continuing to receive a privilege.

LEGITIMATE EXPECTATIONS

Although the term originated in *Schmidt v Home Office*,[35] it was the case of *R v Liverpool Corpn ex p Taxi Fleet Operators Association*[36] which was the first example of the idea in operation. Here, the local authority had statutory powers to 'license such number of taxis as they think fit'. In addition to existing licence holders, who formed the Taxi Fleet Association, there was also a large number of unlicensed minicabs operating in the area. The Corporation decided to adopt a dual strategy for dealing with the problem:

(a) they decided to promote a private Bill to control minicabs;

(b) they decided to increase the number of licensed taxis.

The association was allowed to put its views to a subcommittee which was considering the question of the number of licences. The chairman of the subcommittee then announced publicly that there would be no increase in the number of licences granted until the Private Bill had been enacted. A few months later, the Corporation decided, without informing the Association, to change its mind and increase the number of licences before the bill became

34 [1978] 3 All ER 211.

35 [1969] 2 Ch 149.

36 [1972] QB 299.

law. The Court of Appeal granted the Association an order of prohibition to prevent the Corporation from acting on its decision until it had given the Association a chance to make representations concerning the change of policy. The court held that the Corporation could not be bound by the substance of the assurance given – they could not fetter their discretion to act as they saw fit. However, neither could they simply disregard the assurance. If they had decided they wanted to change their policy, the Association had a legitimate expectation that it would be informed and given the opportunity to make representations. That was what 'fairness' required.

This is of great importance, since it is a way of reconciling the principle that discretion cannot be fettered with the requirements of fairness in decision making.

The *Liverpool Taxi* case lay dormant for many years, until it was applied in *AG of Hong Kong v Ng Yuen Shiu*.[37]

In 1980, the Hong Kong Government announced a change in its policy towards people who had entered and settled as illegal immigrants from mainland China. Henceforth, these illegal immigrants would be liable to be returned to China, but would first be interviewed, and each case would be treated on its merits. The respondent was an illegal immigrant who had entered Hong Kong in 1976 and had subsequently become the owner of a factory employing several workers. He reported to an immigration officer and was interviewed, but he was only allowed to answer questions put to him. He was never given a chance to state his own case. He was then detained and ordered to be deported.

The Privy Council held that the Hong Kong Government was bound by the procedural assurance that it had given that immigrants would be interviewed and considered on the merits:

> The respondent's contention was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made, if he has a legitimate expectation of being accorded such a hearing.

Lord Fraser then went on to say that their Lordships consider:

> ... the word legitimate ... falls to be read as meaning reasonable. Accordingly, legitimate expectations are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis ... The expectation may be based on some statement or undertaking by the public authority, if the authority has acted in a way that would make it unfair or inconsistent with good administration for him to be denied a hearing.

In this particular case, this meant that, at the interview, the immigrant should have been given the chance to say if there were any special factors in his case which he wanted to have taken into consideration, such as owning a factory and employing others.

37 [1983] 2 All ER 346.

'Legitimate' or 'reasonable' expectations

Lord Fraser, in the *Hong Kong* case, had glossed the term 'legitimate expectation' as meaning 'reasonable expectation' but, in *Council of Civil Service Unions v Minister for the Civil Service (GCHQ)*,[38] he withdrew this in deference to Lord Diplock, who said that the term 'legitimate expectation' was to be preferred, because not all expectations of receiving or continuing to enjoy some benefit or advantage that a reasonable person might have would necessarily be given effect in public law.

The *GCHQ* case is still the leading authority in this area.

The government decided to ban trade union membership for people working at GCHQ Cheltenham. An instruction was given by the Prime Minister that the terms and conditions for civil servants working at GCHQ would be altered under Art 4 of the Civil Service Order in Council 1982. The order itself was made under the royal prerogative. There was no prior consultation with the unions, to whom the instruction came as a surprise.

One of the issues before the court concerned consultation. All the members of the House of Lords were agreed that *but for* the issue of national security, the unions would have had a remedy. They had a *legitimate* expectation of being consulted before the change in terms and conditions of service were made, because evidence showed that since the establishment of GCHQ in 1947, prior consultation had been the invariable practice when conditions of service were to be significantly altered.

Lord Diplock defined three categories of case in which a person could claim judicial review of a decision:

(a) where rights or obligations enforceable by him or against him in private law are altered;

(b) where he is deprived of some benefit or advantage which either:

- he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to continue, until there has been communicated to him some rational ground for withdrawing it and on which he has been given an opportunity to comment; or
- he has received *an assurance* from the decision maker that it will not be withdrawn without first giving him an opportunity of advancing *reasons* for contending that it should not be withdrawn.

Lord Diplock was prepared to face up to the consequence that this meant that reasons had to be given for the decision:

> ... *prima facie*, the civil servants at GCHQ were entitled, as a matter of public law, before administrative action was taken on a decision to withdraw the

38 [1984] 3 All ER 935.

> benefit of trade union membership, to have communicated to them the reasons for such a withdrawal and for the unions to be given an opportunity to comment on it.

The *GCHQ* case gives the approval of the House of Lords to the use of natural justice to structure administrative discretion by imposing procedural requirements on decision makers where there is a legitimate expectation that such procedures will be followed.

So far, we have considered the concept of legitimate expectancy mostly as an aspect of natural justice giving rise to the *procedural* structuring of discretion. There are however, two other senses in which the term has been used:

(a) legitimate expectation as a *substantive* confining of discretion;

(b) legitimate expectation as an aspect of standing – legitimate expectation has been used as a basis for 'sufficient interest' where a remedy under Ord 53 is being sought.[39]

Substantive legitimate expectations

We need to look at how the courts have dealt with this.

In *R v SS Home Dept ex p Khan*,[40] a circular letter giving guidance to people in the UK who wished to adopt children from abroad was published by the Home Office. It said:

> There is no provision in the Immigration Rules for a child to be brought to the UK for adoption. The Home Secretary may, however, exercise his discretion and exceptionally allow a child to be brought here for adoption where he is satisfied that the intention to adopt under UK law is genuine and not merely a device for gaining entry; that the child's welfare in this country is assured and that the court here is likely to grant an adoption order. It is also necessary for one of the intending adopters to be domiciled here.

In the event, the applicant, who met the criteria as set out in the circular, was refused entry for the child he wished to adopt. The Home Office applied criteria different from, and much more restrictive than, those set out in the circular; namely, that entry would be refused unless serious and compelling family or other considerations made exclusion undesirable. The Court of Appeal granted certiorari by a majority.

Parker LJ said:

> The Secretary of State is of course at liberty to change the policy but in my view, vis à vis the recipient of such a letter, a new policy can only be implemented after such recipient has been given a full and serious

39 See the discussion above, Chapter 6.

40 [1985] 1 All ER 40.

> consideration whether there is some overriding public interest which justifies a departure from the procedures stated in the letter ...
>
> I would allow the appeal and quash the refusal of entry clearance. This will leave the Secretary of State free either to proceed on the basis of the letter or, if he considers it desirable to operate the new policy, to afford the applicant a full opportunity to make representations why, in his case, it should not be followed.
>
> I would only add this. If the new policy is to continue in operation, the sooner the Home Office letter is redrafted and false hope ceased to be raised in those who may have a deep emotional need to adopt, the better it will be. To leave it in its present form is not only bad and grossly unfair administration but, in some instances at any rate, positively cruel.

Dunn LJ went much further and held that it would be *unreasonable and unfair* to apply criteria other than those set out in the circular:

> Although the circular did not create an estoppel, the Home Secretary set out the matters to be taken into account and then reached his decision on a consideration which on his own showing was irrelevant. In doing so, he misdirected himself according to his own criteria and acted unreasonably.

In a way, Dunn LJ treats the circular as a form of administrative rule making. Ministers must be free to make new rules, but it is substantively unfair to apply new rules retrospectively.

In *R v SS Home Dept ex p Ruddoc*k,[41] the applicant was a member of CND who discovered her telephone had been tapped after issue of a warrant by the Home Secretary. She applied for judicial review, contending that:

(a) tapping was unlawful, because signing a warrant did not meet published criteria in that it had been done for a party political purpose;

(b) there was a legitimate expectation that the Secretary of State would follow the criteria.

The Secretary of State, in the interests of national security, declined to confirm or deny the existence of the warrant but argued:

(a) the court had no jurisdiction, because it would be detrimental to national security;

(b) the doctrine of legitimate expectation did not apply where the applicant had no expectation of being consulted or given an opportunity to make representations.

On the facts, the court held that the minister had not flouted the criteria and that his decision that the warrant fell within them was not irrational.

41 [1987] 2 All ER 518.

As Craig[42] has pointed out, while it may be accepted that there may be a substantive as well as procedural dimension to legitimate expectations, one has to be clear what substantive means in this context. There was a legitimate expectation that the content of the published policy would be applied unless there was evidence to justify departing from it. But it did not go further than that in any substantive sense. So, the minister could show that there were reasons why the existing policy should not be followed in that particular case and, in addition, the minister was free to alter the policy for the future.

In the *US Tobacco*[43] case, however, the court conflated the first question, as to whether there were circumstances which gave rise to a substantive legitimate expectation, with the second question, whether there were overriding public interest considerations which would justify a change in policy. The case has been criticised on these grounds by Craig and by Schwer and Brown.

A more recent case which deals with the issue of substantive legitimate expectations is *Ex p Richmond upon Thames LBC*,[44] which concerned a (successful) challenge of the minister's proposals under the Civil Aviation Act 1982 to introduce a new quota system for airlines according to noise levels of particular aircraft, rather than as before, limiting the number of night flights to and from airports around London. In that case, Laws J sought to emphasise that, while there may be a legitimate expectation of a hearing or consultation before a policy is changed, there cannot be a legitimate expectation that the policy will not be changed at all.

> But there is no case so far as I am aware ... in which it has been held that there exists an enforceable expectation that a policy will not be changed, even though those affected have been consulted about any proposed change. And this is no surprise: such a doctrine would impose an obvious and unacceptable fetter upon the power (and duty) of a responsible public authority to change its policy when it considered that that was required in fulfilment of its public responsibilities. In my judgment, the law of legitimate expectation, where it is invoked in situations other than one where the expectation relied on is distinctly one of consultation, only goes so far as to say that there may arise conditions in which, if policy is to be changed, a specific person or class of persons affected must first be notified and given the right to be heard.

In another first instance case which followed soon after *Richmond*, Sedley J took a different line from Laws. This was the case of *R v MAFF ex p Hamble (Offshore) Fisheries Ltd*.[45] This arose when a trawler owner challenged a change

42 Craig, 'Substantive fairness and legitimate expectations in UK and EC law' (1996) 55(2) CLJ 55(2) 289.

43 *R v SS for Health ex p United States Tobacco International Co* [1992] 1 All ER 212. See, also, Schwer and Brown, 'Legitimate expectations – snuffed out?' [1991] PL 163.

44 *R v SS for Transport ex p Richmond LBC* [1994] 1 All ER 577.

45 [1995] 2 All ER 714.

in government policy relating to the granting of fishing licences. Sedley J held that legitimate expectations could extend to substantive as well as procedural matters and drew on Parker LJ's approach in *Khan* as well as EC jurisprudence.

> Legitimacy in this sense is not an absolute ... The balance must, in the first instance, be for the policy maker to strike; but if the outcome is challenged by way of judicial review, I do not consider that the court's criterion is the bare rationality of the policy maker's conclusion. While policy is for the policy maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern ... it is the court's task to recognise the constitutional importance of ministerial freedom to formulate and reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness out tops the policy choice which threatens to frustrate it.[46]

This suggested that the court was entitled to undertake a balancing exercise, weighing up the policy decision against the individual interests at stake in the interests of fairness.

This approach was soon overruled by the Court of Appeal in *Ex p Hargreaves*.[47] This case was brought by three (Category C) prisoners who were serving sentences of six, seven and eight years respectively. When they were admitted to prison in 1994, they had each been issued with a notice informing them that they could apply for home leave after serving one-third of their sentences. The notice made it clear that the information contained therein applied from 1 October 1992 and that home leave was a privilege. At the same time, each applicant signed an 'inmate compact' under which the prison promised, *inter alia*, to consider him for home leave when he became eligible and required him to be of good behaviour (promised, for example, to refrain from threats of violence, and to keep his cell to a high level of cleanliness and tidiness). But, in 1995, the Home Secretary decided that the rules on home leave were too lenient – there had been some high profile cases of re-offending by prisoners when on leave – and changes were made in the interests of improving public safety and increasing public confidence in the administration of justice. The new rules which were issued said that prisoners were entitled to apply for home leave only when they had served half their sentence. As a result, the earliest date for eligibility for home leave of these three prisoners was deferred by a substantial period. They challenged the Home Secretary's decision to implement the new scheme, arguing that the change of policy was unlawful because it frustrated a legitimate expectation as to the eligibility for home leave which had arisen under the previous rules and

46 [1995] 2 All ER 714, p 731.

47 *R v SS for the Home Dept ex p Hargreaves* [1997] 1 WLR 906; and see Foster, 'Legitimate expectation and prisoners' rights: the right to get what you are given' (1997) 60 MLR 727.

which was created when they had entered into the compact with the prison governor under those former rules. The case went to the Court of Appeal, where their arguments were rejected. The Court of Appeal held that:

(a) the inmate compact did not give rise to a legitimate expectation of being considered for leave after one-third of their sentence which could be enforced by judicial review, since the unfettered discretion conferred on the Home Secretary by statute to change policy could not be thus restricted. The most a prisoner could legitimately expect was that his case would be examined individually in the light of whatever policy the Home Secretary saw fit lawfully to adopt. In any event, the notice and the compact did not contain a clear and unambiguous representation as to timing of home leave so as to give rise to a legitimate expectation;

(b) since the deferment of eligibility for home leave was a matter of substance and not of procedure, the court was not required to conduct a balancing exercise based on fairness and proportionality when deciding the lawfulness of the change of policy; rather, the correct test was whether the decision to change the policy was unreasonable. The court held it was not unreasonable. (Other arguments put on Art 8 of ECHR – interference with family life – and also relevancy, were argued and rejected by the court.)

The Court of Appeal, *per* Hirst LJ, held that on matters of substance (as contrasted with procedure) the appropriate test was *Wednesbury.* Sedley J's *ratio* as to the court performing a balancing exercise should be overruled, although the decision in that case stands. Pill LJ said:

> The court can quash the decision only if, in relation to the expectation and in all the circumstances, the decision to apply the new policy in the particular case was unreasonable in the *Wednesbury* sense ... The claim to a broader power to judge the fairness of a decision of substance ... is in my view wrong in principle.

Forsyth has pointed out the various failings of the *Hargreaves* decision and has commented that the 'inherently plastic nature of *Wednesbury* irrationality means that different judges might well have reached a different conclusion about the rationality of the decision to change the home leave eligibility policy without respecting the expectations of *Hargreaves*'.[48]

He also points to the importance of the trust that individuals place in the statements of officials and to the fact that good government depends in large measure on officials being believed by the governed. 'Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long established practices.'[49] In his view, unless there is an overriding public interest, it should

48 Forsyth, '*Wednesbury* protection of substantive legitimate expectations' [1997] PL 375.

49 *Ibid*, p 384.

generally be held to be unreasonable to leave substantive legitimate expectations unprotected. (He also wryly points to Laws' view that we have discussed, that the more substantial the interference with an individual's fundamental rights, the greater the justification which must be given by the public authority.) For Forsyth, the protection of a legitimate expectation to temporary freedom is sufficiently fundamental to require more cogent justification than that provided in *Ex p Hargreaves*.[50]

Clearly, the courts are still reluctant to expand the scope of legitimate expectation, even in cases where fairness to the individual demands rigorous scrutiny of administrative decision making.

CONSULTATION

The principle that fairness requires a right to be heard for those affected by a decision has been translated in some circumstances into a right to be consulted about public policy making, conferring some limited participation rights. Because of the nature of this decision making, the scope of those entitled to such rights *should* be cast much more widely than is the case, for instance, where natural justice is the justifying principle. For public policy making to have a rational base, there should be strong consultation and participation rights conferred in the public interest and not restricted to cases where a 'quasi-private' interest is affected. In the following section, we want to consider the extent to which our public law structures and protects such consultation and participation rights.

You might expect that a breach of a statutory requirement such as consultation would make a decision *ultra vires,* but it is not as simple as that. Breach of any procedural requirement does not automatically result in the decision being *ultra vires*. This is because the English courts distinguish between *mandatory* and *directory* (discretionary) procedures.

In general, if the requirement is held to be mandatory, then breach will make the decision void. But if the requirement is held to be merely directory, then unless *substantial prejudice* has been caused to the applicant by the failure to comply, it will not be held to be *ultra vires*.

So, how does the court decide whether the requirement is mandatory or directory? The first point is that there are no *fixed rules*, only *considerations*, which the courts take into account. These are:

(a) administrative convenience; would the procedure cause problems for the public body if it were held to be mandatory and consequently a breach held to be *ultra vires*?;

50 [1997] 1 WLR 906.

(b) the importance of the requirement to the overall statutory scheme. Does consultation play a vital or only minor role? The courts are more likely to hold a procedure mandatory if it is fundamental to the scheme of things;

(c) whether the administrative act or decision involves some deprivation of individual rights or harm to individual interests. The greater the value the court attaches to the right or interest, the more likely the procedural requirement will be held to be mandatory;

(d) fairness to third parties. (This does not arise in every situation.) If a third party has relied on the validity of an act or decision and had no control over the procedures, the court will be more inclined to hold the requirement directory so that the decision will stand.

Consultation requirements include not only those situations where the legislation actually uses the word 'consult', but also where, for example, there is a duty to give notice of proposed action and to consider objections and representations, or where there is a duty to ascertain the opinions of a particular group. So, *consultation may be framed in more than one form of words.*

As would be expected, where individual interests are apparent, the courts have, on the whole, responded quite well to procedural requirements. But there are two factors which have tended to limit the significance of consultation in the broader policy context:

(a) the courts have defined the content of a duty to consult (what actually constitutes consultation) in such a way as to conserve rather than modify institutional structures or traditional concepts. In other words, in contrast to the USA, the English courts have not been innovative in their approach to modern problems of governance;

(b) conversely, where the courts have made an attempt to enforce consultation provisions, this has sometimes been made irrelevant because outside factors have to some extent modified institutional structures.

Let us clarify these two factors by using cases as examples.

The content of a duty to consult

In *Rollo v Minister of Town and Country Planning*,[51] under the New Towns Act 1946, the minister had the power to designate an area as a site for the development of a new town, after consultation with 'any local authority who appeared to him to be concerned'. The question was whether two meetings between the minister and the local authority concerned constituted consultation. It was held that it did.

51 [1948] 1 All ER 13.

Lord Greene emphasised that the mandatory duty was limited by the fact that the minister was making a decision in the national interest about which the local authority could not offer any useful advice!:

> He [the minister] has sources of information not merely within his own department but in other government departments, all of which must be of vital importance in enabling him to make up his mind on the question of national interest. Bearing in mind, when he comes to consult with local authorities ... he would, or might, be wasting a great deal of time if he were expressly to ask their opinions on matters which they could know very little.

But, he also stated that the minister:

> ... must allow any authority who has a point which it considers will help him to put it forward. He is not entitled to say he will not listen to any suggestion made.

Lord Bucknall did a little better than that. He said:

> ... the minister must supply sufficient information to the local authority to enable them to tender advice and ... a sufficient opportunity must be given to the local authority to tender that advice.

This judgment at least recognises that consultation is a two way process, although it does not go far enough. The case tends to limit the duty to consult to the supply of information on matters for which the local authority has some institutional responsibility. This fits with the traditional interpretation of use of procedures and consultation and existing patterns. It is more akin to informing the mind of the minister than encouraging an open and participatory policy making process.

This comes through even more clearly in *Port Louis Corpn v AG of Mauritius*,[52] where statute provided that a power to alter the boundaries of towns was 'exercisable after consultation with the local authority concerned'. The minister proposed to alter the boundary of Port Louis by expanding it quite considerably and wrote to the local authority inviting their views. The only information provided was geographical and the local authority replied enclosing a list of questions to which they required answers before giving their views. The minister gave no answers, he just replied that the local authority questions had been considered. The boundaries were then extended and Port Louis challenged the decision on the grounds of a lack of consultation.

The Privy Council held that the local authority were seeking to ascertain government policy and intentions, which were primarily the concern of government. The government were neither required nor expected to formulate detailed plans. The ability to express a view as to the boundaries and the ability to express how to go about it was different, so it was not

52 [1965] AC 1111.

necessary for the minister to answer the local authority questions. This approach leaves the content of consultation very thin.

Agricultural Training Board v Aylesbury Mushrooms[53]

Under the Industrial Training Act 1964, the minister was empowered to set up training boards which would be able to raise levies from employers in the industries concerned. Section l(4) of the Act provided:

> ... before making an industrial training order the minister shall consult any organisation appearing to him to be representative of substantial numbers of employers engaging in the activities concerned.

The minister consulted the National Union of Farmers and also sent a letter to the Mushroom Growers Association. They did not receive the letter and did not know of the consultation between the minister and the National Union of Farmers. Nevertheless, the minister went ahead and made an industrial training order. Donaldson J held that the duty to consult was not absolute:

> ... the essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice ... If the invitation is once received it matters not that it is not accepted and no advice proffered. Were it otherwise, organisations with a right to be consulted could in effect veto the making of an order simply by failing to respond to the invitation.

He went on to say, however, that a letter which *never* arrived did not constitute consultation. But, the effect of the failure to consult was not *total invalidity* of the order; instead, a declaration was granted that the order could not be applied to the Mushroom Growers.

R v SS for Social Services ex p AMA[54]

The Social Security and Housing Benefit Act 1982 empowered the Secretary of State to establish a housing benefit scheme by way of regulation. Section 36(1) required him 'to consult with organisations appearing to be representative of the authorities concerned'. Regulations were made in 1982, but it soon became apparent that their effect was more generous than had been intended; so it was decided to make an amendment as soon as possible.

The Department of Health and Social Security (DHSS) wrote to all local authority associations, including the Association of Metropolitan Authorities (AMA), requesting their views within two weeks. The letter to the AMA was delayed in the post and the AMA wrote asking for more time. Meanwhile, the DHSS were considering further amendments and wrote again to the local

53 [1972] 1 All ER 280.

54 [1986] 1 All ER 164.

authority associations requiring a response within five days. The AMA response was received one day after the deadline.

The AMA applied for judicial review, seeking a declaration that the Secretary of State had failed to consult properly and *certiorari* to quash the regulations. The minister argued that, in the light of the need to amend regulations urgently, the time allowed for consultation and the information provided was sufficient to enable the AMA to make considered comments and that, in any event, the duty to consult was directory only.

Webster J, however, held that the duty was mandatory. He granted a declaration to that effect, but he refused to grant an order for certiorari, mainly on the grounds of administrative inconvenience.

How significant is the duty to consult?

The duty to consult has potential importance as an instrument for structuring discretion. Where the courts hold a duty to be mandatory, there is a recognition of the importance of procedural structuring and the need for accountability. In practice, though, express statutory duties to consult often have only limited significance. This is partly because it generally comes *too late* in the policy making process and access to information and resources is unequally distributed between the parties.

There is, of course, always a considerable amount of non-statutory consultation going on as government needs the co-operation of bodies outside government *and* their resources in terms of information and expertise. But again, in contrast to the USA, this is not conducted openly, thus contributing to inequalities in the balance of power. Furthermore, when the administration is determined to force a particular policy through, the most that the enforcement of consultation procedures can achieve is delay. Our courts have never insisted that public authorities should justify their decisions or respond to *cogent comment.* As a result of this deficiency, many of the cases on consultation appear largely irrelevant to the main issue, which is the extent to which government is prepared to engage in genuine debate over policy.

This brings our discussion on to examples of the second factor: *making the courts' enforcement of consultation virtually irrelevant*.

In *Bradbury v Enfield LBC* (1967),[55] the Education Act 1944 imposed duties on both the Minister for Education and local authorities in respect of education provision, but there are two things to note which are important in the cases under the Act which follow:

(a) there was no clear division of responsibility for policy implementation;

55 [1967] 1 WLR 7311.

(b) there was no provision requiring any *particular kind* of education. It was simply assumed that the grammar/secondary modern/technical provision would continue to receive support.

However, in 1964, a Labour Government was elected, with a commitment to comprehensive education. Initially, the Government attempted to implement this by the use of circulars which sought to persuade local authorities to change to the comprehensive system. Some agreed, and this put those who objected in a difficult position as the 1944 Act did not provide for parental or other involvement in decisions about the *type* of education to be provided. Consequently, many objectors were faced with a *fait accompli.* The only machinery for public consultation provided by the Act related to proposals either to set up or close particular schools. Section 13 provided that:

> ... if a local education authority (LEA) intends to establish a new school or cease to maintain an existing school they must submit proposals to the Secretary of State and must give public notice of the proposals.

Objections to the proposals could then be put before the minister. Enfield Council had already agreed plans with the minister and the LEA. On the advice of the Department of Education, Enfield took the view that changing a school to the comprehensive system did *not* amount to ceasing to maintain it. So, they gave no public notice of the proposals. This was challenged.

The Court of Appeal held that the change *did* amount to ceasing to maintain a school and the requirement to give notice was mandatory. The implementation of the scheme was, therefore, *ultra vires* and the court had imposed a duty to consult. But Enfield then tried to implement an interim scheme in respect of just one school. Donaldson J granted an injunction to prevent this, on the grounds that the articles of governance of the school required that it was selective. The Minister of Education then decided to exercise a power that he had under s 17 of the 1944 Act to *change* the articles of governance. Section 17(5) required the minister to:

> ... afford to the LEA and to any other person appearing to him to be concerned with the management of the school an opportunity to make representations.

The minister duly wrote to the school governors inviting a reply within four days. This action resulted in a different case, *Lee v DES*,[56] where Donaldson J held that the minister had failed to comply with s 17, because any time allowed for representations to be made which amounted to less than four weeks would be regarded as wholly unreasonable.

In effect the power of those who objected to the change in education policy, supported by the courts, was, in the sequence of events, *neutralised* by the law. Neutralisation of consultation procedures remains a feature of more recent cases.

56 [1968] 66 LGR 211.

In *R v SS for Health ex p Daniels* (1993),[57] a decision to close a bone marrow transplant unit was challenged for lack of proper consultation with the Community Health Council, which was a statutory requirement. The court held that the district health authority had failed to comply with the relevant regulations, but 'the court would not make futile orders'. Accordingly, since remedies in public law are discretionary, the court declined to grant a declaration that the closure of the unit was unlawful.

Two more recently reported cases which were heard at the same time are also of interest.

In *R v Devon CC ex p Baker and R v Durham CC ex p Curtis*,[58] the question in both cases was whether there was a duty to consult the residents of a home for elderly people which the local authority proposed to close.

It was held that the authority owed permanent residents a duty to act fairly and this included a duty to consult over the proposed closure. The residents should be informed well in advance of the final decision and have a reasonable time in which to put forward their objections, and the objections must be considered by the authority. The views of residents could be expressed generally or through a support group. This takes the matter past the statutory requirements of consultation in these cases, which are stated in very general terms only, but does this go far enough in the absence of any general duty to give reasons?

Contrast this with the approach of the Australian Administrative Appeals Tribunal in *Hawker de Havilland*,[59] where it was held that it is a *clear principle of law* that *all* parties whose interests may be affected have the right to be heard by a decision maker and this principle is backed up by a *duty to give reasons.*

Consultation requirements in English law are not generally adequate for their purpose when tested against the constitutional background. What we have in these cases is *too little, too late.* The institutional structure may deprive the consultation factor of any real content or possibility of influencing the policy process. This underlines the difficulty of developing procedures which allow for rational choice between differing values and objectives. These have to be something much stronger than our current procedures.

In the European Community, consultation appears to be being increasingly recognised as a valuable way of making decision making more accessible to those affected by it. We have already noted that failure to consult may be a ground on which decisions of European institutions may be challenged. Community consultation procedures have also been encouraged by the 1993 Inter-Institutional Declaration on Democracy, Transparency and

57 [1994] 4 Med LR 364.

58 [1995] 1 All ER 73.

59 *Hawker de Havilland v Australian Securities Commission* [1992] ALMD 1369 Commonwealth AAT.

Subsidiarity.[60] Besides providing greater access to documentation and files, etc, it provides for a notification procedure which consists of publication in the Official Journal of a brief summary of any measure planned by the European Commission and the setting of a deadline for interested parties to submit their comments. The implications of this development are far-reaching and can be regarded as analogous to the requirements of notice and comment under the American Administrative Procedure Act, which is considered next.

THE AMERICAN ADMINISTRATIVE PROCEDURE ACT

Although the USA certainly has not solved all the problems of administrative powers, it has developed some good techniques to control discretion, particularly in relation to rule making. The problems which are encountered in both the USA and the UK are strikingly similar, particularly as regards judicial review and the attempts to overcome *gesellschaft* characteristics. The main problem is *to ensure the legitimate exercise of public power.*

The Administrative Procedure Act (APA) 1946[61] represented a compromise between the proponents of 'big government' who supported regulation of business and those who were opposed to it. One of the major instruments of the 'New Deal', as it was called, was the creation of federal agencies. Some of these, like the Tennessee Valley agency, were *executive;* as Roosevelt said, 'a corporation clothed with the power of government but which possessed the flexibility and initiative of private enterprise'; others, such as the Securities and Exchange Commission, were given the power to *regulate* business.

The APA provided two kinds of procedures for agencies to use; *adjudication and rule making*. Rule making was further divided into *formal rule making and informal notice and comment.*

Formal rule making involves similar procedures to adjudication, that is, a trial type oral hearing with legal representation and evidence subject to cross-examination. In other words, it is similar to a public inquiry in the UK.

Informal notice and comment, on the other hand, is much less judicialised. The agency has to give notice of the proposed rule, including 'either the terms or substance of the proposed rule or a description of the subjects or issues involved'. The agency must then:

> ... afford interested persons an opportunity to participate in the rule making through the submission of written data, views or arguments with or without the opportunity to present the same orally; and after consultation of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose.

60 See Craig and De Burca, *EC Law Text, Cases and Materials*, 1998.

61 5 USC S 9553 (1946), 554, 706.

It is important to stress that these requirements are a procedural 'floor', below which no agency may go.

At first, agencies had only a limited power to use informal notice and comment. Formal procedures were much more common, but they were difficult and slow and agencies tended to resort to case by case litigation. This meant, for example, that agencies such as the Fair Trading Commission (FTC), which had very broad powers to curb unfair trading, made very little impact. Instead of being able to make rules of general application, the FTC had to prosecute specific companies for individual actions which it considered to be unfair.

Part of the reason for the difficulties of formal rule making was that the APA provided more stringent standards of judicial review for formal procedures than for informal ones. In the case of formal rule making, the courts are directed to quash agency action that is *unsupported by substantial evidence*. In the case of informal rule making, the court can quash where the action is *arbitrary, capricious or an abuse of discretion*.

The way these standards were interpreted by the courts meant that agencies could not use the kind of evidence which normally supports legislation to justify formal rule making. Instead, they had to use the kind of evidence which would justify prosecution for a specific offence. The latter is much more stringent.

This situation, with business tolerating the existence of regulatory agencies because their impact was, in practice, very limited, was disrupted in the 1960s. First, in the case of *Florida East Coast Railway*,[62] the Supreme Court narrowed the class of case in which statute would be held to trigger formal rule making. Previously, where legislation provided for 'on the record rule making', formal procedures were held to apply. Now statutes were interpreted to require only the informal notice and comment procedure. Secondly, at about the same time, new agencies such as the Environmental Protection Agency (EPA) and the Occupational Health and Safety Agency (OHSA) were created, whose governing statutes specifically gave them wide notice and comment powers.

The consequence was that there was a massive increase in informal rule making and a greater impact of regulation on business. Naturally, business was not too keen on this and contested agency action in the courts. The analysis of agency defects put forward by business, on the one hand, and those who supported regulation, such as environmentalists and consumerists, on the other, were of course very different.

Business groups argued that single mission agencies, such as the EPA and the OHSA, were not charged with weighing the overall costs of business activities. All they should be concerned with was cleaning up the environment or making the environment safe, regardless of costs and effectiveness.

62 *US v Florida East Coast Railway* 35 L Ed 2d 223 (1964).

Business groups also claimed that agencies were seeking to expand their powers and had clear incentives to please special interest groups whose representatives in Congress were usually in a position to set budgets.

The other faction, environmentalists and consumers, put forward a different argument. They argued that agencies tended to be 'captured' by those whom they were meant to be regulating. Instead of pursuing the public interest and continually engaging in conflict with those they regulated, they tended to settle down into a pattern of tolerant co-existence, if not outright identification with the interests of the regulated.

These lines of argument may appear contradictory, but in fact they produce a single message, that is, that reliance cannot be placed either on the 'transmission belt theory', where Congress tells agencies what to do, or the 'expertise theory', to legitimate administrative action. The response of the courts who were faced with a situation in which rival groups were contesting the substance of agency rule making, often in areas of scientific complexity, was a creative one. They sought to develop *procedure*s which would ensure *rational and open debate* of policies.

A key case was the decision in *Citizens to Preserve Overton Park v Volpe.*[63] Here the Supreme Court reinterpreted the 'arbitrary and capricious' standard. The case concerned the building of a road through a park which statute permitted only if no feasible and prudent alternative routes existed. The Supreme Court held that the lower court should review the decision using the 'arbitrary and capricious' test, but in doing so it should examine the full administrative record. If this was inadequate, to enable the court to fulfil its reviewing function, it should obtain oral testimony from the officials concerned. This was a surprising holding because, in effect, it required that decisions be supported by *a record of the decision making process.* Post hoc rationalisations of written evidence produced after the court proceedings had begun would no longer suffice. The Supreme Court was telling the administration to *compile adequate records to demonstrate the rationality of their decisions*, otherwise they would have to submit to cross-examination of their arguments by objectors.

Overton Park has had a lasting impact on court review of rule making. The 'searching and careful' standard described in *Overton*, often called *hard look review*, has subsequently been applied by the courts to both substantive and procedural issues. The application of 'hard look' resulted in a series of *'hybrid rule making'* (a mix of formal and informal procedures) decisions, which mandated procedures that went beyond the minimum requirements of the APA.

63 401 US 402 (1971).

Then, *Vermont Yankee*[64] halted the development of this judge augmented rule making procedure. The case had arisen from the Nuclear Regulatory Commission (NRC) rule making proceedings to establish numerical values for the impact of radioactive waste on the environment from nuclear power plants. The Court of Appeal had quashed the NRC rule on the ground that the record was insufficient to convince the court that all the issues had been fully and properly discussed. In particular, the court held that cross-examination should have been used to test some issues. This was reversed by the Supreme Court on the grounds that it was not open to the court to impose *specific* procedural requirements which went beyond those laid down by the APA. But the decision did not overrule or overturn all the law of informal rule making that had been developed by the courts.

In the *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance (State Farm)*,[65] which concerned a rule requiring seat belts and airbags in new cars, any broadening of *Vermont Yankee* itself was limited, but the court re-affirmed the hard look standard. The Supreme Court stated that an:

> ... agency must examine relevant data and articulate a satisfactory explanation of action, including a rational connection between the facts and the choice made. Normally an agency rule would be arbitrary and capricious if the agency has relied on facts which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for a decision which runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference of view or the product of agency enterprise.

The *centrality* of the record differentiates the USA from the UK and the 'arbitrary and capricious' test gives much more shape to the standard of review than the English *Wednesbury* test.

In *Home Box Office v FCC*,[66] the court stated:

> Implicit in the decision ... is an assumption that an act of reasoned judgment has occurred which requires the existence of a body of material – documents, comments, transcripts and statements in various forms declaring agency expertise or policy – with reference to which such judgment was exercised.

It is against this material that the courts are under an obligation to test actions of the agency for arbitrariness or inconsistency in the application of delegated authority. Notice and comment procedures are intended to encourage *public participation* in the administrative process and help educate the agency and thus produce more informed agency decision making. Gradually, the former of these underlying principles has come to take precedence, requiring the

64 *Vermont Yankee v NRDC* 435 US 519 (1978).

65 463 US 29 (1983).

66 434 US 829 (1977).

public to be informed of the data and assumptions on which the agency's proposal is based. The final rule or policy must be a *logical outgrowth of the proposal and comments.* The UK principle of ultra vires has failed to recognise these aspects.

Davis points out that rule making, and particularly the design of procedures, is the great American contribution to administrative law. This is probably so, but concern has been frequently expressed by almost all parties involved in the process – business associations, public interest groups and many government officials – of the time it takes to promulgate rules. If all regulations had a clearly determinable factual basis, there would not be any real problem. But, as always, agencies have to make policy choices which involve values where the available 'facts' are contested and inconsistent. In such situations, balancing the various competing interests can result in subjective policy choices which have very real political and economic ramifications. In this context, an agency can expect opposition to almost every rule.

So, more recently, in response to the problems of delay and legitimacy, federal agencies have developed what is known as *negotiated rule making* as an alternative to the traditional procedures for drafting proposed regulations. The essence is that, in certain situations, it is possible to bring together representatives of the agency and affected groups to negotiate the text of the proposed rule. If they do achieve agreement, then the resulting rule is likely to be easier to implement and the likelihood of subsequent litigation diminished. Even in the absence of consensus, the process may be valuable as a means of better informing the regulatory agency of the issues and concerns of affected interests. The Negotiated Rule Making Act 1990 supplements the APA, and is intended to clarify agency authority to encourage use of the process and foster co-operative effort, although it does not require it. The proposed rule resulting from negotiation is published as usual in the Federal Register, and the conventional notice and comment process takes over.

To evaluate properly the real significance of rule making would require an elaborate exercise in political sociology, but it is clear that, in the USA, the interrelationship between law and policy is regarded as being at the heart of the question of procedures in public law.

There is a beginning of this process in the UK, for instance, in the structuring of the relationship between Oftel and BT and between other institutions of that ilk.

A more recent example of provisions which provide for some limited consultation before rules are made is found in the draft Financial Services and Markets Bill, which sets out the basis for the new Financial Services Ombudsman scheme which we discussed in Chapter 3. The draft Bill confers rule making powers on the FSA and the new Ombudsman Company; the rules will delineate the detail of the scheme, including the way in which

complaints will be investigated, and determined, and the matters to be taken into account in reaching a decision on grounds, *inter alia*, of what is fair and reasonable. The FSA is required to publish the rules in the way best calculated to bring them to the attention of the public and to invite comment. It must then have regard to any representations received. The Ombudsman Company must consult with affected parties. While these are very welcome provisions, in that they recognise the values of openness and participation, they do not, alas, go far enough. First, there is no requirement on the rule making bodies to be open about comments received and to demonstrate publicly how they have taken them into account and secondly, consultation seems likely to arise at too late a stage in the process. The FSA is already working on the detail of the ombudsman scheme and the rules will have been formulated long before the consultation requirements kick into place. Inevitably, therefore, there will be pressures against change of the rules following consultation, because too much will already have been invested in their content. So, while we can see some acknowledgment of the need to consult in particular areas, there is still a long way to go if we are to match the procedures current in the USA.

Nor can we look to the courts to supplement the provisions. Again, in the UK, it is still too easy to regard natural justice as being more about the preservation of the sphere of *private autonomy* than the structuring of policy making through openness and participation in the public sphere.

CHAPTER 9

PRESENT TENSE: FUTURE PERFECT?

Throughout this book, we have been looking at the possibilities for administrative justice – accountable and legitimate decision making by government in all its manifestations from government departments to agencies to local authorities – not forgetting the utility regulators such as OFTEL, OFWAT and OFGAS, and those private bodies contracted to exercise what are essentially public functions, be they a firm removing household rubbish or nuclear waste or supplying laundry or orthopaedic services to the National Health Service. However classified, all are a part of, or have a role to play, in the machinery of government, from the macro to the micro.

Although the debate about the suitability of the pro-market and pro-competitive approaches taken to public policy of late is likely to continue in many quarters, it is quite clear that we are in a new era in terms of the delivery of government services and, indeed, of governance. It has become increasingly obvious and important that governments must concentrate their energies on taking a strategic role. As Bamforth comments,[1] certain duties and functions are entrusted to the State, whose role is to devise a framework for these – for education, social security and health, for example. Despite the growth of contracting out and the like, the State necessarily devises and administers the overall environment within which policy is developed and provision takes place.

This being the case, we must ensure that the fundamental principles of administrative justice are not undermined, that the 'art of governance' is considered anew. What does administrative justice require? What makes decisions at the collective or individual level accountable and legitimate? We have stressed that there are two main elements:

(a) participation in decision making – consultation and other fairness procedures;

(b) resolution of disputes – mechanisms for the redress of grievances.

These two elements are the cornerstone of any constitution, the underpinnings on which government and politics should operate. Against such a constitutional background for public activity, law can provide the framework within which these principles are able to operate and are upheld. Because policy decisions are rarely straightforward and primarily involve values, rather than facts alone, there may be several reasonable policy alternatives which might be adopted for

1 Bamforth, 'The public law–private law distinction: a comparative and philosophical approach', in Leyland and Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons*, 1997, p 141.

any given set of circumstances. Law can assist all groups concerned with the varying areas of public policy to establish the options, resolve conflict and set the standards of practice for an open and co-operative web of services.

The question is whether our present framework, our institutional structures, deliver what we expect in terms of our requirements for administrative justice. What does administrative law have to offer? Are the checks and balances, judicial and otherwise, sufficient for a modern complex society such as ours? What is the influence and impact of an ever expanding European law, both European Union law and the ECHR and their institutions, on our domestic law? What will be the effect of the Human Rights Act 1998 and the possibility of legislation on the freedom of information? As we move into the next millennium, with its inherent pressures not just for Europeanisation, but globalisation, we take with us an elaborate network for the control of administrative activity which we have inherited largely from a less complex period.

Let us mention summarily the strengths and weaknesses of our system as it stands at the moment. You will recall that the rather piecemeal, fragmented system of public law that we now have is chiefly a result of history. There was no throwing out of the old and setting up of the new, as there was in France or the USA, and to some extent Australia. English public law has been particularly deficient in keeping pace with claims of modern society. We have just kept building on what was there, taking a pragmatic approach – adopting an ad hoc, add on policy – as the pressures of government and administration mounted and it became imperative that something be done.

The emphasis has always been on the reactive, rather than a more proactive, holistic approach. Hence we have seen the sporadic development and expanded use of extra-judicial mechanisms for the redress of grievances, such as tribunals and inquiries and the ombudsmen, and the growth of 'the disconcerting number of quangos' that have come to be effecting government policy in recent years,[2] not forgetting the Citizen's Charter and Service First initiatives. All of these have their positive and more negative elements in the quest for the establishment of an administratively just environment.

We have discussed briefly the lack of uniformity of the tribunal system and the largely untapped potential of the public inquiry to promote participation in government.[3] We have seen that the ombudsman is a remedy which has gone against the general trend in spreading from the public to the private sector.[4] There are, of course, some unresolved issues with ombudsmen

2 Stewart, *Ego Trip*, 1992, Democratic Audit.

3 Above, Chapter 4.

4 It is important to bear in mind that the public/private distinction is something of a false one in modern administration, where who delivers what is less important than *how* it is delivered. Is public policy made and are public services delivered in an accountable and legitimate manner? Is there room for those on the receiving end to make their needs and wishes known and have their complaints redressed?

systems, but on the whole, they are proving highly successful. The evolution of the 'private' ombudsmen is providing a fertile ground for debate about the nature of the ombudsman enterprise and the need for some rationalisation and oversight.

What of internal complaints procedures – the devising of which is a requirement of the Citizen's Charter and Service First programmes?[5] The aim is to settle concerns at local level, which is sensible, but there are, presently, clear problems here, in that there are issues generally of independence, of a lack of consistency throughout and within the different schemes, and an insufficient input of resources overall. However, properly designed complaints handling procedures not only have a capacity to resolve individual complaints satisfactorily, but can have a very positive input into quality assurance programmes and the monitoring of services. We have also noted that the initial and perhaps more lasting impact of the Charter initiative may not have been on the public directly, but on the operating standards of government departments and the manner in which decisions are made.[6]

But, what of the role of the courts, of judicial review, which is regarded qualitatively by many as the pinnacle of administrative control? Sunkin has stated:

> ... it is now widely accepted that judicial review is expected to play a more extensive role associated with imposing accountability on government and the development of public law principles for the general benefit of the community and public bodies.[7]

Certainly, one decision of the Court of Appeal can have a tremendous impact on administrative decision making. But generally, the effect of judicial review proceedings on government and administration is uncertain and may not always be positive in terms of overall administrative justice.[8] Not only may a judgment which is contrary to government policy be rendered of little consequence by subsequent legislation, but the small amount of research conducted into the impact of judicial review has indicated that it 'has led to more bureaucracy, a greater attention to formality and a greater role for lawyers in government'.[9] It has also been concluded that judicial review rarely encroaches on many of the areas of government policy. Where it does have an effect, this is usually only temporary, leaving policy decisions for the most

5 Although it was also a requirement for local authorities before this, in the 1970s, it was not well adhered to.

6 See above, Chapter 2.

7 Sunkin, 'Withdrawing: a problem of judicial review', in *op cit*, Leyland and Woods, fn 1, p 240.

8 See, in particular, Richardson and Sunkin, '*Judicial review: questions of impact*' [1996] PL 79; and Cranston, 'Reviewing judicial review', in Richardson and Genn (eds), *Administrative Law and Government Action*, 1994.

9 Le Sueur and Sunkin, *Public Law*, 1997, p 98.

part relatively inaccessible. Judicial review is not, to any great extent, a driving force of accountability and legitimacy.

One of the problems is the emphasis the courts have given traditionally to individualisation – the settlement of the individual dispute – rather than to the development of principles of good administration. This may now be starting to change. The courts may at last be emerging, even if a little strainedly, from their former torpor. Some members of the judiciary appear to be prepared to be more innovative in the development of public law principles and are taking a wider, more considered perspective on fundamental rights, the requirement for reasons, legitimate expectations, openness and reasonableness. The concept of fairness is one area that has moved on in leaps and bounds. But public law, as yet, is far from being fully principled.

As Cranston argues, judicial review has been characterised by a 'jumble of rules in search of some principles'.[10] The courts have the discretion to make all kinds of pragmatic interventions and justify them on all kinds of grounds. We must be prepared to ask if the courts are the best way to enforce individual rights in relation to administration. Compensation is rarely awarded, and there are also practical problems with cost and delay. Despite a number of reforms, plaintiffs and their legal advisors remain uncertain of what to do for the best, which procedure to use and whether to consider internal complaints procedures, the ombudsmen or seek an application for judicial review. There are similar problems of time and procedure, plus stricter standing, in EC law. Further, potential litigants must be committed and determined if they want to invoke the ECHR, although this should be less difficult following incorporation into our domestic law.

There is no real monitoring of judicial review, but we must look more closely at its effectiveness, to see to what extent it improves or has the potential to improve the quality of governance. Cranston goes on to point out that there is a very clear divergence between the culture and ethos operating in the courts and that evident in administration. The courts seemingly have little real understanding of the way in which public authorities actually operate, the pressures upon them and the need within them for flexibility. Government in all its forms is overwhelmingly concerned with efficacy, policy choices, management and budgetary constraints. The cultural divide leads to misunderstandings, tensions and assertions that the courts are interfering in something they have no right or experience to meddle with.[11]

The gap could be lessened, but it is unlikely that sufficient impetus could come from the courts alone. A change of culture and ethos would require a concerted effort, possibly instigated by legislation and supported by other mechanisms. The way forward is to work towards the prevention of arbitrary

10 *Op cit*, Cranston, fn 8.

11 *Op cit*, Cranston, fn 8, pp 64–65.

government decisions rather than placing too much reliance on reactive gestures. The courts need assistance in the development of principles of good administration. A much closer consideration needs to be given to the realities of governance and the role of the courts in administrative quality assurance.

Administrative quality assurance envelops both of our factors for administrative justice; redress of grievances and participation in the policy process. The latter is often regarded as a move out of the traditional area of lawyering, but the two go hand in hand: they are symbiotic. It should be clear from the many cases referenced in the previous chapters that many of the disputes that come before the courts and before the ombudsmen, although individualised, have at their base a concern about exclusion from the policy or decision making process of a public authority.

Here, we are looking at the need for public input, influence and comment by those affected by policy decisions at all levels of government. We have argued that present mechanisms are inadequate; most policy is not made in Parliament, which enacts only broad based legislation. The rest is left to the discretionary powers of public authorities, the parameters of which need to be set. There is no surrogate political process in this area where the links or interface between law and politics becomes most apparent. The Charter programme says that the public is to have more input, but to present this has amounted to little more than consumer market research and surveys. We have to wait to see what influence the People's Panel is to have. Be that as it may, it is clear that we need better access to information that is useful and generated in the right form and mechanisms for the exercise of voice.

We recall here the Administrative Procedure Act (APA) of the USA, the daily federal register of proposed rules and policy and the requirement for on the record decision making. Until recent budgetary cuts, the USA also had a standing Administrative Conference (ACUS) which reviewed certain areas of administrative decision making to see where improvements could be made in line with constitutional principles and requirements under the APA.

Similar institutions have been established in other countries with legal systems similar to our own. In New Zealand, the Legislative Consultative Council provides a more accessible, open legislative process where wide views can be taken into account and demonstrated to be so. In Australia, the Administrative Review Council (ARC) of the federal government in Canberra has conducted a great deal of work into the administrative machinery, including recent reviews on the role of the civil service, the Commonwealth Ombudsman and health service complaints. There is also there a system of administrative appeal tribunals.

So what are the possibilities here?

First, it is clear that we need some kind of standing review body of administrative procedures and development. We have various codes of practice; we should have a new Freedom of Information Act in the near future

if the Government keeps its promise to make it more effective than the present code. Some public meetings have already been opened up to the public, but we also need the opening up of government advisory bodies.[12]

Secondly, there is a need to institutionalise participative procedures to provide a genuine framework for rule and policy making as well as review, monitoring, planning and standard setting in administration.

Finally, we need to look at the scope of judicial review. We need to concentrate not just on government in its traditionalist, narrow sense, but on all those who exercise executive power or functions in relation to the public, including large associations and corporations. We need also to consider more carefully the impact of government by contract (which has chiefly been regarded as a private matter), not forgetting the property and other commercial dealings of public authorities, which can have a profound effect on the public.[13]

The English courts have been limited when compared to those in other jurisdictions, particularly the USA, and it is not always useful to draw parallels, as we indicated in Chapter 1. But the courts need assistance in the development of a clear jurisprudence of substantive principles, principles on which their judgments can bite with certainty and consistency. This comes not from any distrust of judges, but rather the mould in which they presently work their craft, where they have considerable discretion to impose their own values and views as to what is, or is not, fundamental. Such a development may, in turn, reduce the discretion of the courts to decide which ingredients shall go into the 'magic porridge pot' of *Wednesbury*, in any given situation. But in the long term, administrative justice will be the winner, and the courts should welcome being able truly to assume their role as supreme quality assurers of administrative decision making.

Some assistance may come from the explicit adoption of the ECHR in the Human Rights Act 1998, which should give wider scope to judicial review, no longer limiting it to essentially technical questions of procedure, reasonableness and interpretation – which has led to many fictions. It is a major reform, with far-reaching significance, and should be an added impetus for those judges who have been steadily developing the common law status of the ECHR.

The ECHR is also relevant to the institutions and structures of administrative law and the availability of appeals on the merits. Article 6(1) requires a fair and public hearing by an independent and impartial tribunal in

12 There is no equivalent here of the US Federal Advisory Committee Act, which seeks to ensure openness.

13 *Op cit*, Cranston, fn 8, who cites in illustration R *v National Coal Board ex p NUM* [1986] ICR 791, where it was held that a decision to close a colliery contrary to the recommendation of an independent review body was not amenable to judicial review because it was a management decision.

the determination of civil rights and obligations or criminal charge. This goes further than the English concept of natural justice, which is largely concerned with how a decision is made rather than who makes it.

The European Court has construed Art 6 to require what is essentially a judicialised form of due process. The tribunal must be independent of the parties and the executive, must hold proceedings in public, pronounce its decision publicly and ensure a fair hearing of both parties. In most cases this means an oral hearing (very similar to the requirements of the Franks Committee). Most British tribunals would be likely to pass scrutiny, but what of the situation where there is no right to a tribunal? Remember that the provision of tribunals is spasmodic and the ECHR requires full appeal on the merits, not just on the legality of the issue.

Article 6 applies to liberty, property and employment. A broad interpretation is also now evolving in relation to licensing and entitlement to sickness benefit and pensions. Article 6 potentially stands for the creation of a wider range of appeal tribunals and possibly a more general appeal tribunal, not dissimilar to the Australian Administrative Appeal Tribunal, in reviewing the merits of a decision.

However, Art 6 should not be regarded as a panacea for the ills of our administrative justice system. Large areas of discretionary decision making are excluded from Art 6 by the giving of a narrow interpretation to civil rights and obligations and a distinction being drawn between private and public rights in this context. Article 6 applies to the latter, but not the former.

If judicial review is to take on effectively the supreme constitutional role of guardian of administrative justice, it is time also to reconsider the role of the non-judicial mechanisms for the control of government action: the ombudsmen; tribunals and inquiries; and internal complaints procedures. We need to look not only at their effectiveness and the often unnecessary constraints placed on them, but at their relationship with judicial review and the pressures that the failings of alternative measures exert on the courts.[14]

The time is ripe to put an end to our piecemeal approach to administrative justice and take a holistic view to carry us forward into the next century.

14 See, generally, Boyle, 'Sovereignty, accountability and the reform of administrative law', in *op cit*, Richardson and Genn, fn 8, pp 81 and 104.

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