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Administrative Law

PETER CANE

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ADMINISTRATIVE LAW

FIFTH EDITION

PETER CANE

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Preface

In addition to the inevitable and constant flow of legislation, case law, and secondary literature since the publication of the 4th edition of this book in 2004, there have been other developments of major significance in English administrative law. The Freedom of Information Act 2000 became fully operative in 2005. The actual and potential impact on English administrative law of the European Convention on Human Rights and the Human Rights Act 1998 has become clearer. The tribunal system has been radically overhauled; and while the full effects of the restructuring will take many years to unfold, it is safe to assume that they will lead not only to further institutional change (in September 2010 the government announced plans for a 'unification' of the court and tribunal judiciary under the leadership of the Lord Chief Justice) but also to new understandings of the respective functions of, and the relationship between, judicial review of and appeals from administrative decisions.

As well as taking account of such changes, in this edition I have fundamentally re-conceptualized, and reorganized the presentation of, the book's subject matter. In the first four editions the centre of gravity was legal accountability in general and judicial review in particular. In this edition, by contrast, I have set out to give an account of administrative law as a framework for public administration. Understood in this way, administrative law is concerned, first, with the institutions of public administration and their relationship with other governmental institutions (such as legislatures and courts); secondly, with legal rules that regulate the day-to-day conduct of public administration; and (only) thirdly, with the institutions and mechanisms involved in holding public administrators accountable for (non-) compliance with administrative law norms. The most obvious results of this change of emphasis can be seen in the order in which the various topics are dealt with and the way material is distributed between the various chapters. There are also many less obvious changes of emphasis and phrasing in discussions of topics carried over from the 4th edition as well as new sections to replace treatment of issues that no longer seemed so relevant.

Nevertheless, this remains a book about law—legal norms and values, legal institutions, and legal accountability. It is not a book about public administration. Nor is it a book about the impact of law on public administration—although the available literature on this topic is briefly

surveyed in Chapter 20. The shift of emphasis may perhaps best be summed up by saying that in this edition, accountability institutions and mechanisms are treated as instrumental to securing compliance with legal norms rather than as intrinsically valuable features of the legal landscape.

A major catalyst for the new approach has been my increasing exposure in recent years to US administrative law and a growing interest in comparing US law with English and Australian administrative law (the third of these being the product of an amalgam of concepts and ideas borrowed from the other two). I want to express my warm thanks to Dean Larry Sager of the Law School of the University of Texas at Austin for giving me the opportunity to visit the US regularly and to be part of a vibrant intellectual community of fine scholars; and also to Dean Michael Coper of the Australian National University College of Law for releasing me regularly from my obligations in Canberra so that I could expand my intellectual horizon in fascinating and satisfying directions.

Thanks also to Paul Craig for encouraging me to prepare a new edition after so many years; and to Natasha Knight, Emma Hawes, and the rest of the production team at Oxford University Press.

ADDENDA

1. Because false imprisonment is a strict liability tort and actionable without proof of damage ('*per se*'), an agency that incarcerates a person in breach of public law may be held liable and the person incarcerated may be awarded damages even though the person would have been imprisoned if the agency had acted lawfully.[1] The unlawfulness must be 'material' (in the sense of relevant to the decision to detain),[2] or a 'serious abuse of power',[3] or such as 'undermines the achievement of the statutory purpose'.[4]

2. It had been held that any reasons given for non-compliance must demonstrate that the authority took account of relevant considerations and weighed them in a reasonable way.[5]

Peter Cane
Canberra
January 2011

[1] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12. The illegality involved applying an unlawful policy. (Remember that many grounds of illegality do not prevent the same decision being made again.) Lords Phillips, Brown, and Rodger dissented on this point. Lords Dyson, Collins, and Kerr thought that only 'nominal damages' should be awarded in such a case; but Lords Hope and Walker, and Lady Hale, were prepared to award a modest sum to recognize that the claimant's personal freedom had been interfered with.

[2] Ibid, [68] (Lord Dyson); [207] (Lady Hale).

[3] Ibid, [175] (Lord Hope); [193] (Lord Walker), [221] (Lord Collins).

[4] Ibid, [251] (Lord Kerr).

[5] *R (Gallagher and McCarthy) v Basildon District Council* [2011] EWHC 2824 (Admin).

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List of Abbreviations

AC	Appeal Cases (1890–)
Admin LR	Administrative Law Reports
ADR	alternative dispute resolution
All ER	All England Law Reports
ALR	Australian Law Reports
App Cas	Appeal Cases (1875–90)
Brit J of Law & Society	British Journal of Law and Society
CA	Court of Appeal
CBNS	Common Bench New Series (Court of Common Pleas 1856–65)
Ch	Chancery Division Reports
CJQ	Civil Justice Quarterly
CJR	claim for judicial review
CLA	Commission for Local Administration
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLR	Commonwealth Law Reports (Australian)
Cm	Command Papers (HMSO)
CMLR	Common Market Law Reports
Cmnd	Command Papers (HMSO)
COD	Crown Office Digest
CP	Consultation Paper
CPR	Civil Procedure Rules
Crim LR	Criminal Law Review
CSIH	Court of Session Inner House (neutral case citation)
Cth	Commonwealth
DLR	Dominion Law Reports (Canadian)
DoE	Department of the Environment
DSS	Department of Social Security
DTI	Department of Trade and Industry
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
ELR	Education Law Reports
Env LR	Environmental Law Reports

EU	European Union
European LR	European Law Review
EWCA Civ	England and Wales Court of Appeal Civil Division (neutral case citation)
FOI	freedom of information
FOI Act	Freedom of Information Act 2000
FtT	First-tier Tribunal
Harvard LR	Harvard Law Review
HC	House of Commons
HL	House of Lords
HMSO	Her Majesty's Stationery Office ('The Stationery Office')
HRA	Human Rights Act 1998
HRLR	Human Rights Law Reports
HSO	Health Service Ombudsman
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Cases Reports
ILJ	Industrial Law Journal
IMR	individual ministerial responsibility
J	Mr/Ms Justice
J	Journal
J Env L	Journal of Environmental Law
JPL	Journal of Planning and Environment Law
JR	Judicial Review (journal)
JRP	judicial review procedure
JSWL	Journal of Social Welfare Law
KB (or QB)	King's (or Queen's) Bench Division Reports
L	Law
Law Com	Law Commission (Report)
LGO	Local Government Ombudsman
LGR	Local Government Reports
LJ	Lord Justice
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
LR HL	House of Lords Appeals (1866–75)
LR Ir	Reports of Irish Cases
LS	Legal Studies
LS Gaz	Law Society Gazette
MLR	Modern Law Review
MoD	Ministry of Defence
Monash ULR	Monash University Law Review (Australian)
MP	Member of Parliament
MR	Master of the Rolls
NAO	National Audit Office

New LJ	New Law Journal
NGO	non-governmental organization
NHS	National Health Service
NILQ	Northern Ireland Legal Quarterly
NPM	new public management
NSWR	New South Wales Reports
OJLS	Oxford Journal of Legal Studies
P&CR	Property and Compensation Reports
Parl Aff	Parliamentary Affairs
PASC	Public Administration Select Committee (House of Commons)
PCA	Parliamentary Commissioner for Administration
PCO	protective costs order
PD	Practice Direction
PDR	proportionate dispute resolution
PHSO	Parliamentary and Health Service Ombudsman
PI	Planning Inspectorate
PII	public interest immunity
PL	Public Law (journal)
PO	Parliamentary Ombudsman
Pol Q	Political Quarterly
Pub Admin	Public Administration (journal)
QB (or KB)	Queen's (or King's) Bench Division Reports
RSC	Rules of the Supreme Court
RTR	Road Traffic Reports
Scot CS CSOH	Scottish Court of Session Outer House (neutral case citation)
SLT	Scottish Law Times (law report)
Stat LR	Statute Law Review
STC	Simon's Tax Cases
Sydney LR	Sydney Law Review
TC	Tax Cases
TLR	Times Law Reports
Tort L Rev	Tort Law Review
TSO	The Stationery Office (Her Majesty's Stationery Office)
U of NSWLJ	University of New South Wales Journal
U of Penn LR	University of Pennsylvania Law Review
UK	United Kingdom
UKHL	United Kingdom House of Lords (neutral case citation)
UKSC	United Kingdom Supreme Court (neutral case citation)
US	United States
UT	Upper Tribunal
WLR	Weekly Law Reports

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Part I

Introduction

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1

Administrative Law and Public Administration

1.1 ADMINISTRATIVE LAW

Administrative law is part of the legal framework for public administration. Public administration is the day-to-day implementation of public policy and public programmes in areas as diverse as immigration, social welfare, defence, and economic regulation—indeed in all areas of social and economic life in which public programmes operate. In colloquial terms, the business of public administration (or 'bureaucracy', as it may be called)[1] is 'running the country'. Besides administrative law, constitutional law is another element of the legal framework of public administration; and this book deals with some issues that are covered in books on constitutional law. The various categories into which the law is divided are more-or-less artificial, and the distinction between constitutional law and administrative law need not concern us unduly.[2] The only point to make is that whereas administrative law focuses on public administration, constitutional law is broader, being concerned with the whole gamut of public institutions and public functions. In terms of the traditional tripartite division of public functions into legislative, executive, and judicial, administrative law focuses primarily (but certainly not

[1] In this book the terms 'bureaucracy' and 'bureaucrat' are used interchangeably with 'public administration' and 'public administrator' respectively. According to context, 'public administrator' and 'bureaucrat' are used to refer to both the elected and the appointed members of the executive and to both (individual) officials and (corporate) agencies. The word 'agency' is used to refer to any corporate public administrative entity whether called an 'agency' or not. According to context, the word 'agency' is also used to include 'official'. All these terms are used in a much wider sense than 'civil servant': R Sandberg, '"A Whitehall Farce": Defining and Conceptualising the British Civil Service' [2006] *PL* 653. 'Bureaucratic' may be used as a term of abuse to imply officiousness and lack of regard for the individual. Here it is used without such connotations.

[2] It would be more important if the UK had a codified Constitution like the US or Australian Constitutions.

exclusively) on the executive function, whereas constitutional law is equally concerned with all three functions and the institutions that perform them.

1.1.1 PUBLIC LAW AND PRIVATE LAW

Administrative law (like constitutional law and, perhaps, criminal law and international law) is a branch of 'public law'. Public law is contrasted with 'private law'. In rough terms, private law is concerned primarily with relations between citizens; public law deals primarily with the public sector and with relations between citizens and the bureaucracy. The distinction between the public and private sectors of society has at least two dimensions. Its institutional dimension refers to the distinction between public agencies and officials—loosely 'the government' or 'the State'—on the one hand, and 'private' citizens on the other. Its functional dimension refers to the distinction between public functions (or what we might call 'governance') and private activities. In these terms, public law is concerned with public institutions and their relations with private citizens, and with the performance of public functions, while private law is concerned with private activities and relations between private citizens (both individuals and corporations).

French law embodies a sharp distinction between public law and private law, largely because it has two sets of courts—'administrative' courts that deal with public-law matters and 'ordinary' courts, the main business of which is adjudicating private-law disputes. In English law the distinction between public law and private law has traditionally been less sharply drawn than in French law. This is not because England lacks (specialist) 'public-law courts'—most tribunals (notably the First-tier and Upper Tribunals) are effectively public-law courts. Rather the main reason is that the 'ordinary' courts (in particular, the Queen's Bench Division of the High Court,[3] as well as the Court of Appeal and the Supreme Court) have jurisdiction to deal with disputes of all types, whether between citizen and citizen or citizen and government. By contrast, since the end of the eighteenth century in France, it has been a criminal offence for a judge of an ordinary court to hear a claim against the government! However, as a result of various developments over the past forty years, a sharper distinction between public law and private law has been introduced into English law. These developments include

[3] The Administrative Court is a component of the Queen's Bench Division, not a separate court.

Britain's membership of the EU; reform of the procedural rules for making claims for judicial review; changes in public administration, including privatization of public enterprises and contracting-out of public functions; and the enactment of the Human Rights Act 1998.

We will examine these various matters in due course. But at this point it is worthwhile briefly asking why we might want to draw a distinction between public law and private law. An obvious but not very informative reply would be: because we want a different legal regime to apply to performance of public functions than to private activities. By way of explanation, it is possible to suggest a number of reasons for this. First, because public administrators have the job of running the country they must be able to do certain things that private citizens cannot; obvious examples are declaring war and issuing passports. Secondly, because of the power public officials and agencies can wield over citizens (most particularly because government enjoys a monopoly of legitimate coercion), we may want to impose on them special duties (such as duties of procedural fairness) that do not normally apply to private citizens, and other special rules about what they may do and how they may do it. Thirdly, public agencies may have a monopoly over certain activities and the provision of certain goods and services; and we might think that in exercising such monopolies they ought to be subject to forms of 'public accountability' to which private individuals are usually not subject.

Fourthly, because courts are themselves public institutions (the judiciary is one of the traditional 'branches' of government), the view they take of their proper role when dealing with the exercise of public power is different from the way they understand their role in relation to purely private matters.[4] Concerning the affairs of private citizens the courts are the primary organs for interpreting, applying, and enforcing the law. By contrast, the prime responsibility for running the country rests on the bureaucracy; and so, when courts resolve disputes about and review the way public programmes are implemented, they may take a more restrained view of their role in interpreting and applying the law in recognition of the central role of the administration.

A fifth reason for distinguishing between public law and private law arises out of the fact that although governments have certain distinctive tasks (such as national defence), many of the things they do are also done by private citizens. Governments make (and sometimes break) contracts

[4] For an exploration of this theme in relation to norms regulating the exercise of contractual and administrative discretion respectively see T Daintith, 'Contractual Discretion and Administrative Discretion: A Unified Analysis' (2005) 68 *MLR* 554.

just as private individuals do; governments own property just as private citizens do; and governments sometimes commit torts. The relevant bodies of law—the law of contract, tort, and property—are central areas of private law, originally developed to regulate dealings between citizen and citizen. Should these regimes of private law apply equally to government contracts, government property, and government torts, or should there be a separate law of public contracts, public property, and public torts? As we will see later, the legal answer to these questions is neither an unqualified 'yes' nor an unqualified 'no'. There are, for example, some 'public-law' rules of liability in contract and tort that apply to claims arising out of the performance of public functions.

The argument against having a special public law of contract, tort, and so on was most famously put by the great Victorian jurist, AV Dicey.[5] In his view, it was a major strength of English law that public officials were subject to basically the same laws as private citizens to the extent that those laws were relevant to the performance of their public functions.[6] In this way the law ensured that public officials were given no unfair privileges or advantages over citizens. An argument pulling in the opposite direction is that even when a public agency makes a contract (for instance) it is, in some sense, doing so as an agent or representative of the citizenry at large and must bear in mind the interests of the community as a whole. The public interest may be harmed by subjecting public agencies to rules designed to deal with cases in which such responsibility for the 'common good' is not at issue. On the other hand, government is very powerful and we may feel that in their dealings with public agencies, private citizens need some protection against the exercise of this power (even in the absence of abuse) by modification in their favour of the rules which govern citizens' dealings with other citizens. The distinction between public law and private law can, therefore, be used either to accord public agencies special privileges or to impose on them special responsibilities and duties, and subject them to special constraints.

Three examples will illustrate the importance of whether a particular activity is regulated by public law or private law.[7] Take government contracting first. As a general rule, private individuals are free to refuse to buy goods or services from a business on the ground that the business

[5] In his *Introduction to the Study of the Law of the Constitution*, ch 4 (first published in 1885).

[6] For instance, the tort of trespass to the person is relevant to the exercise by the police of their powers to arrest, search, and detain criminal suspects.

[7] Other good examples include *R v Somerset County Council, ex p Fewings* [1995] 1 WLR 1037 and *Wandsworth LBC v A* [2000] 1 WLR 1246.

has trading links with a country under the control of a government of which they disapprove. This follows from the principle that individuals are free to contract or not to contract with whomever they please. Do (and should) government bodies enjoy the same freedom? We will see in Chapter 9 that as a matter of common law, central government enjoyed the same freedom of contract as a private individual. However, now this freedom to contract is heavily circumscribed by rules based on EU law which, for all practical purposes, prohibit central government and other 'organs of the State' from refusing to contract with someone for 'non-commercial' or 'non-economic' reasons.[8]

Another illustration is provided by the police. The police, of course, have extensive powers of arrest; but these powers are not unlimited. In particular, a police officer can be sued for wrongful arrest and false imprisonment (which are forms of the tort of trespass to the person) if he or she arrests a person without a justification recognized by law. The application of tort law (which is part of private law) to the police is a reflection of the fact that, constitutionally, police are not public 'employees' but 'officers' who enjoy a significant degree of independence from the government of the day in the way they exercise their powers and perform their duties. On the other hand, police officers are not the same as private security guards, and they enjoy powers of arrest more extensive than those possessed by ordinary citizens. Apparently because of the public nature of policing activities, the House of Lords has held that, in a tort action for false imprisonment, the question of whether the police acted lawfully or, by contrast, tortiously, in arresting a person suspected of having committed an arrestable offence, is to be judged according to public-law principles (of reasonableness).[9] The effect of this decision is to give the police greater freedom than private citizens to arrest in the public interest and correspondingly to encroach upon the liberty of the individual. It is also clear that decisions and actions of the police can be challenged by way of judicial review which, as we will see, is a procedure for challenging public (as opposed to private) decision-making.[10]

[8] Some such restrictions on freedom of contract apply equally to public agencies and private individuals: for instance, the prohibition on discriminating in matters of employment on grounds of gender or race.

[9] *Holgate-Mohammed v Duke* [1984] AC 437. For comment see M Dockray, 'Arrest for Questioning?' (1984) 47 *MLR* 727.

[10] eg *R v Metropolitan Police Commissioner, ex p Blackburn* [1968] 2 QB 118; *R v Chief Constable of Devon and Cornwall, ex p Central Electricity Generating Board* [1982] QB 458. On other ways of controlling the police see AJ Goldsmith, *Complaints Against the Police: The Trend to External Review* (Oxford: Clarendon Press, 1991), esp chs 1 and 5.

Thirdly, consider the case of *Swain v Law Society*.[11] Under statute, the Law Society ran a compulsory liability insurance scheme for solicitors. The Society placed the insurance with commercial insurers and received commission for so doing. It decided not to pay out the sums received as commission to individual solicitors as a sort of dividend but instead to apply them for the benefit of the profession as a whole. Two solicitors challenged this decision but the House of Lords held that since, in administering the scheme, the Society was acting in a public capacity in the interests of all solicitors and members of the public who employed them, the legality of its decision was to be judged according to principles of public law, not private law; and so judged, what the Society had done was a proper use of its statutory powers. The question of whether, as a matter of private law, individual solicitors were entitled to a pay-out, was irrelevant.

You may be able to think of other reasons for having a special regime of public law that applies to the performance of public functions. Some are discussed in Chapter 11 (which deals with the judicial review procedure) and Chapter 5 (dealing with access to information about the performance of public functions). Here it is sufficient to observe that even if we think that it is a good idea to distinguish between public law and private law, and to apply the former to the performance of public functions and the latter to private activities, functions and activities do not come labelled as 'public' or 'private'. Nor is publicness (or privateness) like redness—a characteristic that can be observed by the senses. Rather the classification of functions and activities as public or private is ultimately a matter of value-judgment and choice. This can be appreciated by considering how, in different countries and at different times, the provision of health care, housing, education, and other 'essential' services such as electricity and transport, has been subject to varying degrees of public ownership and control. The 1980s witnessed a significant shifting of the boundary between the public and the private sectors in many Western countries. The precise nature of the shift varied from country to country. In Britain, for instance, sale of state-owned assets ('privatization') was prominent, while in the United States (where there was less direct government involvement in the productive economy) the shift from public to private mainly took the form of reducing government regulation of activities such as air transport ('deregulation'). In Britain, ironically, privatization of state-owned monopolies such as the

[11] [1983] 1 AC 598.

gas, electricity, and water industries was accompanied by increased government regulation to protect consumers. Reduced public ownership led to increased public regulation.

Ultimately, then, whether a function is classified as public or private depends, in part at least, on a judgment about whether its performance ought to be subject to control in accordance with public-law principles. The answer to this question, in turn, depends in part on the reasons for drawing the distinction between public law and private law. These reasons may vary according to context. Because there are various reasons for distinguishing between public law and private law, there are various criteria for determining whether or not any particular function is public. All of these criteria are complex, and their application to particular cases may require difficult and sometimes controversial judgments. The important point is that such judgments are, at bottom, about whether the performance of particular functions should be regulated by public law or private law. Classification of functions as public or private follows this prior judgment about the appropriate accountability regime.[12]

1.1.2 GENERAL PRINCIPLES OF ADMINISTRATIVE LAW

The various activities of the modern state—and, hence, of public administration—are extraordinarily diverse, and this diversity is recognized, under the broad heading of 'administrative law', by the existence of categories such as immigration law, public housing law, tax law, social security law, and so on. By contrast, this book deals with what might be called 'general principles of administrative law' that purport to provide a framework for public administration across the whole spectrum of public activity. Some of these general principles are found in legislation—most notably, perhaps, s 6 of the Human Rights Act 1998 (HRA), which imposes obligations to respect rights conferred by the European Convention on Human Rights (ECHR). But many have been developed by courts in the process of reviewing public decisions and adjudicating disputes between citizens and public agencies. They include the principles that government decision-makers must follow fair procedures (Chapter 5), not exceed or abuse their powers (Chapter 7), and act reasonably (Chapter 8). The focus in this book is not on the law specific to areas of public administration such as immigration, social security,

[12] For further discussion see P Cane, 'Accountability and the Public/Private Divide' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003).

land-use planning, and so on, but on a set of rules and principles about how government should perform its tasks, whatever they might be.

Of course, these two approaches—the specific and the general—are not mutually exclusive. A question about how a power should be exercised or a decision made never arises in the abstract but always in relation to one or another of the specific areas of public administration. The meaning and significance of a general principle of administrative law will always depend to a greater or lesser extent on the specific context in which it is being applied. For this reason, some people think that administrative law cannot be properly understood unless it is studied in relation to a specific area of administration. Only in this way, it is argued, is it possible to see how the general rules are used to deal with particular problems.[13] However, this book is informed by the view that general principles applying across the range of public administrative activities can usefully be examined and discussed in their own right, and that doing so may illuminate larger issues—about the nature and role of government and its relationship to society, for instance—more effectively than confining attention to a specific area of administration. This does not mean that the specific context in which the general rules operate can be ignored, and sometimes it will be crucial; but there is much that can helpfully be said about the way in which public administration generally is framed and regulated by law. At the same time, the general approach may actually provide information about particular activities that the specific approach might not. A danger of the specific approach is that, by focusing on just one area, it may conceal both similarities and differences between that and other areas of public administration.

One important consequence of adopting the general approach is that this book will not tell you much about the substance of what public administrators do or the public programmes they implement. The general principles of administrative law are concerned with the functions of public administrators defined in abstract terms—such as making and interpreting law and policy, and applying them to individual cases. Moreover, in an important sense, the general principles of administrative law are primarily negative. We can think about government as having a complex set of ('policy') objectives and about administrative law as both facilitating and constraining the realization of those objectives. Law can facilitate by defining objectives and by creating institutions, conferring powers, and establishing processes for realizing those

[13] For a theoretically subtle statement of this view see TRS Allan, 'Doctrine and Theory in Administrative Law: The Elusive Quest for the Limits of Jurisdiction' [2003] *PL* 429.

objectives. Law can constrain by specifying how such institutions must behave in operating such processes and exercising such powers—lawfully, fairly, reasonably, and so on. Law as facilitator is concerned primarily with ends; law as constraint is concerned primarily with means to ends.[14] This book focuses on administrative law as a constraint on the realization of policy objectives. It does this not because constraint is more important than facilitation—in fact the opposite is true. Government and law exist first and foremost to make the world a better place; and for this purpose, law's facilitating role is more important than its constraining function. However, ends do not always justify means, and it is with means and their quality that the general principles of administrative law are essentially concerned.

On the other hand, administrative law as constraint is not *entirely* negative because it also serves the positive objective of legitimizing public administration to the extent that it adopts the means on which administrative law insists. The significance of this objective should not be underestimated because people often disagree about the ends that the State ought to pursue. Peaceful and productive social life depends not only on the willingness of those who agree with government policies and objectives to accept them but also on the willingness of those who disagree. This is more likely to happen if public policies are promoted by acceptable means; and this is the prime task of and justification for the general principles of administrative law explained in this book.

1.2 WHAT IS ADMINISTRATIVE LAW ABOUT?

Administrative law is about three main aspects of public administration: first, its institutional framework. At the central level of government, the institutions of public administration include Ministers of State and their departments; non-departmental executive agencies, such as Jobcentre Plus; 'independent' regulatory agencies, such as the Office of Fair Trading, the Health and Safety Executive, the various utilities regulators; and so on. Local authorities and other local bodies, and the various components of the National Health Service are other major institutions of public administration; and the police may also be included in this

[14] We might encapsulate this contrast in a distinction between 'rule by law' and 'rule of law'. Law is both a tool of governance and a constraint on its pursuit. In the modern scholarly literature, the distinction has been put in terms of a contrast between 'green light approaches' and 'red light approaches': C Harlow and R Rawlings, *Law and Administration*, 3rd edn (Cambridge: Cambridge University Press, 2009), ch 1.

category. Many of these agencies are created by statute, although the legal foundation of the core institutions of central government—ministerial offices and departments—is non-statutory: these institutions are the product of organic development over time rather than specific, dateable acts of creation.

Secondly, administrative law is concerned with what we might call the 'normative' framework of public administration. On the one hand, it is about the functions, powers, and duties of public administrators and the ('policy') objectives of public administration. Most of these functions, powers, and duties are statutory; but central government has certain non-statutory functions and powers, which are sometimes called 'prerogative', indicating that they were originally powers exercisable personally by the Monarch (as some such powers still are—at least in principle). On the other hand (as we have seen), administrative law imposes certain normative constraints on public administration. This book focuses on such constraints and is concerned only incidentally with norms that define the tasks and objectives of public administration.

Not all the norms that frame and regulate public administration are 'legal' in a strict sense. In the English legal system 'law' in the strict sense refers to primary legislation made by Parliament; secondary (or 'delegated') legislation made by officials and agencies in exercise of powers to make law conferred by Parliament; and common law, made by courts (and, to a lesser extent, tribunals). Legislation and common law may be called 'hard law'. Public administration is also regulated by a very large body of norms made by public officials and agencies that lack the full 'force of law'. These go by a bewildering variety of names including 'policies', 'codes of practice', 'guidelines', 'directions', and so on. They may collectively be called 'soft law'. As we will see, although soft law lacks the legal force of hard law, it is not without legal effect. Administrative law is concerned, in one way or another, with all the norms that regulate public administration.

Not all of the constraints on public administration and the realization of public objectives are normative. For instance, the financial and other resources available to bureaucrats may crucially affect their ability to implement public programmes. Non-normative constraints may hinder compliance with normative constraints: for instance, short-staffing may jeopardize the ability of bureaucrats to follow fair procedures. In practice, non-normative constraints may be more powerful than normative constraints.

Thirdly, administrative law is about the accountability of public administrators for the performance of their functions, the exercise of their

powers, and the discharge of their duties. In other words, it is concerned with enforcement of (ie ensuring compliance and remedying non-compliance with) the norms that regulate public administration. There are many ways in which public administrators can be held accountable. For instance, Ministers are 'responsible' to Parliament, both collectively and individually, for the way they and their departments perform their functions; decisions made by public administrators may be challenged in the Administrative Court by making a claim for judicial review; many public decisions can be the subject of an internal review by the relevant department or agency, or an appeal to a tribunal (or a court); citizens may complain about the conduct of a public administrator to the relevant agency or to an ombudsman. Bureaucratic bodies may also be subject to various types of auditing and inspection, and to scrutiny by a Parliamentary committee. Such accountability mechanisms not only provide means for dealing with citizens' grievances and for resolving disputes with the administration but also incidentally generate norms that regulate public administration. Some such regulatory norms have the status of hard law (if they are made by courts or tribunals), but others are soft law—for instance, one of the things ombudsmen do is develop and promulgate 'principles of good administration' based on lessons learned from handling citizens' complaints. Such principles are analogous to codes of practice in not having the full 'force of law'.

Because this third concern of administrative law—accountability—involves enforcing norms that regulate public administration, it is possible to view those norms as principles of accountability. So, for instance, in the 4th edition of this book, the legal requirement of procedural fairness (along with other regulatory norms) was treated as a 'ground' of judicial review rather than a norm of administration. In this edition, the emphasis is shifted and the norms that constrain public administration are treated primarily as a set of instructions to public administrators about how to perform their functions, exercise their powers, and discharge their duties, and only secondarily as providing the basis for holding administrators accountable. A good justification for this emphasis is that only a very small proportion of public administrative activity is ever challenged or disputed, whether in a court or tribunal or before an ombudsman or in Parliament. Just as most citizens comply with the norms of criminal law most of the time, most public administrators comply with administrative law norms most of the time. The prime responsibility for complying with these norms rests upon and is discharged by administrators themselves. In practical terms, the main significance of administrative law norms is not that they provide

standards for dealing with bad administration but that they help to define, encourage, and promote good administration.

The main focus in this book will be on hard legal norms, both statutory and common law. This is certainly not because soft law that regulates public administration is unimportant: soft law is a ubiquitous feature of public administration that extensively regulates the day-to-day activities of bureaucrats. However, the hard legal norms deserve particular attention because they purport to be of very general application and because they embody the most fundamental ('legal') values that public administrators are expected to promote and respect.

1.3 THE PROVINCE OF ADMINISTRATIVE LAW

Administrative law provides a framework for public administration. Now we must consider in more detail what is meant by 'public administration'. In the earlier discussion of the relationship between public law and private law we noted that the public/private distinction has two elements: an institutional element and a functional element. When scholars first started writing systematically about administrative law in the mid-twentieth century, the 'province' of administrative law was understood institutionally in terms, primarily, of the organs and agencies of central and local government. In other words, administrative law norms were understood as regulating the conduct of government officials and bodies. In the 1980s the Thatcher Conservative government initiated a process of constitutional and institutional reform involving, for instance, privatization of state-owned enterprises (such as the gas and electricity industries) and assets (such as public housing), promotion (and increased regulation) of industry self-regulation (in the financial services sector, for example), contracting-out (or 'out-sourcing') of the provision of public services (such as garbage collection and aged care) to non-governmental ('private') entities, and the subjection of government agencies (such as the National Health Service and Whitehall departments) to competitive and financial forces analogous to market pressures under which private businesses operate.

A common theme of many of these developments was the desirability of reducing direct government participation in social and economic life.[15] An obvious question raised by this reform agenda concerned the

[15] As already noted, reduction in direct participation has been accompanied by a large increase in indirect participation in the form of regulation, eg of the privatized utilities and of industry self-regulatory regimes.

role of administrative law in the world of what was compendiously called 'new public management' (NPM). What part would (and should) administrative law norms play in regulating the performance of functions that had once been the province of central and local 'government' but which were now to be performed by non-governmental entities, subject only to a greater or lesser degree of supervision or regulation by government?

Coincidentally, at much the same time as these issues were bubbling to the surface, the House of Lords (in the *GCHQ* case[16]) held that decisions of central government were subject to administrative law norms regardless of whether the power to make the decision was given by a statute or was, on the contrary, a prerogative power recognized by the common law (and inherited by central government from the monarchy in its historical capacity as the executive branch of government). The basic principle underlying this decision was that the applicability of administrative law norms should depend not on the source of the power to make the decision—that is, statute or common law—but on the substance or nature of the decision. The court approached this issue by asking the related question of whether it was the constitutionally appropriate body to review the decision, and whether it was competent, by reason of its procedures and the qualifications of its members, to do so—in other words, whether the decision was 'justiciable'. The seeds of this definition of the scope of administrative law—in what have come to be called 'functional' terms—are probably to be found in an earlier decision of the Court of Appeal (in *ex p Lain*[17]) in which it was held that decisions of the Criminal Injuries Compensation Board (CICB) were amenable to judicial review (even though the Criminal Injuries Compensation Scheme (CICS), which the Board administered, was not contained in either primary or secondary legislation) because the CICS was analogous to tort law and the functions of the CICB were analogous to those of courts in awarding tort damages.

The functional approach to the scope of administrative law provided the courts with legal resources for dealing with the constitutional developments initiated by the Thatcher regime. In the ground-breaking *Takeover Panel* (or *Datafin*) case[18] the issue was whether decisions of the

[16] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. *GCHQ* involved a decision implementing a rule made under the prerogative. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453 it was held that prerogative legislation itself could also be reviewed.

[17] *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864.

[18] *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815.

City Panel on Takeovers and Mergers were subject to judicial review for compliance with administrative law. The Panel had no statutory or non-statutory decision-making power; nor was the decision in question supported by any contractual arrangement between the Panel and the company affected by the decision (Datafin). The Panel's authority was accepted by the financial community generally, but it lacked any formal legal foundation. Equally importantly for present purposes, the Panel was not a government entity. It was set up by and for, and exercised authority over, private financial institutions. In essence, the court held that the decisions of the Panel were subject to the norms of administrative law and to their enforcement by judicial review because the Panel was performing regulatory functions of public importance that significantly affected the interests of individuals, and because its activities were embedded in a framework of statutory regulation of the financial services industry (even though the Panel itself was not operating under a statute). If the Panel had not existed, it was likely that the government would have established a statutory body to do its work.

We can see, then, that within the space of about twenty years there was a fundamental change in the way the province of administrative law and judicial review was defined. In that time, the focus shifted from controlling the institutions of (central and local) government to controlling the exercise of functions of governance (whatever they may be and whatever their source) whether performed by government or non-government entities. As we will see (12.1.2), the functional approach has not swept all before it. The province of judicial review (a mechanism by which the norms of administrative law are enforced) is defined by a messy combination of functional and institutional markers.[19] This is partly because the common law develops slowly: large paradigm shifts can be firmly cemented into the law only by the higher courts—and sometimes only by the highest court. 'Accidents of litigation' play a crucial role in this process. The picture is complicated by the fact that included in the normative framework of public administration are norms of EU law and human rights norms contained in the ECHR as domesticated by the HRA. The province of these two sets of norms is different from that of domestic administrative law norms as defined by the scope

[19] J Black, 'Constitutionalising Self-Regulation' (1996) 59 *MLR* 24.

of judicial review. We will need to return to this complex picture at various points in this book.

1.4 THE SOURCES OF ADMINISTRATIVE LAW

These can be briefly identified on the basis of the discussion so far. The main sources of administrative law norms in the strict sense of 'law' are Parliament and those whom Parliament has authorized to legislate, plus courts and tribunals. However, if we include soft law in the definition of 'law', other sources include public administrative agencies regardless of whether they have been authorized by Parliament to legislate on the matters dealt with by soft law. In the US, the Constitution is another important source of administrative law. For instance, the Fifth Amendment imposes an obligation to observe 'due process' applicable to much public administration. The UK, of course, has no single document called a 'Constitution'; but this is not to say that it has no constitution. In particular, many would regard the HRA as part of the UK's constitution; and if that view is taken, another source of administrative law is the constitution.

These various sources of administrative law are arranged in a hierarchy such that norms lower in the hierarchy must be consistent with higher norms. By virtue of the European Communities Act 1972, any norm of the English legal system[20] (including primary legislation) inconsistent with EU law will be invalid and of no legal effect. By virtue of the HRA, all norms of English law must be compatible with the ECHR. Any incompatible norm (except a provision of primary legislation) will be invalid and of no legal effect. Certain courts have the power to declare provisions of primary legislation incompatible with the ECHR, but such a declaration does not invalidate the legislation or affect its legal force. All subordinate legislation must be consistent not only with such 'constitutional' norms but also with primary legislation; and soft law must be consistent with secondary legislation as well.

[20] This book deals primarily with English administrative law, although some important issues arising out of Welsh and Scottish devolution will have to be considered. In legal terms, 'England' means 'England and Wales'. Despite devolution, England and Wales constitute one 'legal system'. The administrative law of Northern Ireland is essentially similar to that of England. Scottish administrative law is significantly different from English, especially in matters of procedure (which, since 1998, have been within the remit of the Scottish Parliament).

1.5 ADMINISTRATIVE LAW AND ADMINISTRATIVE JUSTICE

In recent years, it has become popular to talk about the 'administrative justice system' in much the same way that we talk about the 'criminal justice system' or, less often perhaps, the 'civil justice system'. The Tribunals, Courts and Enforcement Act 2007 (TCE Act) contains a very broad definition of the administrative justice system:

> ... the overall system by which decisions of an administrative or executive nature are made in relation to particular persons including—(a) the procedures for making such decisions, (b) the law under which such decisions are made and (c) the systems for resolving disputes and airing grievances in relation to such decisions.[21]

Along similar lines, a 2004 White Paper says:

> Each of us has the right to expect that State institutions will make the right decisions ... about our individual circumstances ... The job of those who organize and lead departments and agencies is to establish, maintain and constantly improve the systems which enable the individual decision-makers to get the decisions right ... This is the sphere of administrative justice.[22]

According to these statements, administrative justice and administrative law overlap to a considerable extent. Both are concerned with the normative framework of public administration and with accountability. Both are concerned with decision-making by public administrators and with the resolution of complaints and disputes about the decisions made. However, there is one significant respect in which the concerns of administrative justice as depicted above appear to be narrower than those of administrative law. This can be seen in the focus on the making of decisions about individuals—both in the first instance by administrators in the process of implementing public programmes, and at one remove by complaint-handlers, appellate bodies, and reviewers such as ombudsmen, tribunals, courts, and so on. One of the most significant aspects of public administration is the making of legal rules (secondary legislation) and the development of general policies (soft law), and administrative law has quite a lot to say about bureaucratic law-making and policy-making.

[21] TCE Act, Sch 7, para. 13.
[22] *Transforming Public Services* (2004), paras 1.3–1.6.

In another respect, however, the statement in the White Paper brings within the 'sphere of administrative justice' an aspect of public administration that few lawyers would include within their understanding of administrative law. When the White Paper speaks of 'establishing, maintaining and constantly improving systems which enable decision-makers to get the decisions right' it seems to be referring to what an American scholar, Jerry Mashaw, has called 'the management side of due process'.[23] Mashaw's argument (developed in relation to the administration of social security benefits) is that in order to achieve accurate, fair, and timely decision-making it is necessary to put in place 'a quality control or quality assurance system' in addition to the legal requirements of procedural fairness. The basic point underlying Mashaw's approach (and that of the White Paper) is that the normative framework of public administration is no more than that—a set of rules about how decisions ought to be made. Maximizing the chance that decisions will actually be made in accordance with those rules requires administrators to be properly trained, adequately resourced, and well managed. As we will see (in Chapter 20), this point is reinforced by empirical research suggesting that the impact of administrative law, and of decisions of courts and tribunals, on public administration is critically affected by other factors such as institutional culture, resources, and competing demands on administrators. Administrative justice, we might say, is an aspiration to the realization of which administrative law can make a contribution but which, alone, it cannot secure.

1.6 THE PLAN OF THIS BOOK

This book is divided into four Parts. The remaining chapter in this Part examines certain aspects of the institutional framework of public administration of particular relevance to its main concerns with norms and accountability. Part II gives an account of the normative framework of public administration constructed by administrative law. The first chapter in this Part contains a discussion in abstract terms of the powers and functions of public administrators—of what, earlier in this chapter, was referred to as the 'positive' or 'facilitative' element of the normative framework. The remainder of the Part is divided into two sections: the first deals with public-law norms and the second with private-law

[23] JL Mashaw, 'The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims' (1974) 59 *Cornell Law Review* 772.

norms. All of these norms are addressed to two different audiences: first, the public administrators whose conduct they regulate and, secondly, the accountability institutions that enforce them. In other words, they perform two distinct roles: to administrators they provide guidance and to accountability institutions they provide the criteria according to which the administration is to be held accountable.

Part III is concerned with institutions, mechanisms, and procedures of accountability—in other words, with policing the norms of administrative law. It is divided into two sections. Section A deals with judicial modes of accountability—review of administrative decisions by and appeals from administrative decisions to courts and tribunals. Section B deals with non-judicial modes of accountability, including Parliamentary scrutiny and ombusdmen.

Finally, Part IV addresses two questions: what is administrative law for, and what are its effects? The first question invites us to consider the values that administrative law respects and promotes and which it injects into public administration. The second question leads to an examination of empirical research about the impact of administrative law norms and accountability mechanisms on public administration.

1.7 CONCLUSION

Apart from providing a concise account of the basics of administrative law, the overarching aim of this book is to encourage readers to think about the general principles of administrative law not only as criteria for holding them accountable when things go wrong but also, and more importantly, as a set of instructions to public administrators about appropriate means for promoting and realizing the objectives of public programmes. Accountability is important, of course, but it is not the main game.

The Treasury Solicitor publishes a short guide to administrative law for public administrators entitled *The Judge Over Your Shoulder*.[24] Despite its slightly tendentious title, the authors of this publication are actually ambivalent about administrative law. In the very first paragraph they say that the guide 'is not about what "good administration" is or how to achieve it'; but they also advise that 'a keen appreciation of the requirements of good administration [which they summarize as 'speed, efficiency and fairness'] will often give a pretty good idea of what

[24] The most recent (4th) edition is dated 2006.

administrative law will say on the point'. Fidelity to the norms of administrative law is certainly not all there is to good administration. Still less do those norms provide a formula for the successful implementation of public programmes and the realization of public policy objectives. But they are a significant aspect of good administration, which is, itself, a valuable policy objective that should be a component of the implementation of every public programme.

2

The Institutional Framework of Public Administration

This chapter is about the first of the concerns of administrative law identified in Chapter 1: the institutional framework of public administration. The main focus will be on the core institutions of central government and constitutional principles regulating their relationships with one another. Some other important institutions of public administration will also be mentioned and discussed in this chapter and throughout the book. Apart from considerations of space, the focus on central government is justified by the fact that a good understanding of these core institutions provides essential background for analysing the general principles of administrative law with which this book is primarily concerned.

2.1 THE EXECUTIVE

Following the famous account of the English constitutional system written by Charles de Secondat, the Baron Montesquieu in the mid-eighteenth century,[1] the core institutions of central government are traditionally divided in the three 'branches': the legislature, the executive, and the judiciary, each of which has a characteristic function: legislative, executive (or 'administrative'), and judicial, respectively. In the UK of the twenty-first century, the executive institutions of central government are many and diverse, but at their heart are the Prime Minister, Ministers of State, and the government departments, staffed by civil servants, that they lead. According to Lord Diplock,[2] these institutions constitute 'the Government', which is the

[1] In *L'Esprit des Lois*, first published in 1748.
[2] *Town Investments Ltd v Department of Environment* [1978] AC 359, 381.

contemporary political name for 'the Crown' in the institutional sense of that term.[3]

Ministers of State constitute the elected (or 'political') component of the executive branch; civil servants constitute the non-elected (or 'appointed') component. The ministry, broadly understood, is quite a large body, consisting of around 100 people ranging from the most senior (the Prime Minister, the Chancellor of the Exchequer, and the various Secretaries of State who sit in the Cabinet) to the most junior 'front-bencher'. For present purposes, perhaps the most important characteristic of government Ministers is that they belong to one or other of the Houses of Parliament—the House of Commons and the House of Lords. The significance of this fact can be explained in terms of two constitutional principles: separation of powers and responsible government.

2.1.1 SEPARATION OF POWERS

According to Montesquieu, the strength of the English constitution lay in the fact that the various institutions of government, each with its characteristic function, were separated from one another. The underlying idea was that concentration of power facilitates and encourages its abuse, and that 'the separation of powers' provides a bulwark against such abuse. As traditionally understood, separation has two aspects: separation of institutions and separation of functions. The US system provides a good illustration of separation. In the US, the President is the only elected member of the executive. All its other members are appointed—in the case of the most senior 'political' officials, by the President personally. The President is directly elected by the people in elections separate from those in which members of the legislature (Congress, consisting of the House of Representatives and the Senate) are chosen. The President is not a member of or answerable to the

[3] In its personal sense, 'the Crown' refers to the Monarch. In a material sense, it refers to an item of headgear. It is often said that English law lacks a concept of 'the State', and uses the concept of the Crown instead. But such statements suffer from uncertainty about the meaning of 'the State'. The basic idea seems to be that whereas the concept of the Crown implies that government is a sort of person or corporation, the State is a metaphysical entity categorically different from persons and corporations. It is not clear what advantages would accrue from substituting 'State' for 'Crown'. See generally M Loughlin, 'The State, the Crown and the Law' and P Craig, 'The European Community, the Crown and the State' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

legislature and cannot propose legislation to Congress, still less control its legislative agenda.[4]

As we have noted, the position in the UK is quite different. A significant number of senior members of the executive are elected, although not directly. Ministers (except those who belong to the House of Lords) are popularly elected as Members of Parliament, and formally appointed as Ministers by the Queen acting on the advice of the Prime Minister (who is, technically, appointed by the Queen). The government more or less controls Parliament's legislative agenda: most Acts of Parliament are based on bills presented to Parliament by a Minister and very few 'Private Members Bills' are enacted into law. Ministers are answerable to Parliament for the conduct of public administration under the principle of 'responsible government'.

2.1.2 RESPONSIBLE GOVERNMENT

According to the principle of responsible government, ministers are 'responsible' to Parliament both collectively and individually. The main significance of collective ministerial responsibility (CMR) is that the government can remain in office only so long as it 'enjoys the confidence' of the House of Commons. If a 'vote of no confidence' were passed, the government would have to resign *en bloc*. In that case, either an election would be called or a different political group would form a government. In the US, by contrast, no matter how strained relations between Congress and the President may become, the only way the President can be dislodged is by the rare and difficult legal process of impeachment or by the people at an election (held every fourth year).

In principle, at least, individual ministerial responsibility (IMR) forges the same link between Parliament and individual members of the government as CMR forges with the government as a whole. In practice, however, ministers rarely resign as a result of Parliamentary pressure. Rather—as we will see in more detail in Chapter 17—the main significance of IMR is that it provides a formal channel for the flow of information and explanation from the executive to the legislature about the conduct of public administration. As a result, Parliamentary oversight of the day-to-day operation of public administration is, in practice, certainly no more extensive than Congressional oversight of the

[4] Of course, the President is a major policy-maker, and much Presidential policy is enacted into law by Congress. But proposals for legislation ('bills') must be presented to Congress by a member acting on the President's behalf, and the President is by no means assured of having proposals accepted.

executive in the US, where power to compel cooperation by the executive with its investigations into the conduct of public administration is implicit in Congress's constitutional functions of legislating and appropriating funds.[5]

2.1.3 SEPARATION OF POWERS, MINISTERIAL RESPONSIBILITY, AND THE INSTITUTIONAL FRAMEWORK OF PUBLIC ADMINISTRATION

The nature of the relationship between the legislature and the executive has a significant impact on the institutional framework of public administration. This can, once again, be clearly illustrated by contrasting the UK system with that in the US. In the US, the separation of the executive from the legislature creates a degree of competition between the two sets of institutions for control of public administration. Under the Constitution, it is the President's responsibility to 'take care that the laws be faithfully executed', and the President can, by 'executive order', regulate how this is done. Congress also has power to legislate in relation to the exercise of executive power. In exercise of this power, Congress has created a large number of non-departmental agencies, some of which are protected to a certain extent from Presidential control by statutory limitations on the power of the President to dismiss the appointed head of the agency. Statutes that create such agencies also, of course, specify their powers and duties and regulate the manner in which they are to be exercised and discharged. In 1946 Congress passed the Administrative Procedure Act, which regulates important aspects of administrative procedure and agency structure. In response, presidents have developed various techniques for exercising control over such agencies. The US Supreme Court plays a pivotal umpiring role by determining the extent to which Congress may, by legislation, limit the control of the President over the executive branch, of which he is the constitutional chief, and by pronouncing upon the constitutionality of various Presidential techniques for controlling the bureaucracy.

In the UK, by contrast, the combined operation of the political party system and the principle of CMR means that there is no competition between the executive and Parliament for control of public administration, and so the courts have no umpiring function. The government has more-or-less unfettered power to organize public administration in the

[5] SS Smith, JM Roberts, and RJ Vander Wielen, *The American Congress*, 6th edn (Cambridge: Cambridge University Press, 2009), 179.

way it wants and to decide how it will be divided between departmental and non-departmental agencies (and private entities in the case of the outsourcing of public services, for instance). A spectacular illustration of this control is provided by the fact that until very recently the power to 'manage' the civil service (ie the non-elected component of the administration) was non-statutory.[6] This is not to say that there is no tension between Parliament and the government about the exercise of executive power. Indeed, they regularly fight over the extent of Parliament's powers to require members of the executive to appear before Parliamentary committees and to answer questions and provide information. There are also ongoing arguments about the nature of the responsibility of ministers for non-departmental administrative agencies. However, whereas in the US such disputes between the President and Congress tend to be treated as matters of constitutional law to be resolved by the courts, in the UK they are treated, at their highest, as matters of constitutional 'convention' and beyond the jurisdiction of the courts to adjudicate.[7]

2.1.4 GOVERNMENT BY CONTRACT AND THE NEW PUBLIC MANAGEMENT

As we have already noted, governmental bodies are not the only institutions of public administration. There is a long history of performance of what might be classified as public functions by non-governmental entities. For instance, one of the characteristics of a profession is that professionals regulate compliance by other professionals with codes of professional conduct developed by the profession itself. Such professional 'self-regulation' is a centuries-old phenomenon; and because an important aim of regulation is consumer protection, it is generally considered to involve the performance of public functions. Furthermore, there have long been various arrangements that might now be called 'public/private partnerships'. For example, the Board of Deputies of British Jews for many years played an important role in policing certain Sunday Trading laws;[8] and the Family Fund (a public fund to assist families of severely handicapped children) is administered by a

[6] It is put on a statutory basis by the Constitutional Reform and Governance Act 2010. However, the Act says little about the way this management power is to be exercised.

[7] Such issues may not even be regulated by convention but might depend only on the power relations between the competing institutions.

[8] G Alderman, 'Jews and Sunday Trading in Britain: The Private Control of Public Legislation' (1989) 8 *Jewish Law Annual* 221.

private charitable organization (formerly the Rowntree Trust and now the Family Fund).

In the course of the nineteenth and twentieth centuries governments became more and more involved in social and economic life, and the number of activities identified as public grew greatly. Beginning in the 1980s the Thatcher Conservative government instituted a programme of change that involved the privatization of many publicly owned enterprises and assets, such as public utilities—gas, water, electricity, and so on. Whereas such businesses were formerly conducted by public officials and agencies subject, at least in principle, to public law, they were now operated by non-governmental entities prima facie subject to private law. One possible response would have been to classify the privatized activities (such as the provision of basic utilities) as 'public services' and to subject their conduct to a special regime of public-law rules despite the fact that they were no longer provided by public institutions. However, the main legal response to privatization has been to subject the conduct of privatized businesses that are considered to be of public importance to regulation by public agencies. As a result, although the private service providers are not subject to public law, the regulators are.

Another component of this programme of restructuring public administration (which, along with privatization, has been compendiously referred to as the 'new public management' (NPM))[9] was the use of contracts and contract-like techniques to promote 'efficiency' in the delivery of services that were not privatized. To this end, services as diverse as garbage collection, legal advice, and prison management have been 'contracted-out' (or 'out-sourced'), which means that while a public body remains ultimately responsible for the conduct of the activity, it is actually carried out by a private entity under the terms of a contract with the public body.

Many governmental activities that have not been contracted-out are nevertheless conducted along contractual lines. For instance, the National Health Service and Community Care Act 1990 created an 'internal market' within the NHS. Central to the operation of this market is the so-called 'NHS contract', by means of which units within the NHS ('providers') can sell services to other units within the service

[9] G Drewry, 'The New Public Management' in J Jowell and D Oliver (eds), *The Changing Constitution,* 4th edn (Oxford: Oxford University Press, 2000) and 'The Executive: Towards Accountable Government and Effective Governance?' in J Jowell and D Olivers (eds), *The Changing Constitution*, 6th edn (Oxford: Oxford University Press, 2007).

('purchasers').[10] Schools can 'opt out' of local authority control; they can handle their own budgets and compete for students provided they meet agreed performance targets. Under the 'Next Steps' programme[11] (which was implemented not by statute but by contract-like 'framework documents' of unclear legal status)[12] the government bureaucracy has been roughly subdivided into two sectors which might (crudely) be called the 'policy-making sector' and the 'policy-implementing sector'. Policy-makers remain in the traditional Whitehall departmental structure while policy-implementers are hived off into executive agencies. Agencies are given budgets and are expected to use them efficiently to meet performance targets set by the department of which they are satellites. The main aim of this reform was to increase efficiency and financial accountability in the running of government programmes and to put the delivery of public services on a more business-like footing while stopping short of privatization.[13]

Yet another aspect of NPM is the 'private finance initiative' (PFI). PFI has been described as 'the subset of public service procurement or government contracting which is characterized by the fact that it involves private sector provision of capital assets, the use of which is then, as it were, rented out by the private sector either to the public authorities or directly to the public, or both'.[14] For example, a private contractor might build a public road in return for the right to levy tolls on road-users. In addition to the search for 'efficiency', reduction of public spending is a widely acknowledged motivation for PFI arrangements.

All of these components of NPM have significant effects on the institutional structure of public administration. They also have important ramifications for accountability, which will be discussed in Chapter 19.

[10] A Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford: Oxford University Press, 2001).

[11] The official history of the Next Steps programme is D Goldsworthy, *Setting Up Next Steps* (HMSO, 1991). See also P Greer, *Transforming Central Government* (Buckingham: Open University Press, 1994). Executive agencies account for more than 75 per cent of the civil service: Drewry, 'The Executive' (n 9 above), 196.

[12] They are not ordinary contracts because such agencies remain part of the Crown, which, in law, is a single indivisible entity.

[13] The 'Public Service Agreement' is another contractual technique used within government to regulate and exercise financial control over performance of public functions: D Oliver, *Constitutional Reform in the UK* (Oxford: Oxford University Press, 2003), 212–13.

[14] M Freedland, 'Public Law and Private Finance—Placing the Private Finance Initiative in a Public Law Frame' [1998] *PL* 288, 290. See also M Elsenaar, 'Law, Accountability and the Private Finance Initiative in the National Health Service' [1999] *PL* 35.

2.1.5 CENTRALIZATION AND DECENTRALIZATION

For several hundred years up to the end of the twentieth century, the UK was a unitary, not a federal, state. In essence, this meant that there was only one legislature in the UK—the Westminster Parliament—and its Acts covered the whole nation and took precedence over all other forms of law. As a result, the central administration (the Crown and its Ministers) enjoyed a sort of dominance in the life of the nation. This was not because governmental power and public administration were entirely concentrated in Whitehall. Indeed, until the rapid growth of the central administration in the nineteenth century in response to social and economic problems generated by the Industrial Revolution, central government was mainly concerned only with the waging of war (primarily for territorial aggrandizement), national defence, and foreign relations. Other governmental activities, such as regulation and welfare, were conducted at local level by an assortment of agencies. Justices of the Peace ('magistrates', 'JPs'), who were agents of the Crown, were the main local officials. They had very considerable autonomy from central control, especially after the abolition of the Court of Star Chamber in the seventeenth century. Indeed, the eighteenth century can be described as the golden age of the office of JPs, on which the conduct of public administration mainly depended. However, from about the 1830s onwards, many of the functions performed by JPs were centralized, and today the main business of magistrates' courts is trying minor criminal cases, although they still perform some administrative functions such as liquor licensing.

To fill the gap at local level created by the decline of the administrative system based on the office of JP, in the nineteenth century Parliament created the first local authorities in the contemporary sense (ie elected local councils). Today, local authorities represent a large and highly significant element of the system of public administration in the UK. Local authorities are responsible for about 25 per cent of all public expenditure. The existence, functions, powers, and duties of local authorities derive from central legislation (Acts of Parliament). Many of the norms of administrative law apply to local administration in the same way as they apply to central administration. However, in certain respects, local government is in a different position from its central counterpart. For one thing, until the rule was changed by s 90 of the Local Government Act 2000, members of local authorities could be required to repay money spent or lost as a result of conduct of the

authority in breach of public law.[15] Secondly (as we will see in 6.5.1), in making spending decisions, local authorities owe a 'fiduciary duty' to local taxpayers that central government does not owe to national taxpayers. Thirdly, although local authorities have wide law-making powers, their legislation is secondary, not primary, and must be consistent with Acts of Parliament (as well as with EU law and the ECHR). Moreover, the substance of much local legislation and policy is directly or indirectly influenced by central government. More generally, many statutes give Ministers of central government power to issue 'guidance' or 'directions' to local authorities, or 'default powers' in case a local authority fails to perform a duty. Fourthly, the relationship between the local 'executive' (ie the council leader and other local officials both elected and appointed) and the local 'legislature' (ie the full council) is rather different from the relationship between Parliament and the central government.[16]

On the other hand, despite being subordinate to and significantly dependent on Parliament and central government legally, politically, and financially, local authorities are nevertheless popularly elected and carry out functions of national importance such as providing housing, education, and a wide variety of social welfare services. If these activities were conducted by central government it could, within the limits of the law as laid down by Parliament and the courts, carry them out as it wished and integrate them into its management of the social and economic life of the nation as a whole. By contrast, local authorities are obviously concerned primarily to further the interests of their own areas. Many local authorities are under the control of political parties[17] that do not form the government at Westminster, and may allocate their budgets (the bulk of which is provided by central government in the form of grants) partly, at

[15] There may still be common law liability for breach of trust: *Westminster City Council v Porter* [2003] Ch 436.

[16] See Local Government Act 2000, Part II (designed to strengthen the accountability of the local government executive to the full council). For discussion of the constitutional context of these provisions see I Leigh, *Law, Politics and Local Democracy* (Oxford: Oxford University Press, 2000), ch 7. For the view that they are motivated by 'efficiency' rather than 'democracy' see G Ganz, *Understanding Public Law,* 3rd edn (London: Sweet & Maxwell, 2001), 82–3. Further steps to introduce Westminster-style governance structures into local government were taken in the Local Government and Public Involvement in Health Act 2007.

[17] The influence and role of political parties in local government has increased greatly in the last forty years. The situation was investigated by a government-appointed committee in the 1980s (the 'Widdicombe' Report on the Conduct of Local Government Business, Cmnd 9797, 1986). On the legal significance of the politicization of local government see 6.3.5 and 6.5.1.

least, according to their own priorities rather than those of central government. For these reasons, local government presents central government with coordination problems of integrating the activities of local authorities into the running of the nation as a whole.

Tensions and conflicts between central and local government can and do arise, and in the 1980s and 1990s central government assumed much tighter legal, political, administrative, and financial control over local government than had previously been the case.[18] The general policy of the Conservative governments of that period was to emphasize the role of local authorities as service providers[19] rather than as democratic political institutions. Given that many of the services provided by local authorities are basic social welfare, which many think should ideally be uniform throughout the country, a high degree of central control is inevitable. But the desire for, and the desirability of, local autonomy and democracy remain and argue against excessively tight central control.[20]

So far as administrative law is concerned, the most radical proposal for increasing local autonomy would be to give local authorities more freedom in interpreting the statutes under which they operate. The basic rule of administrative law is that the courts, not the administration, are the authoritative interpreters of legislation. Administrators act legally only if they comply with relevant legislative provisions as they would be interpreted by a court. Even if the legislation is ambiguous or incomplete, it is not open to an administrator to act in accordance with a 'reasonable' interpretation if that differs from the way a court would interpret the provision. By contrast, under the radical proposal local authority conduct would be legal provided it was based on an interpretation of the legislation that was reasonable in the sense that it represented a defensible plan for local action within the broad spirit of the empowering legislation. In other words, whereas under the present law, local government has to cut its cloth to meet the demands of central government as expressed in empowering legislation, under this radical proposal central government would more often have to accommodate local government and leave people freer to do what they wanted in their

[18] M Loughlin, 'Restructuring of Central-Local Government Relations' in J Jowell and D Oliver (eds), *The Changing Constitution,* 4th edn (Oxford: Oxford University Press, 2000), ch 6.

[19] As a result of a programme called 'compulsory competitive tendering'—a form of contracting-out—local authorities became less involved in direct service-provision and more involved in arranging for services to be provided. The sale of many council houses greatly reduced the role of local authorities as providers of residential accommodation.

[20] D Hill, *Democratic Theory and Local Government* (London: Allen & Unwin, 1974).

local area. Even within the confines of the present law, a presumption that statutes should, if possible, be interpreted so as to promote local autonomy[21] would significantly enhance the independence of local government.

After 1997 the Labour government embarked on a programme of reform designed to readjust the relationship between central and local government.[22] The Local Government Act 2000 gives local authorities the power 'to do anything which they think is likely to' promote or improve the economic, social, or environmental well-being of their areas (s 2(1)). However, this power is subject to 'any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made)' (s 3(1)). These provisions neither expressly nor impliedly give local authorities more freedom in interpreting the legislation under which they operate, and it remains to be seen how they will be interpreted and applied by the courts.[23] More importantly, local authorities continue to rely on central government for most of their income,[24] and they are subject to close and detailed financial regulation.[25]

Besides local authorities, there are very many unelected bodies that operate at local level delivering services and implementing public policy.[26] Many of these bodies have been established by central government, and their number has increased greatly since 1979 at the expense of the powers and functions of elected local authorities. As in the case of executive agencies, managerial and financial accountability and 'customer satisfaction' are prime objectives of the creation of such 'independent' bureaucratic institutions. Elected local authorities and unelected local agencies are not the only sites of bureaucratic activity outside Westminster and Whitehall.[27] Diffusion and decentralization of

[21] Such a provision would be analogous to s 3 of the Human Rights Act, which requires legislation to be interpreted, as far as possible, compatibly with the ECHR: I Leigh, 'The New Local Government' in J Jowell and D Oliver (eds), *The Changing Constitution*, 6th edn (Oxford: Oxford University Press, 2007), 300.

[22] Leigh, 'The New Local Government' (n 21 above).

[23] Leigh, *Law, Politics and Local Democracy* (n 16 above), 52–62.

[24] The Local Government Act 2003 gives authorities increased powers to borrow for capital projects.

[25] D Oliver, *Constitutional Reform in the UK* (Oxford: Oxford University Press, 2003), 300–3.

[26] Concerning regional development boards and regional assemblies see C Turpin and A Tomkins, *British Government and the Constitution*, 6th edn (Cambridge: Cambridge University Press, 2007), 194–5.

[27] Of course, the major central government departments and agencies (such as Jobcentre Plus) have local offices around the country.

power increased significantly with UK membership of the EU. This added a supra-national element in the form of the legislative, executive, and judicial institutions of the EU. By virtue of the provisions of the European Communities Act 1972, conflicts between EU law and UK law (including Acts of Parliament) have to be resolved in favour of EU law.

Sub-national bureaucratic fragmentation was further increased by devolution to Scotland, Wales, and Northern Ireland in 1998. Scottish devolution involves a division of legislative authority between the Scottish and Westminster Parliaments. The constitutional status of Acts of the Scottish Parliament (ASPs) is unclear.[28] It is 'superior' to ordinary secondary legislation. On the other hand, it does not count as 'primary legislation' for the purposes of the HRA. If it is incompatible with Convention rights it is invalid.[29] By contrast, although an Act of (the Westminster) Parliament can be declared incompatible with Convention rights, such incompatibility does not affect its validity. Moreover, the Westminster Parliament retains (and exercises) the power to pass legislation that applies to Scotland, even in areas in which the Scottish Parliament has legislative capacity. Scottish legislation is invalid to the extent of any inconsistency with Westminster legislation. The Supreme Court has jurisdiction to entertain challenges to legislation of the Scottish Parliament on the ground that it is beyond power or inconsistent with Westminster legislation.[30]

In general, the Welsh Assembly has power to make only secondary legislation.[31] Both Welsh and Scottish devolution involved the creation of new executive branches of government that exercise many of the powers formerly exercised by the Secretaries of State for Wales and Scotland respectively. However, Scottish and Welsh civil servants belong to the one UK civil service. Devolution has

[28] A McHarg, 'What is delegated legislation?' [2006] *PL* 539. This uncertainty is relevant to how the courts should approach challenges to ASPs. For recent judicial discussion see *Petition of Axa General Insurance Ltd for Judicial Review of the Damages (Asbestos-related Conditions) (Scotland) Act 2009* [2010] ScotCS CSOH 02. See also BK Winetrobe, 'The Judge in the Scottish Parliament Chamber' [2005] *PL* 3.

[29] Subject to the provisions of HRA, s 6(2).

[30] See eg *Martin v Her Majesty's Advocate* [2010] UKSC 10.

[31] Under the Government of Wales Act 2006, power to make 'Assembly Measures' can be conferred on the Welsh Assembly by Order in Council; and provision is made for a referendum (scheduled for March 2011) on the issue of giving the Assembly power to make 'Assembly Acts': Turpin and Tomkins, *British Government and the Constitution* (n 26 above), 226–7. The status of these two types of legislation, like that of Acts of the Scottish Parliament, is not spelled out.

significantly reduced the power of central government. The powers of the devolved executives are, of course, limited to specific areas of administration. Within such areas the Scottish Parliament can confer on Scottish Ministers the power to make delegated legislation.

The devolution statutes regulate many aspects of the operation of the devolved legislatures and executives. Devolution has added significantly to the role of law in constitutional arrangements. At the same time, agreements and concordats that are not meant to be legally enforceable also play a major role in regulating relations between the various layers of government.[32] It remains to be seen how large a role courts will play in this new multi-layered constitution.[33] Legalization creates opportunities for judicialization; but the extent to which such opportunities are exploited depends on the balance between cooperation and confrontation in dealings between the various governmental units. The greater the tensions, the more likely that recourse will be had to the courts to resolve essentially political differences.

This brief survey clearly demonstrates the complexity of the institutional structure of public administration in the UK in general, and in England in particular. However, the basic principles of administrative law and the various modes of accountability with which this book is mainly concerned are of quite general applicability to all the institutions of public administration in England.

2.2 THE LEGISLATURE

There are various respects in which the legislature forms a significant element of the institutional framework of public administration. First, Parliamentary ('primary') legislation is an important tool by which governments create institutions of public administration and define their functions, powers, and duties. Most institutions of public administration, whether at the central or local level, are 'creatures of statute' and most of the powers, duties, and functions of the administration are statutory. Secondly (as we will see in more detail in Chapter 17), by statute Parliament plays a significant role in the process for the making of secondary legislation by the administration. In particular, in certain

[32] Concerning devolution 'concordats': R Rawlings, 'Concordats of the Constitution' (2000) 116 *LQR* 257; J Poirier, 'The Functions of Intergovernmental Agreements: Post-Devolution Concordats in Comparative Perspective' [2000] *PL* 134.

[33] On why there has been almost no litigation about division of powers: R Hazell, 'Out of Court: Why Have the Courts Played No Role in Resolving Devolution Disputes in the United Kingdom?' (2007) 37 *Publius* 578.

cases it has the power to 'disallow' (ie reject) pieces of secondary legislation. By contrast, the US Supreme Court has held that it is contrary to constitutional separation of powers for Congress to 'veto' secondary legislation.[34] Thirdly, under the principle of responsible government, MPs play a significant role in holding the executive to account for the conduct of public administration through mechanisms such as Parliamentary debates and questions, select committee investigations, and handling constituents' complaints. The office of ombudsman in England originated as an extension and reinforcement of this complaint-handling function of individual MPs and, more generally, of Parliament's role in scrutinizing the day-to-day conduct of government.

2.2.1 SUPREMACY OF PARLIAMENT AND THE PRINCIPLE OF LEGALITY

An important consequence of the constitutional upheavals of the seventeenth century in England was that the central courts came to be associated less closely with the Monarch (ie with the executive) and were more aligned with Parliament. The Act of Settlement of 1700 transferred the power to dismiss judges from the Monarch to Parliament and severely limited the permitted grounds of dismissal, thus providing a legal foundation for 'the independence of the judiciary' from the executive.[35] This re-alignment of the judiciary is the source of the basic administrative law principle of 'legality'[36] and the idea, developed by Dicey in the late nineteenth century, that the role of an independent judiciary vis-à-vis the administration is to ensure that it complies with the law. Under the principle of the supremacy of Parliament (as classically expounded by Dicey), primary legislation is the highest form of law and will prevail in any conflict with the common law. This is the basis for interpreting the principle of legality in terms of the doctrine of '*ultra vires*',[37] which tells bureaucrats that they must perform their duties and

[34] *Immigration and Naturalization Service v Chadha* 462 US 919 (1983). A useful introduction to this and other aspects of US administrative law is PL Strauss, *Administrative Justice in the United States*, 2nd edn (Durham, NC: Carolina Academic Press, 2002).

[35] The Monarch retained the power of appointment which, with the advent of representative government in the nineteenth century, passed effectively to the government, where it remained until the creation of the Judicial Appointments Commission in 2006.

[36] Confusingly, the phrase 'the legality principle' is also used in a narrower sense to refer to the principle that legislation is interpreted consistently with fundamental common law rights: P Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act' (2009) 125 *LQR* 598.

[37] Literally, 'beyond power'.

not exceed or abuse their powers, and that Parliamentary legislation is the ultimate source of what those duties and powers are.

This approach apparently makes sense when we remember that most institutions of public administration are created and most of their powers and duties are conferred by legislation. However, the power of the central courts to control public administrators by reviewing their decisions was not conferred by Parliament but was assumed by the courts themselves in the course of the seventeenth century. Moreover, by the time the doctrine of *ultra vires* had developed, basic principles of administrative law (such as the principle of legality itself and the rule that administrators must follow fair procedures) had already been laid down by the courts as matters of common law. Nevertheless, the doctrine of *ultra vires* was understood to mean that although statute was not the source of the power of courts to control the administration or of the basic principles according to which that power was exercised, in doing so the courts were giving effect to the *implied* 'intention of Parliament' that the conduct of public administrators should be subject to control by an independent judiciary according to principles developed by the judges. The argument went something like this: even though Parliament has not expressly authorized the courts to supervise the administration, it cannot have intended breaches of duty by administrative agencies to go unremedied (even if no remedy is provided by statute), nor can it have intended to give administrative agencies the freedom to exceed or abuse their powers, or to act unreasonably. It is the task of the courts to interpret and enforce the provisions of statutes, which impose duties and confer powers on public administrators, in the light of the principles embodied in the norms of administrative law. In so doing they are giving effect to the intention of Parliament.

Four problems with the *ultra vires* interpretation of the principle of legality are worth mentioning. The first is a general problem with applying and interpreting statutes: statutory provisions, including those that create institutions of public administration and confer powers and impose duties on them, may be unclear, ambiguous, or incomplete. When they are, it is unrealistic to treat the process of interpreting statutes, resolving ambiguities and lack of clarity, and filling gaps, as always being a matter of discerning and giving effect to the intention of Parliament. Even assuming that we can make sense of the notion of intention when applied to a multi-member body following a simple-majority voting rule, there will be many cases in which Parliament did not think about the question relevant to resolving the ambiguity or lack of clarity, or filling the gap—on the contrary, the unclearness, ambiguity,

or gap may have been deliberate and designed to offload onto the bureaucracy the choice involved in how to resolve it. In such cases statutory interpretation is inevitably a creative activity. The weakness of the intention theory of statutory interpretation is made clear by the notion of 'purposive interpretation'. Especially (but not only) in the contexts of interpreting statutes passed to give effect to EU law and of protecting Convention rights (ie rights recognized by the ECHR),[38] courts may go beyond interpreting the words actually used in statutes and insert (or 'imply') into legislative provisions words or phrases needed to give effect to what the court perceives to be the true purpose or aim of the provision in question.[39] It makes little sense to describe this process in terms of giving effect to what Parliament actually intended all along.

A technique for giving meaning to the idea of the intention of the legislature is for courts to pay attention to what are sometimes called '*travaux préparatoires*'—that is, policy documents and statements (including Parliamentary debates) that preceded the enactment of the relevant legislation and might throw some light on its intended meaning or, at least, the purpose for which it was enacted. In *Pepper v Hart*[40] the House of Lords held that where a statutory provision is ambiguous or obscure or leads to an absurdity, a court required to interpret the provision can refer to clear statements, made in Parliament by a Minister or promoter of the bill, as to its intended meaning and effect, and to other Parliamentary material that might be necessary to understand such statements. This decision was of considerable constitutional significance because it implied that the relevant intention was not that of Parliament in enacting the legislation but rather that of the government in promoting it. The court seemed to acknowledge the effective reality that Parliament does not legislate but rather legitimizes the government's legislation. In so doing, it further undermined the notion that in interpreting legislation, the courts were giving effect to the intention

[38] Section 3 of the HRA imposes on courts an obligation, 'so far as it is possible' to 'read primary legislation in a way that is compatible with Convention rights'. On the meaning of 'so far as it is possible' see AL Young, 'Judicial Sovereignty and the Human Rights Act 1998' [2002] *CLJ* 53; G Marshall, 'The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained?' [2003] *PL* 236.

[39] eg *R (Wright) v Secretary of State for Health* [2009] 1 AC 739, [17]–[18] (Baroness Hale of Richmond). See generally A Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 *OJLS* 179.

[40] [1993] AC 593. In response to this decision, procedures were adopted for avoiding and correcting errors and ambiguities arising out of ministerial statements: HL Debs, Vol 563, col 26, 5 April 1995.

of Parliament. In an influential article critical of the decision in *Pepper v Hart,* Lord Steyn made these implications explicit;[41] and in its wake the House of Lords embarked on a process of re-interpreting *Pepper v Hart* so as to avoid undermining the principles that the job of interpreting legislation belongs ultimately to the courts, not to the government, and that the question for the court is what the statutory words mean, not what the government or anyone else thinks they mean.[42] Although theoretically based on a distinction between the government and the legislature, this approach actually asserts an independent role for the judiciary in determining what the law is—not only the common law but also statute law.

A second problem with the 'intention-of-Parliament' interpretation of the principle of legality is that it does not accurately reflect the law. As already noted, the power of courts to control the administration and the principles of administrative law on the basis of which they exercise this power are judicial creations. Courts go to great lengths to preserve their jurisdiction to supervise the administration by applying these principles. Perhaps the most striking modern example of this is the case of *Anisminic Ltd v Foreign Compensation Commission*.[43] The main question in this case was whether a section in the Foreign Compensation Act, purporting to 'oust' ('exclude') the jurisdiction of the court to review 'determinations' of the Commission, was effective to that end. The House of Lords held that the word 'determination' must be read so as to exclude *ultra vires* (ie illegal) determinations. It then went on to extend considerably the notion of *ultra vires* as it applied to decisions on questions of law, the final result being to reduce the application of the 'ouster clause' almost to vanishing point, despite the fact that it had arguably been meant to have wide effect.

Another example is provided by the law concerning the role of statute in determining the requirements of procedural fairness. In the face of legislative silence on the question of whether an applicant before an administrative body is entitled to fair procedure as defined by the common law, two approaches are possible. It could be said that the

[41] J Steyn, *'Pepper v Hart* A Re-examination' (2001) 21 *OJLS* 59; see also G Marshall, 'Hansard and the Interpretation of Statutes' in D Oliver and G Drewry (eds), *The Law and Parliament* (London: Butterworths, 1998); A Kavanagh, '*Pepper v Hart* and Matters of Constitutional Principle' (2005) 121 *LQR* 98.

[42] The leading cases are *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349; *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.

[43] [1969] 2 AC 147.

common law rules of procedural fairness will apply only if there is evidence of a legislative intention that they should; alternatively, it could be argued that silence should be construed as an invitation to the courts to apply common law procedural standards. On the whole the courts have tended to the latter view, thus asserting the independent force of the common law rules of procedural fairness. Moreover, the 'right to a fair trial' is now guaranteed by Art 6 of the ECHR, further undermining the ability of Parliament to regulate administrative procedure even expressly.

A third problem with the *ultra vires* interpretation of the principle of legality is that it does not justify regulation of the performance of non-statutory functions. As we have seen (1.3), in the *GCHQ* case the House of Lords rejected the proposition that the common law (prerogative) powers of central government are beyond the province of administrative law in favour of the proposition that exercise of a common law power will be reviewable provided the power is justiciable. We have also seen that the province of administrative law has been extended to embrace the exercise, for public purposes, of *de facto* power which has no identifiable legal source either in common law or statute. Whatever the administrative law principles applicable to the exercise of non-statutory powers, they cannot, by definition, be derived from a power-conferring statute.

A fourth problem with 'the doctrine of *ultra vires*' is, perhaps, the most significant. The doctrine assumes that Parliamentary legislation is the highest form of law in the system. However, to all intents and purposes, this is no longer true. The European Communities Act 1972 provides that conflicts between EU law and UK law (even primary legislation) must be resolved in favour of EU law. A provision of primary legislation that cannot be given an interpretation consistent with the ECHR can be declared to be incompatible with the Convention. Such a declaration does not render the provision invalid or inoperative but it does impose an obligation on the government to bring the legislation into compliance with the ECHR and renders the government liable to being sued in the ECtHR for breach of the Convention if it does not do so.

These two qualifications on the supremacy of primary legislation affect the *ultra vires* doctrine in different ways. The effect of EU law is that a decision or action of a public administrator may be unlawful even if it complies with all relevant provisions of UK statute law. The impact of the HRA is more subtle but also more pervasive. The *ultra vires* doctrine (even as modified by EU law) focuses attention on exercise of public functions and asks whether or not it complies with the law. By

contrast, the HRA directs attention to the rights of citizens and asks whether or not those rights have been infringed. As we will see, the approach to answering this latter question adopted by the ECtHR and English courts is significantly different from the approach traditionally taken to answering the *ultra vires* question. Under the influence of the ECHR and as a result of the enactment of the HRA, English administrative law is experiencing a 'rights revolution'; but it is not yet clear to what extent the language of rights and the techniques of rights protection will supplant the conduct-oriented understanding of the legality principle.

One thing is clear, however. The normative framework of public administration in England is a product of the activities of various institutions including the legislature, courts (and tribunals), the law-making authorities of the EU, and the institutions of the ECHR—the Council of Europe and the ECtHR. Although the common law contribution to the framework made by the courts must be consistent with that of these other institutions, it is an autonomous contribution that cannot be fully captured by saying that in holding the administration accountable and in developing principles of administrative law, the courts are merely giving expression to 'the intention' or 'the will' of some other institution such as the UK legislature or the European Commission. This is because the documents in which such institutions express their 'intentions' may be unclear, ambiguous, or incomplete; and the institutions responsible for interpreting those documents—ultimately the courts—must sometimes exercise independent and creative choice in resolving lack of clarity and ambiguity, and filling gaps. By virtue of their power to hold the administration accountable, courts play a significant and independent role in establishing the normative framework of public administration.

All this having been said, however, the fact is that the great bulk of public administration involves the implementation of statutory programmes, the performance of statutory functions, the exercise of statutory powers, and the discharge of statutory duties. Although statutes are not the whole legal framework of public administration, in very many cases statutory provisions are the source of the administrator's power and define the task to be performed. Moreover, common law principles of administrative law must be applied in the context of and consistently with relevant statutory provisions.

One final point about statutory interpretation: although courts have the ultimate power to interpret legislative documents, they do so relatively rarely. Public administrators are much more central to the process

of interpreting and applying legislation. Not only do they do so much more often than courts, but most of the time they do so without any judicial supervision: only a miniscule proportion of administrative applications and interpretations of legislation is ever challenged. In English law, the principle of legality means that administrators have to get the law right; and 'right' means what the courts say is right. Although we know very little about how, in practice, administrators go about the task of interpreting statutes, we can assume that they follow basically the same approach as courts because they know that if they do not, their decision may be held unlawful if it is challenged. In US law, by contrast, courts are often prepared to accept bureaucratic interpretations of legislation even if the judges would have adopted a different interpretation, provided that they consider the administrator's interpretation to be 'reasonable'. This approach, in theory anyway, allows administrators a degree of freedom in approaching the task of statutory interpretation.

2.2.2 REPRESENTATION AND PARTICIPATION

The elected legislature is an expression of the fundamental constitutional principle of representative government. One of the main functions of elected representatives is to scrutinize the day-to-day conduct of public administration and in this way make it accountable to the people. Another function is to contribute to the formulation of government policy by debating and amending legislative proposals. The capacity of the legislature to perform both of these functions is significantly limited by the existence of cohesive political parties. Where, as in the UK system, party discipline is strong, an effect of the principle of responsible government is to reduce the chance that the legislature will act against the interests and wishes of the party in power (ie the government).

The legislature's capacity to perform the second function is further weakened by the fact that in systems of responsible government, the legislative initiative rests with the government. By the time legislative proposals ('bills') receive their first reading in Parliament, the policy they embody and give effect to has been fully determined outside of Parliament. By contrast, in the US the legislative initiative rests with individual members of Congress, and Congressional committees play a much more significant role than their UK counterparts in formulating legislative policy and drafting legislation. This is not to say that UK MPs—especially those belonging to the party in power—play no part in the policy formation process; but that role does not justify describing that process as 'representative'.

In fact, apart from government ministers, the major players in the policy formation process are (unelected) public administrators, and individuals and groups in society likely to be affected by the policy, whom the government is required or chooses to consult. As we will see in more detail later, elected representatives play an even smaller role in formulating policy embodied in secondary legislation. Parliament reviews only a tiny proportion of secondary legislation and only after it has been made. In some cases, it has the power to reject the legislation, but has no power to amend. Some secondary legislation is made by elected local authorities, although the content may be more-or-less determined by central government. But a very large proportion of secondary legislation is drafted, and the policy it embodies is developed, by ministers and public administrators in consultation with individuals and groups in society.[44]

The basic point is this: public administrators play a major role in the process of formulating legislative policy and drafting primary and secondary legislation. The institutional structure of this process is much more participatory than representative. We might expect that the normative framework of public administration would reflect this structure. But as we shall see (4.2), the participatory process of policy-making is regulated by the law only relatively lightly.

2.3 THE JUDICIARY

As already noted, in the course of the seventeenth century, the courts developed what we now call 'judicial review' as a technique for supervising inferior government bodies. Incidental to exercising this control, the courts have also developed many of the general principles of administrative law that form the subject matter of Part II of this book. As its name implies, judicial review involves reviewing administrative decisions. Another way in which courts exercise control over public administrators is by entertaining private-law claims in contract and tort, typically for compensation for harm caused by administrative action. Such claims are generally considered a less significant mode of public accountability than the reviewing of decisions and in fact, judicial review was developed to provide a more effective alternative to claims for damages.

[44] EC Page, *Governing by Numbers: Delegated Legislation and Every-day Policy-Making* (Oxford: Hart Publishing, 2001), esp chs 5–7.

Besides judicial review, the other main legal process for challenging administrative decisions is appeal. Unlike judicial review, which is a judicial invention, appeals are statutory: the courts never developed the procedure of appeal as we understand it today. Judicial review and appeal are both forms of adjudication. Appeal is the typical procedure by which inferior courts are supervised by superior courts, but various statutes also provide for appeals from administrative agencies to courts. However, the most significant institution with appellate jurisdiction over public administrators is the tribunal. Tribunals in the modern sense date from the beginning of the twentieth century, although their origins can be traced back to the late eighteenth century, or even earlier.

The most important constitutional principle about the judiciary is that of judicial independence, which is itself an aspect of the separation of powers and is also associated, in the English legal system anyway, with the rule of law

2.3.1 SEPARATION OF POWERS, RULE OF LAW, AND JUDICIAL INDEPENDENCE

As we saw earlier, the idea of a tripartite separation of governmental powers and functions—legislative, executive, and judicial—is usually attributed to Montesquieu writing in the middle of the eighteenth century. Montesquieu's basic idea was influential not only in England but also, and more particularly, in France and the US. So far as adjudicatory supervision of public administration is concerned, the French constitutional system adopts a very different approach to separation of powers from that in the UK system. By a law passed at the very end of the eighteenth century, the judicial branch (consisting of what have come to be called 'the ordinary courts'), was prohibited from adjudicating claims against the government because this was considered to be properly a task for the executive, not the judiciary. To exercise this function, Napoleon established the *Conseil d'Etat*, located within the executive branch and staffed by civil servants; and now France has a three-tier system of administrative courts separate from the 'ordinary' courts.

AV Dicey, the author of the famous *Introduction to the Study of the Law of the Constitution* (first published in 1885 and still influential today), expressed strong opposition to the French system. In his view, one of the great strengths of the English system was that government officials were answerable in the 'ordinary courts' (ie to the judicial branch of government) in the same way as private citizens. He thought

that 'courts' closely associated with the executive (such as the Court of Star Chamber, which was abolished in the seventeenth century as part of the constitutional settlement that brought the English Revolution to an end) did not provide citizens with adequate protection against the executive, for which a truly 'independent' judiciary was necessary. Dicey considered the possibility of suing government officials in the ordinary courts according to principles of private law to be an element of 'the rule of law'.[45] He had two main objections to the French system as he understood it. One was that full protection of citizens against the exercise of public power required the possibility of challenging public decisions and actions before an adjudicator who was truly independent of the government. Dicey understood independence in terms of the protections afforded to the English central judiciary by the Act of Settlement 1700 (ie salary protection and 'security of tenure' subject only to removal for cause by Parliament) and location in an institution separate from the executive. Dicey's other objection to the French system was that public-law courts were likely to develop principles of law that, in his opinion, gave the government privileges and exemptions that citizens did not enjoy.[46]

Ironically, many of the tribunals that existed in the late nineteenth century to adjudicate disputes between citizen and administration arising out of the implementation of public programmes were embedded within public administrative agencies. Dicey did not discuss such tribunals, and it is not clear whether he considered them to be constitutional monstrosities. It is possible that his objection was not to the existence of adjudicatory tribunals embedded within the executive but only to a system (like the French) in which decisions of such tribunals were not subject to supervision by the ordinary courts.

By the beginning of the twentieth century, tribunals were no longer embedded within administrative agencies but were free-standing adjudicatory bodies. However, most members of tribunals were not judges, and most tribunals had more-or-less close links with the agencies from whose decisions they heard appeals. Moreover, some statutes made

[45] Dicey also included within the rule of law the idea that the rights of the governed against the governors are better protected by the courts and judge-made law than by a statutory or constitutional bill of rights.

[46] Ironically, English law in Dicey's time did exactly this by generally immunizing the Crown (although not individual officials) from tort liability and providing procedural protections against being sued for breach of contract. In these respects, the position of the Crown was not assimilated to that of private citizens until the enactment of the Crown Proceedings Act in 1947.

provision for appeal not to a free-standing tribunal but to a more senior official within the agency. However, by the middle of the twentieth century it was accepted that in general, appeals should be heard by a tribunal, not an official; and tribunals had come to be understood as being part of the judicial branch of government, not the executive. The process of judicialization of tribunals was taken much further by the Tribunals, Courts and Enforcement Act 2007 (TCE Act), which created the First-tier and Upper Tribunals to which the jurisdiction of many pre-existing tribunals has been transferred. Legally qualified members of these tribunals are now called 'judges' and they enjoy the guarantee of independence contained in the Constitutional Reform Act 2005.[47] Formerly tribunal members were typically appointed by the agency from whose decisions they heard appeals; but now, the appointment of members and judges of tribunals, like that of court judges, is handled by the Judicial Appointments Commission.

Independence of the judiciary is the most important aspect of the separation of powers in the UK constitution and it informs the concept of the rule of law. Its significance is heightened by the fact that the executive and the legislature are integrated rather than separated. This integration makes for very strong government, giving the executive almost complete control not only over the policy-making process but also over the legislative process by which policy can be translated into law. To counterbalance the combined force of the other two branches, the citizen needs a truly independent judicial branch that can 'speak truth to power'. This is found in the traditional judiciary.

In Australia, at the federal level, separation of judicial power and independence of the judiciary is given even greater emphasis because in addition to having a Westminster Parliamentary system of responsible government, Australia is a federation: the independence of the federal judiciary from the federal executive/legislature is considered crucial not only for protecting the citizen against the federal administration but also for protecting the interests of the states against the Commonwealth (ie the federal level of government). In the US, by contrast, executive power and legislative power are much more diffused and fragmented. Legislative power is divided between the two Houses of Congress (the upper House—the US Senate is much stronger than the House of Lords) and the President; executive power is divided between the President and the departments of State over which the President has direct control,

[47] However, only judges in the traditional sense ('court judges' we might say) enjoy the protections afforded by the Act of Settlement.

and the non-departmental agencies (created by Congress) over which the President has less control, for which he has to compete with Congress. The basic assumption on which the US system is based is that the best way to protect the citizen against government is to weaken its power by dividing it between various institutions. In this model, the prime role of the courts is to act as an umpire between the various other organs of government, not to act as a counterweight to the combined strength of the executive and the legislature.

This analysis helps to explain why judicial review of the executive by the central courts is considered such an important safeguard in the UK system of government. For instance, in quantitative terms, tribunals are much more important than courts as adjudicators of disputes between citizen and government arising out of the conduct of public administration. Nevertheless, the Administrative Court continues to play a crucial role in reviewing public decisions in high profile cases involving the core of central government and issues of high political, social, and economic import. The constitutional significance of the independence of courts and tribunals has been increased by the enactment of the HRA, giving force in the UK to the ECHR which, by Art 6, confers a right that in the determination of their 'civil rights and obligations' a person is entitled to a fair hearing before 'an independent and impartial tribunal'. As we will see, this provision has been used to test various aspects of public administration and modes of accountability in the UK. Independence is pivotal to the scheme of the ECHR because human rights are conceptualized as rights of citizens against government. It was under the influence of the ECHR that the government decided to cut the historic link between the legislature and the highest court in the UK—(the Appellate Committee of) the House of Lords—and to replace it with the UK Supreme Court. This move emphasizes the distance, between the judiciary and the other two branches of government, considered increasingly important for maintaining a suitable balance of power between the various components of the government. It was a particularly significant development in the context of the ECHR because of the new power, conferred on the higher courts by the HRA, of reviewing Parliamentary legislation for compatibility with the ECHR and issuing declarations of incompatibility.

To sum up this chapter: the institutions of public administration are many and various, and their interactions with other governmental institutions are complex and fluid. Administrative law provides no more than a framework within which such interactions take place.

Part II

The Normative Framework of Public Administration

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3

The Tasks and Functions of Public Administration

As explained in 1.2, administrative law norms both facilitate and constrain the realization of public policy objectives by the administration. This chapter looks briefly at the facilitative role. For this purpose, it is useful to distinguish between the tasks of public administration and its functions. By 'tasks' I refer to the substantive programmes that the bureaucracy is responsible for implementing: for instance, the social security system, border control, procurement of military hardware, financial services regulation, the National Health Service, higher education, and so on and so on. This chapter has nothing specific or detailed to say about the tasks of public administration. Rather, it focuses on what I call bureaucratic 'functions', which can be understood as modes of performing the various tasks of government.

3.1 BUREAUCRATIC FUNCTIONS

Since the eighteenth century, the most common way of thinking about the functions of government has been in terms of Montesquieu's threefold classification: legislative, executive, and judicial. According to a strict interpretation of separation of powers, each of these functions would be performed by one and only one set of governmental institutions: the legislature, the executive, and the judiciary respectively. Some such approach underlies the French system of administrative courts (see 2.3.1): because reviewing executive decision-making is itself understood as an executive function, it must be performed by an executive institution, not by the judiciary. However, unless we adopt the circular approach of defining the legislative function as what the legislature does, the executive function as what the executive does, and the judicial function as what the judiciary does, a realistic assessment will lead us to the conclusion that all three branches of government effectively perform all three functions.

Obviously, the legislature 'legislates' in the sense of making general rules (or 'norms') in the form of Acts of Parliament. The two Houses of Parliament also make general rules to regulate their internal affairs, which they implement on a day-to-day basis. The Houses of Parliament perform judicial functions when they try members or outsiders for contempt of Parliament. Similarly, the judiciary not only tries alleged criminals and resolves disputes between citizens and between citizen and government, but also makes (common) law; and, like the legislature, it makes rules about its own internal operations which it implements on a day-to-day basis.

3.1.1 RULE-MAKING BY THE EXECUTIVE

Turning to the executive, in addition to implementing Acts of Parliament, it also makes rules. Indeed, in quantitative terms, the executive makes many more rules than the legislature. Bureaucratic (or 'administrative') rules can be usefully divided into a number of categories.[1] First, there are statutory instruments (SIs) that are subject to the provisions of the Statutory Instruments Act 1946. To be subject to the Act, the rules must meet the definition of a 'statutory instrument' contained in s 1 of the Act. All such rules are made either by a Minister or the Queen-in-Council in exercise of powers conferred by statute, and they must normally be published. Commonly the statute under which particular rules are made provides that they must be 'laid before Parliament' and, in many cases, approved (or, at least, not disapproved) by one or both Houses. The 1946 Act regulates the procedure for laying.

Secondly, there are rules made in exercise of statutory powers (or, in a few cases, prerogative power) to make rules but which are not subject to the 1946 Act. This category includes what is sometimes called 'sub-delegated legislation',[2] that is rules made by B in exercise of a power to make rules conferred by statute on A and 'delegated' by A to B in exercise of an express or implied power to delegate. Also included in this category are by-laws made by local authorities. Instruments in this category may be (but equally may not be) subject to a statutory requirement of laying before Parliament, or publication, or both, contained in the statute conferring the power to make rules.

[1] For a wide-ranging discussion see R Baldwin, *Rules and Government* (Oxford: Oxford University Press, 1995). See also J Black, *Rules and Regulators* (Oxford: Oxford University Press, 1997).

[2] See *Blackpool Corporation v Locker* [1948] 1 KB 349.

Rules made in exercise of statutory powers to make rules are often referred to as 'delegated legislation'—hence the term 'sub-delegated legislation' used in the previous paragraph. The term 'delegated legislation' is inaccurate in the sense that Parliament does not 'delegate' its legislative power, which is the power to make primary legislation. Rather, it authorizes others to make rules that have the status and force of law but which are subordinate to primary legislation in the normative hierarchy. For this reason, the terms 'secondary legislation' or 'subordinate legislation' are preferable. However, not all rules to which these names are applied are made in exercise of statutory powers to make rules. Orders-in-Council are made in exercise of prerogative power.[3]

Thirdly, there are rules made by governmental agencies but not in exercise of any statutory or prerogative power to make rules. Such rules go by a variety of names: 'quasi-legislation',[4] 'administrative rules',[5] 'tertiary rules',[6] 'administrative guidelines', 'circulars', 'informal rules', 'codes of practice', 'policies', and so on. A useful collective name is 'soft law'. In general, such rules do not have to be, and sometimes are not, published, and do not have to be laid before or approved by Parliament. The constitutional and legal status of many such rules is a matter of controversy: consider 'extra-statutory tax concessions', for example. These are non-statutory rules made by the tax authorities (in exercise of a broad statutory discretion to manage the tax system) stipulating when full tax liability will not be enforced. There is a basic constitutional principle, embodied in the Bill of Rights of 1688/9, that the levying of taxes must be authorized by statute; and so there is an argument for saying that non-statutory rules made by the Revenue that effectively determine a taxpayer's liability to tax are 'unconstitutional'. On the other hand, it has been recognized that such concessions can, if applied fairly and without discrimination, aid the efficient administration of the tax system.[7] A different criticism is that non-statutory rules are undesirable if they are used as a substitute

[3] A McHarg, 'What is delegated legislation?' [2006] *PL* 539.

[4] G Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (London: Sweet & Maxwell, 1987).

[5] R Baldwin and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] *PL* 239.

[6] Baldwin, *Rules and Government* (n 1 above).

[7] *R v Inspector of Taxes, Reading, ex p Fulford-Dobson* [1987] QB 978, 985–8. Concessions must be consistent with tax legislation: *R v Her Majesty's Commissioners of Inland Revenue* [2005] 1 WLR 1718.

for legislation to achieve ends that might encounter political opposition in Parliament.[8] Nevertheless, administrative law recognizes the value of soft law in various contexts.

Fourthly, there are rules made by non-governmental bodies that exercise public functions but enjoy no statutory or common law power to make rules to regulate the conduct of members of the public.[9]

It is sometimes said that rules in the last two categories 'lack the force of law', meaning that they are not enforceable in a court. This statement is an oversimplification. The phrase 'having the force of law' has no precise meaning but is an amalgam of features that different rules may possess to a greater or lesser extent. For example, the Immigration Rules (which fall into the third category described above) are referred to in the immigration legislation and must be laid before Parliament; and an appeal can be brought against an immigration decision on the ground that it is inconsistent with the Rules. However, it has been said that they do not 'create rights'.[10] Again, it has been held that the Prison Rules are merely 'regulatory' and that their breach cannot give rise to a cause of action for damages, although it may found an application for judicial review.[11] In fact, the legal force of any particular rule depends partly on the source of its authority (essentially, whether or not it is supported by statute or common law); partly on the way it is drafted (rules which are drafted in precise technical language are more likely to be given some legal force than are rules drafted loosely and non-technically); and partly on its contents.[12]

3.1.2 ADJUDICATION BY THE EXECUTIVE

The executive also performs judicial functions. A clear example is provided by the land-use planning system in which the jurisdiction to hear appeals from decisions of local planning inspectors resides in the Secretary of State (who delegates this power to planning inspectors, who resemble tribunals). However, by contrast with the position in the US, where appeals from primary decisions, in areas such as social security and immigration, are heard by 'administrative (law) judges' who are

[8] Ganz, *Quasi-Legislation* (n 4 above), 13–14.

[9] If the body owes its existence to a contract, it may have contractual power to make rules. Such rules would be legally binding only on parties to the contract conferring the rule-making power.

[10] *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230.

[11] *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58.

[12] For example, Baldwin and Houghton say that procedural rules are relatively unlikely to be held to create legally enforceable rights: 'Circular Arguments' (n 5 above), 262–4.

structurally part of the executive branch (and, in the case of social security, of the Social Security Administration itself), in the UK most appeals from primary decisions of public administrators are heard by tribunals that are structurally separate from the administration. In this respect, the land-use planning system is the exception rather than the rule.

It is worth noting that this analysis rests on a distinction between primary decision-making (for instance, about entitlement to social security benefits) and appeals from such decisions; and it impliedly classifies making primary decisions as 'administrative' (ie executive) and exercising appellate jurisdiction as 'judicial'. During the first half of the twentieth century, this distinction between administrative and judicial functions was important in administrative law. For instance, at one time the courts took the view that certain remedies for unlawful bureaucratic action were available only in relation to the exercise of judicial functions;[13] and for a significant period the law was that the rules of procedural fairness (then called 'natural justice') only applied in cases where the decision-maker was under a 'duty to act judicially'. However, it is very difficult to distinguish between judicial and administrative functions because they both paradigmatically involve the same three steps: finding facts, identifying relevant law, and applying that law to the facts. This is what a social security benefits officer does when deciding whether an applicant is entitled to benefits, it is what the First-tier Tribunal (FtT) does when hearing an appeal from a decision of such an officer, it is what the Upper Tribunal does when it hears an appeal from the FtT, and it is what a court does when it judicially reviews an administrative decision or a decision of a tribunal.

One way of thinking about the distinction between administrative and judicial decisions that may help us to understand the difference between what a bureaucrat on the one hand, and a court or tribunal on the other, does when making a decision about the application of law to facts is in terms of a contrast between 'implementation' (an administrative function) and 'adjudication' (a judicial function). Applying general rules to individual cases involves striking a balance between the general ('public') objectives and purposes of the rule and the particular situation and ('private') interests of the individual to whom the rule is being applied. Often, the two considerations—the public and private interests—will point in the same direction. But sometimes they will conflict, as when

[13] *R v Electricity Commissioners, ex p Electricity Joint Committee Co (1920)* [1924] KB 171 (Atkin LJ).

promoting the general, public interest requires the interests of particular individuals to be compromised or ignored to some extent. The basic role of the bureaucrat implementing the law is to resolve such conflicts in favour of the public interest—but without, of course, totally ignoring the interests of the affected individual. By contrast, the basic role of the adjudicator is to resolve such conflicts in favour of the individual's interests—but without, of course, totally ignoring the public interest. In other words, the difference between implementation, which is the basic executive function, and adjudication, which is the basic judicial function, lies in the way they respectively resolve conflicts between public and private interests. The weight to be given by implementers and adjudicators to individual interests depends, to some extent, on whether those interests are 'rights'—whether conferred by statute, the common law (property and contractual rights for instance), or the ECHR. Interests that are also rights are given greater weight than interests that are not.

In 2.3 we noted that in the English legal system judicial independence is the most significant application of the principle of separation of powers. This was explained as a response to the concentration of power that results from the institutional overlap between the legislature and the executive. The account just given of the distinction between implementation and adjudication supports that explanation. Adjudication by independent courts and tribunals, biased towards the interests of the individual, provides a counterweight to implementation of government policy (given the force of law by legislation made by Parliament and the executive itself) by the executive and biased towards the public interest. Throughout the twentieth century, the main strand in thinking about what we might call 'administrative adjudication' (ie reviews of and appeals from bureaucratic decisions implementing government programmes and policy) was that it should be institutionally independent of the executive. Institutional and functional integration of the executive with the legislature is counterbalanced by institutional and functional separation of the judiciary from the executive. By contrast, in the US, where the legislature and the executive are institutionally separate, less weight is put on institutional separation of the judiciary from the executive.

To summarize the main point of this section: it is helpful to distinguish between implementation (an executive function) and adjudication (a judicial function) and to note that in the English system of public administration, adjudication by executive agencies of disputes between citizen and government is relatively uncommon.

3.2 POWERS AND DUTIES

An important distinction within the general category of bureaucratic functions is that between 'powers' and 'duties'. In this context, the word 'power' is used in three senses. First, to say that an agency has a (legal) power to do X may mean that it is (legally) entitled to do it. In this sense there is nothing wrong with saying that an agency has both the (legal) power and a (legal) duty to do X because, of course, an agency that is required by law to do X is legally entitled to do X. Secondly, we need to distinguish between legal powers and what we might call '*de facto*' powers. Legal powers derive either from legislation or common law. If an agency has a legal power to do X, it has authority to do it. By contrast, an agency may have the ability to do X without having legal authority to do it. Provided the law does not prohibit X we can say that the agency has *de facto* power.

In theory, it would be possible for the law to say that public administrators may only do such things as they have been given power to do by legislation. This is the basic rule of English law in relation to local authorities, for instance. However, this is not the law so far as central government is concerned. It also has common law powers—ie powers conferred by the courts. Some of these powers it has by virtue of being the central government (the power to conduct foreign relations, for instance) but others (such as the power to make contracts) are said to belong to it simply by virtue of the fact that central government is a person or a corporation. The odd idea that the central government is a person or corporation can be traced to the monarchical origins of the English constitution. In the medieval period it was said that the Monarch had 'two bodies'—one official and the other personal. The modern official manifestation of the Monarchy is central government. The term 'prerogative' is sometimes confined to powers that central government has by virtue of being the government, but at other times it is used to refer also to powers that central government has by virtue of being a person or corporation.[14] It is generally considered that courts lack the authority to create new prerogative powers—the list of prerogative powers is closed. However, the courts do have authority to determine the content and limits of existing prerogatives, which may be unclear. If a court feels that a particular act not authorized by statute requires

[14] M Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25 *OJLS* 97. Powers of the former type are sometimes said to involve the exercise of '*imperium*' and powers of the latter type to involve the exercise of '*dominium*'.

positive legal authorization, it may be able to achieve this by extending an existing prerogative power into a new area.[15] However, prerogative powers only continue to exist to the extent that they have not been abolished or abridged by statute.[16]

The default principle of English law is that a private individual or corporation may do anything that the law does not prohibit. In some respects, central government, being a person or corporation, enjoys the same freedom of action—the same *de facto* power. For example, in *Malone v Metropolitan Police Commissioner*[17] it was held that since there was no law against telephone tapping and it did not amount to any common law wrong, it was not unlawful for the police to engage in it. In another case it was held that the government was free to compile a list of people considered unsuitable to work with children.[18] Many schemes for the payment of ('*ex gratia*') compensation without admission of liability are based simply on the government's freedom to make gratuitous payments out of its own resources. The default principle has been called a 'third source' of government power.[19]

However, the default principle has only limited application to central government. For example, it may not levy taxes or appropriate public money without the authority of an Act of Parliament;[20] it may not deprive an individual of personal liberty without positive legal authority; or search or seize[21] private property except with legal authority. But there is no identifiable general principle that determines which acts of government require positive legal authorization in order to be lawful.[22]

The third meaning of the word 'power' is 'discretion'. The latter concept is complex,[23] but for our purposes we can say that the essence of

[15] On one view, this is what was done in *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1989] QB 26, noted by R Ward, 'Baton Rounds and Circulars' [1988] *CLJ* 155.

[16] *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

[17] [1979] Ch 344. For an account of the current law on interception of communications, see D Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford: Oxford University Press, 2002), 660–83.

[18] *R v Secretary of State for Health, ex p C* [2000] HRLR 400.

[19] BV Harris, 'The "Third Source" of Authority for Government Action' (1992) 109 *LQR* 626. For inconclusive judicial discussion of the nature and extent of 'third-source' powers see *Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government* [2008] 3 All ER 548.

[20] But see JF McEldowney, 'The Contingencies Fund and the Parliamentary Scrutiny of Public Finance' [1988] *PL* 232.

[21] *Burmah Oil Ltd v Lord Advocate* [1965] AC 75.

[22] See A Lester and M Weait, 'The Use of Ministerial Powers without Parliamentary Authority: the Ram Doctrine' [2003] *PL* 415.

[23] D Galligan, *Discretionary Powers* (Oxford: Clarendon Press, 1986), ch 1.

discretion is choice. In this sense of the word, a body cannot have both a power and a duty in respect of the same action. A duty is something black and white: once we know what it is that a body has a duty to do and what it actually did, we can say either that the authority has performed its duty or that it has not. Furthermore, it is not for the duty-bearer to decide what action the duty requires; some other (superior) body will have the power to decide exactly what the duty-bearer has to do.

Discretionary powers are quite different. They give the power-holder a choice. That choice is not unlimited; as we will see, it is limited by various principles of administrative law. But within the limits laid down by those principles, it is for the power-holder to decide what to do. Failure to act in a particular way will not be an abuse of power unless the decision not to act in that way is beyond the limits of the discretion given to the power-holder. The choice given to a power-holder may relate to one or more aspects of an activity. It may be a choice as to whether to do X or not; or as to whether to do X, Y, or Z; or as to how or when to do X.

The distinction between discretions and duties is less clear in practice than in theory. As we have seen, the notion of a duty entails that someone other than the duty-bearer must decide what action the duty requires. The legislature may do this by couching the duty in clear, concrete, and specific terms. But many statutory duties are couched in more-or-less vague terms that leave it unclear what the duty-bearer must do in concrete situations. For example, fire authorities have a 'target duty'[24] to 'make provision for fire-fighting services';[25] and road authorities have a duty 'to take such measures as appear to . . . be appropriate to prevent accidents'.[26] Courts are generally wary of deciding what specific actions are required by target duties. The assumption seems to be that the legislature intended the uncertainty inherent in such duties to be resolved by the duty-bearer, not by the court. Typically, performance of target duties involves decisions (which may be politically contentious) about the deployment of scarce resources, and courts are unwilling to tell statutory authorities how to allocate their limited budgets between competing activities. This creates the theoretically paradoxical position that the duty-bearer is allowed to decide what the duty requires it to do.

[24] This useful term was coined by Woolf LJ in *R v Inner London Education Authority, ex p Ali* (1990) 2 Admin LR 822, 828.

[25] *Capital and Counties Plc v Hampshire CC* [1997] QB 1004, 1026.

[26] *Larner v Solihull MBC* [2001] LGR 255.

The way the courts have resolved this paradox is effectively to interpret target duties as having both mandatory and discretionary elements. Take, for example, the provision that imposes a duty on local authorities to provide 'sufficient schools'. Courts have interpreted this provision as requiring local authorities to provide minimum educational facilities; and the court will decide what this minimum is. But beyond that minimum it will be left to the authority to decide what to provide. For example, in *Meade v Haringey LBC*[27] the issue was whether the council had breached its duty by closing its schools during a strike of ancillary workers. The court said that the decision whether to close the schools was within the area of discretion left to the authority. This technique of interpreting a duty as a duty-coupled-with-a-discretion, although strictly illogical (how can a duty be discretionary?), is a useful device to enable courts to avoid making decisions that they feel uncomfortable about making for one reason or another. The mandatory element in such cases may be defined in terms of the concept of 'unreasonableness':[28] was the authority's failure to take the particular action in question so unreasonable that no reasonable authority would have failed to do it? If so, it was under a duty to take that action. If not, the failure to take the action was within the area of discretion given to the authority by the legislation.

3.3 LAW, FACT, AND POLICY

Finally in this chapter we need to examine one of the most difficult sets of distinctions relevant to understanding the various functions that public administrators perform between issues of law, issues of fact, and matters of policy. Finding facts, and identifying and interpreting relevant legal rules, are central to implementation and adjudication, both of which also involve applying relevant law to the facts of individual cases. Moreover, law is one of the most important tools that governments use to implement policy—ie, their goals, purposes, and objectives.

Law is located in primary and secondary legislation and in decisions of courts and tribunals. Facts are found by gathering evidence about what has happened in the world. Policy is expressed in soft law and in other forms of communication, both written (eg ministerial press releases) and oral (eg impromptu media statements). Administrative law

[27] [1979] 1 WLR 637. [28] See 7.3.1.

principles guide administrators in identifying and interpreting law, finding facts, and ascertaining and implementing policy. These distinctions are also relevant to the accountability of administrators for the way they use their powers and implement government programmes. For instance, a bureaucratic decision may be subject to an appeal to a court if the appeal raises a 'point of law'. Just as importantly, the degree of control exercised by courts and tribunals over administrative decision-making depends, in important respects, on whether the decision is challenged on legal, factual, or policy grounds. For instance, administrators have less freedom (or 'autonomy') in interpreting relevant law than in finding relevant facts or implementing policy. In general terms, then, the distinctions between law, fact, and policy are relevant to the scope of bureaucratic discretion and to the availability of various modes of accountability.

3.3.1 LAW AND FACT

In practical terms, the distinction between law and fact is reasonably straightforward: a question of fact is a question about the existence of some phenomenon in the world around us; a legal question is a question about rules and norms found in primary and secondary legislation and in decisions of courts and tribunals.[29] But this practical approach is not of much help when the issue is how to categorize the process of applying law to facts which is, after all, the reason why bureaucrats find facts and ascertain law. Is a decision about whether and how a rule applies to particular facts a decision on an issue of law or a decision on an issue of fact?

Before tackling this question, we should ask why it is framed in terms of the distinction between law and *fact*. After all, there is a third possibility—that it is neither a question of law nor of fact but of policy. Policies are the objectives and purposes of law, and law is a tool for promoting those objectives. It seems plausible to think that whether a particular law applies to a particular set of facts might depend on the law's purpose. Then the question would be, is the process of applying law to facts a matter of law or policy? We will return to the distinction between law and policy in 3.3.2.

[29] However, the distinction is much less straightforward in theory. Legal 'positivists' say that law is a matter of 'social fact'. According to this view a question of law is a question about certain types of facts—principally, facts about what certain officials and institutions have done. Moreover, not all laws are norms: for instance, 'There shall be a Supreme Court' is not a norm.

There are two main approaches to answering our initial question about whether applying law to facts raises an issue of law or an issue of fact. These might be called the analytical approach and the strategic approach. In *Edwards v Bairstow*[30] the question was whether a joint venture to purchase a spinning plant was 'an adventure in the nature of trade' within the Income Tax Act. On the analytical approach, the details of the business arrangement are matters of fact, and the meaning of the phrase 'adventure in the nature of trade' is a matter of law. But how are we to classify the composite question of whether the factual arrangement entered into by the taxpayer satisfied the legal definition of an adventure in the nature of trade?

One view is that such composite questions about whether particular facts fall within particular statutory language (sometimes called 'mixed questions of fact and law') are questions of law.[31] Others, however, point out that in many cases different opinions can reasonably be held about how to answer such questions. For example, reasonable people may differ about whether a flat is 'furnished', or whether a house is 'unfit for human habitation', or whether a particular piece of land is 'part of a park'. In *Edwards v Bairstow* Lord Radcliffe said that any reasonable decision on such an issue should be treated as a decision on a question of 'fact and degree' rather than as a decision on a question of law.[32] Similarly, some (but not all) say that when a word in a statute bears its 'ordinary' meaning, its application to a particular case is a question of fact, not law.[33]

According to the analytical approach, the first question to ask is whether an issue is one of law or of fact. The answer to this question will determine issues such as how much discretion the administrator had in resolving the issue or which modes of accountability are available to challenge the decision. However, people may disagree about whether particular issues should be classified as matters of law or matters of fact. An attempt might be made to iron out such differences of classification by making the definitions of questions of law and questions of fact respectively more detailed and complex. But it is not clear that this would solve the problem. There is, *ex hypothesi*, no obvious way of

[30] [1956] AC 14; see also *O'Kelly v Trusthouse Forte Plc* [1984] QB 90.

[31] eg Lord Denning MR in *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56; Lord Hope in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, [6]. For a clear exposition of the analytic approach see E Mureinik, 'The Application of Rules: Law or Fact?' (1982) 98 *LQR* 587.

[32] See also *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929.

[33] *Brutus v Cozens* [1973] AC 854.

deciding whether mixed questions of fact and law are questions of law or questions of fact. Nor is there an obvious way of deciding whether a word in a statute is being used in its 'ordinary' meaning so that its application to particular facts is a question of fact rather than law.

Points such as these form the foundation of the second approach to the law/fact distinction, namely the strategic approach. This approach treats the law/fact distinction not so much as a description of what is involved in applying law to fact but rather as a formula for expressing value-judgments about the appropriate scope of bureaucratic discretion and accountability. For example, where the citizen appeals against an administrative decision 'on a point of law', as in *Edwards v Bairstow*, the result of adopting the 'fact and degree' classification is that the court will not allow the appeal unless it thinks that the decision was 'unreasonable'—that is, so unreasonable that no reasonable decision-maker properly understanding its powers could have reached it. The mere fact that the court might not agree with the decision will not be enough to justify allowing the appeal. On the other hand, classifying a question as one of law can be used to justify allowing the appeal merely on the ground that the court would have decided the issue differently. According to the strategic approach, courts first decide whether or not they want to give a remedy and then classify the issue at stake in order to achieve the desired result.

Courts and tribunals generally purport to adopt an analytical approach to distinguishing between law and fact; but this need not fatally undermine the strategic approach as a description of judicial behaviour because English judges are often loath to admit that their decisions about the scope of the legal accountability of public administrators are based on strategic considerations and value-judgments as opposed to 'legal principles'.

Understood strategically, the law/fact distinction is a tool for allocating decision-making power between administrators on the one hand and accountability institutions such as courts and tribunals on the other. So, for instance, limiting the scope of appeals from decisions of administrative agencies to cases that raise 'points of law' gives administrators more freedom in resolving issues of fact and policy than in resolving issues of law. In fact, administrators are generally required to answer legal questions 'correctly' as determined ultimately by a court. By contrast, they generally enjoy greater freedom to resolve issues of fact and policy differently from the way a court would. Both the legislature and the courts are involved in making such decisions about the allocation of decision-making power between administrators and accountability

institutions. For instance, it is by statute that appeals may be limited to points of law; but it is courts who ultimately decide whether or not an issue is one of law.

A consideration that weighs in favour of less rather than more bureaucratic discretion and more rather than less legal control over bureaucratic decision-making is the value of achieving consistency and uniformity of decision-making, especially where decisions on the same issue are made by various officials or agencies working independently of one another. Where there is no developed system for reporting and publishing decisions of such bodies, accountability institutions can play a significant role in ensuring uniformity of result. To treat like cases alike is, of course, a basic requirement of justice, and this gives uniformity a high value in our legal system.

A consideration that may favour more rather than less bureaucratic discretion and less rather than more legal control is that bureaucrats will typically have more experience of and expertise in the matters they deal with than accountability institutions have. Such experience and expertise is relevant to interpreting and applying legislation, finding facts, and implementing policy. A person with a mature understanding of the problems the legislation was designed to address and the factual background against which it operates is likely to be able to give it the meaning and operation which will best achieve the objectives of the legislator. A common criticism of courts in particular is that they lack a proper appreciation of the realities of day-to-day public administration. On the other hand, the argument from uniformity and the argument from expertise and experience obviously pull in different directions; and at the end of the day the job of assessing their relative weights may fall to an accountability institution such as a court, which will have no choice but to do that job in the way that it thinks best.[34]

[34] Contrary to the suggestion of T Endicott, 'Questions of Law' (1998) 114 *LQR* 292, the strategic approach does not suggest that a court decides whether or not to find for the applicant in a particular case according to its judgment about which party deserves to win. Rather, strategic use of the law/fact distinction involves assessing arguments for and against judicial control of the type of decision in question and type of decision-maker involved. Endicott calls this a 'normative' approach, and it is the one he favours. The main difference between his and the strategic approach appears to be terminological: for him, both the analytic and the strategic approaches are 'analytic'. But the former is an unsound analytic approach because it does not pay attention to the reasons why we distinguish between issues of law and issues of fact; whereas the latter is a sound analytic approach because it does. Endicott defines a question about the application of law to facts as a question of law if 'the law requires it to be answered in a particular way'. In effect, this means that a question of law is a question that the court thinks it should answer for itself rather than allowing the agency in question to answer provided it does so reasonably.

It is important to remember that decisions about the allocation of decision-making power between bureaucrats and accountability institutions will most commonly be made in the context of a decision implementing a particular public programme in a particular case. Sometimes courts (for instance) are criticized for the impact of their power-allocation decisions on the implementation of particular programmes. For example, it has been argued that in dealing with questions of land clearance, courts have more often intervened to protect the rights of landowners than to promote the public interest or greater public participation in land-use decisions.[35] It has also been suggested that courts have tended to require some groups (such as immigrants) more than others (such as police officers) to exhaust alternative remedies before making a claim for judicial review;[36] and have been more likely to place a narrow interpretation on the powers of a body such as the Commission for Racial Equality than on the powers of the likes of the Monopolies and Mergers Commission.[37] More generally, Griffith has argued that the judiciary as a group tends to espouse conservative rather than radical political views and that this creates a consistent, although not an invariable, bias in its dealings with the government.[38]

Such criticisms remind us that in order fully to understand legal regulation of public administration we must pay attention not only to the functions of the bureaucracy but also to its tasks: border control, social security, education, and so on. Decisions about where the power of decision should lie may be explained in part by the context in which the matter arises and by the issues at stake. Statutes that establish public programmes can never fully specify how those programmes should be implemented. The prime responsibility for implementation 'on the ground' rests with the administration. However, the application of general principles of administrative law by accountability institutions can significantly affect the detailed implementation of public programmes. In deploying general principles, accountability institutions not only promote the values that underlie those principles (such as uniformity and expertise) but also indirectly participate, albeit sporadically and typically unsystematically, in the tasks of administration and the implementation of public programmes.

[35] P McAuslan, *The Ideologies of Planning Law* (Oxford: Pergamon, 1980), 84ff.

[36] S Sedley, 'Now You See It, Now You Don't: Judicial Discretion and Judicial Review' (1987) 8 *Warwick Law Working Papers*, No 4, 4.

[37] JAG Griffith, *The Politics of the Judiciary*, 4th edn (London: Fontana, 1991), 139.

[38] Ibid, 5th edn (London: 1997), chs 4, 8, and 9. See also JAG Griffith, *Judicial Politics Since 1920: A Chronicle* (Oxford: Blackwell, 1993).

3.3.2 LAW AND POLICY

To make a decision 'according to law' is to make it by applying a rule or principle derived from legislation or common law ('hard law'); whereas to make a decision 'on policy grounds' is to make it on the basis of some political, social, or economic value (which may be embodied in soft law). 'Policy' refers to the goals, values, and purposes of the public programmes which it is the job of public administrators to implement and which inform, justify, or underlie the provisions of legislation that creates institutions of public administration and confers functions, powers, and duties on the bureaucracy. Law in general, and legislation in particular, is one means of promoting policies; and embodying policies in (secondary) legislation is one of the main functions of the executive.

The distinction, between law on the one hand and the policy that informs it (or which it embodies) on the other, is by no means straightforward. The job of identifying law often involves not simply locating a statutory provision and applying it mechanically to a set of facts. Statutes are often unclear, ambiguous, or incomplete and must be 'interpreted' before being applied. Statutory interpretation is a core function of the administration, and statutory provisions may be reasonably open to more than one interpretation. Issues of statutory interpretation are often considered to provide paradigm instances of issues of law. However, it is a basic principle of statutory interpretation that when the words of a statute are unclear, ambiguous, or incomplete, reference may be made to the 'purpose' of the provision. Moreover, reasonable people may disagree about whether the words of a statute are unclear, ambiguous, or incomplete and, therefore, about when reference to purpose is permissible. Put differently, people may disagree about how much of the legislator's purpose is actually embodied in the words of the legislation. As a result, we might say, many questions of statutory interpretation are 'mixed questions of law and policy', having partly to do with the meaning of the words used and partly with their underlying purpose.

Like the law/fact distinction, the distinction between law and policy is impossible to draw analytically and can be used strategically.[39] It plays

[39] eg Safeguarding Vulnerable Groups Act 2006, s 4(2): 'the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact'. The term 'policy' is sometimes used not to describe aims, purposes, and objectives but rather soft-law instruments in which they may be embodied. In this sense, the distinction between law and policy is that between hard law and soft law. It is relatively easy to distinguish analytically between soft law and hard law.

an important part in regulating the scope of bureaucratic discretion because administrators have more freedom in deciding issues of policy than in resolving issues of law.

3.3.3 FACT AND POLICY

There are two distinct processes required of the administrator when addressing the factual element of a decision. One is to make sure that any relevant finding of fact is adequately supported by evidence;[40] and the other is to take account of all relevant facts and ignore any irrelevant fact.[41] In relation to both processes, identifying issues of fact and distinguishing fact from policy can be problematic.[42] A good example in relation to the first process is the question of whether a worker is an 'employee' or an 'independent contractor'.[43] On its face, this might look like a question of fact. However, whether a worker is an employee or an independent contractor depends only partly on the factual details of the relationship between the worker and the employer, to which evidence is relevant. It depends partly on legal principles, such as the 'control test' (ie it is partly a question of law). The classification of the employee is also influenced by policy factors. This is made clear by the rule that the parties to a contract cannot conclusively stipulate that the worker is not an employee and thereby, for example, deprive the worker of legal protections enjoyed by employees but not by independent contractors. Rather, the effect of such a stipulation depends on the particular protection in issue and its purpose: a worker may be an employee for one purpose but an independent contractor for another. Whether a worker is an employee or an independent contractor is a 'mixed question of fact, law and policy'. By focusing on one element of the question rather than another, it may be classified as fact, law, or policy; and as we have seen, this can affect the freedom of an administrator to classify the worker.

The second ('relevance') requirement is an application of a more general principle requiring decision-makers not to take account of irrelevant factors and not to ignore relevant ones.[44] It is not possible to

[40] The distinction between issues of fact and issues of law is further complicated by the possibility that finding a fact to exist on the basis of totally inadequate ('no') evidence will be classified as an 'error of law'.

[41] As to the latter see, eg, *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330; and generally T Jones, 'Mistake of Fact in Administrative Law' [1990] *PL* 507.

[42] D Galligan, *Discretionary Powers* (Oxford: Oxford University Press, 1986), 314–20.

[43] *O'Kelly v Trusthouse Forte Plc* [1984] QB 90.

[44] See 6.5.1.

distinguish between relevant and irrelevant factors without identifying the purposes or objectives by reference to which relevance is to be judged. Conversely, all questions of purpose arise in particular factual contexts: particular powers are given to deal with particular situations. Policy-making involves applying values to factual premises to produce statements of purpose. Fact and policy are intimately linked. The distinction between them is impossible to draw analytically and can be deployed strategically to allocate decision-making power between bureaucrats and accountability institutions.

To summarize the main point made in this section: general principles of administrative law constrain the implementation of public programmes by the bureaucracy. However, they also allocate decision-making power between the bureaucracy and the accountability institutions (especially courts) that apply those principles and decide who has the last word on particular issues. Indeed, courts allocate power not only between themselves and the bureaucracy but also between the bureaucracy and the legislature. The prime task of the administration is to implement statutory provisions. Because statutes are often unclear, ambiguous, or incomplete, administrators have a degree of discretion in implementing the statutory mandate. In deciding the scope of that discretion, accountability institutions allocate power between the legislature, the administration, and themselves.

3.4 CONCLUSION

Public administrators make and implement hard and soft law, and to a limited extent they adjudicate disputes arising out of these activities. They exercise discretion and have duties to discharge. They find facts, and they interpret hard and soft law and promote their underlying purposes. Administrative law norms give bureaucrats instructions about how to perform all of these functions and accountability institutions police compliance with those norms. The remaining chapters in this Part explore the nature and content of those norms.

Section A

Public-Law Norms

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4

Procedure

In making decisions, public administrators must follow fair procedure. In general, the requirements of fair procedure differ according to whether the administrator is making a decision that affects a particular individual or individuals or is, by contrast, making a general rule. In this chapter, these two different functions will be referred to as decision-making and rule-making respectively.

4.1 FAIR PROCEDURE IN DECISION-MAKING

4.1.1 THE COMMON LAW

There are three main sources of rules of fair procedure: legislation, the common law, and the ECHR.[1] In the common law there are two main principles of fair procedure: the rule against bias, which requires that a decision-maker must not be judge in his or her own cause (*nemo iudex in sua causa* in Latin); and the 'fair hearing rule' (*audi alteram partem* in Latin). Traditionally, these two principles were referred to as the 'rules of natural justice'. This term might be thought to suggest that the principles have some objective validity and that through them the law is simply giving effect to self-evident propositions about how decisions ought to be made. There is a certain amount of truth in this. For instance, we may rightly be suspicious of a decision for or against a party made by a person who has an interest, financial or otherwise, in the decision. It is not necessarily the case, of course, that an interested decision-maker will, because of that interest, make an unfair decision. The decision-maker may succeed in standing back from the situation and deciding purely on the merits of the case. However, the point of this rule is not only that 'justice' should be done but also that it should be seen to be done. What matters is not only that the decision-maker was

[1] EU law may also be relevant: R Gordon, *EC Law in Judicial Review* (Oxford: Oxford University Press, 2007), ch 10.

not actually biased but also that there was no appearance of bias. Of course, this does not guarantee that justice will be or has been done, any more than the appearance of bias necessarily leads to a biased decision. However, while impartiality and the appearance of impartiality carry no guarantee of a fair decision, they do increase the chance of that outcome.

Much the same could be said of the fair hearing rule: giving a person a fair hearing does not guarantee that the decision will be fair; but a fair hearing does increase the chance of a fair outcome. Moreover, fair hearings are valuable not only instrumentally for the contribution they make to fair outcomes but also intrinsically. Giving a person a fair hearing shows them respect as an individual; and empirical research has demonstrated that people value fair procedure for its own sake and are more prepared to accept adverse decisions if they have been treated fairly.[2]

The language of natural justice has given way to that of 'procedural fairness'; but the idea that procedure has intrinsic value survived the shift, even though at times some judges have been inclined to say that a decision can be 'fair' even if not reached by a 'fair' procedure—a move that was, perhaps, more difficult when procedural requirements were hallowed with the tag of naturalness. But in other respects, the linguistic shift was not without significance. For instance, in the early twentieth century there was judicial support for the idea that the rules of natural justice applied only to decision-makers that had a 'duty to act judicially' (although the meaning of this phrase was far from clear). The shift to fairness was associated with the abandonment of this idea and the application of procedural obligations to all public decision-making, whether 'judicial' or not. On the other hand, the language of fairness also allowed this expansion of the scope of the principle of procedural fairness to be balanced by greater flexibility in determining what the principle required in relation to particular types of decisions and in particular situations.

4.1.1.1 The rule against bias

A decision that has actually been affected by bias on the part of the decision-maker will, of course, be illegal[3] (or 'unlawful') and 'invalid'. A decision-maker is actually biased 'if motivated by a desire to favour one side or disfavour the other'[4] 'for reasons unconnected with the

[2] TR Tyler, *Why People Obey the Law* (Princeton, NJ: Princeton University Press, 2006).
[3] In the administrative law sense, of course, not the criminal law sense.
[4] *R v Gough* [1993] AC 646, 659 (Lord Goff of Chieveley).

merits of the issue',[5] such as 'prejudice, predilection or personal interest'.[6] Regardless of actual bias, a decision-maker who is a party to the matter to be decided, or who has a financial interest in the decision to be made (or, exceptionally, a non-financial interest) is 'automatically disqualified' as a decision-maker if the decision has not yet been made; and if a decision has been made, it will be invalid.[7] In any other case, 'the court must first ascertain all the circumstances that have a bearing on the suggestion that the [decision-maker] was biased . . . then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility . . . that the tribunal was biased'.[8] In both 'automatic disqualification' and 'real possibility' cases, the concern is not about actual bias (whether justice was done), but about the appearance of bias (whether justice was seen to be done). In cases of automatic disqualification, it does not matter that the decision-maker did not know of the interest at the time the decision was made because the basis of the disqualification is the existence of the interest, not its potential effect on the decision-maker's mind. By contrast, in other cases the ground of invalidity is the 'real possibility', objectively judged, that the decision was biased—which could only happen if the decision-maker was aware of the relevant circumstances.

In automatic disqualification cases, the crucial question is whether the interest in question is of such a nature as to justify disqualification of the decision-maker (if the decision has not yet been made) or invalidation of the decision (if it has). For instance, in the notorious *Pinochet* case,[9] the House of Lords held that one of the Law Lords was automatically disqualified by reason of involvement with a charity that had been allowed to intervene in proceedings to secure the extradition of a former president of Chile to stand trial for alleged abuses of human rights. In 'real possibility' cases, the critical factor is how the concept of the 'fair-minded and informed observer' is interpreted and applied and how much knowledge of the circumstances of the case is attributed to the notional observer. For example, in one case the court said that 'the informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction' such as 'the practice of judges and

[5] *R v Inner West London Coroner, ex p. Dallaglio* [1994] 4 All ER 139, 151 (Simon Brown LJ).
[6] Ibid, 162 (Sir Thomas Bingham MR).
[7] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* [2000] 1 AC 119; *In re P* [2005] 1 WLR 3019.
[8] *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, [85] (CA); *Porter v Magill* [2002] 2 AC 357, [103] (Lord Hope).
[9] See n 7 above.

advocates lunching and dining together at the Inns of Court'![10] In another case it was said that 'the observer may... be credited with knowledge that a Recorder, who in a criminal case has sat with jurors, may not subsequently appear as counsel in a case in which one or more of those jurors serve'![11] A realistic approach might be that the concept of the 'fair-minded and informed observer' is a device to legitimate the court's own assessment of the circumstances and merits of the case before it.[12]

The law in this area is somewhat confusing and its conceptual structure is unsatisfactory because of the relationship between the issues of whether the decision-maker knew of the conflict of interest and how the fair-minded observer would react to it. If the decision-maker was unaware, the only question is whether the interest was significant enough to justify disqualification of the decision-maker or invalidation of the decision. However, although the real-possibility test is, in principle, applied only to cases where the decision-maker knew of the conflict of interest, it actually provides a criterion for assessing the significance of the interest independently of whether or not the decision-maker knew of the conflict. In fact, the important distinction is not between cases where the decision-maker knew of the conflict of interest and cases of ignorance but between types and degrees of interest. Thus, 'indirect' or 'remote' or 'insignificant' financial interests will not lead to disqualification or invalidation either in cases where the decision-maker was aware[13] or in cases of ignorance. Disqualification or invalidation would not be a reasonable reaction to such cases, and this is why the fair-minded observer would not think that there was a real possibility of bias. Conversely, a significant financial interest will disqualify or invalidate whether or not the decision-maker knew of it; and if it was known, the fair-minded observer would, of course, perceive a real possibility of bias.

The same can be said of non-financial interests. Some non-financial interests—such as that in *Pinochet*,[14] or being closely related to one of the parties,[15] or hearing an appeal from one's own decision—are so

[10] *Taylor v Lawrence* [2002] 3 WLR 640, [61].

[11] *Lawal v Northern Spirit Ltd* [2003] ICR 856, [21].

[12] AA Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to Gough' (2009) 68 *CLJ* 388.

[13] *R v Mulvihill* [1990] 1 WLR 438; *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071.

[14] The fact that the case concerned the highest court in the system and also that it was highly sensitive were also, no doubt, influential factors.

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

significant that if known to the decision-maker, they would lead the fair-minded observer to perceive a real possibility of bias, but would also justify disqualification or invalidation even if the decision-maker was ignorant. By contrast, other non-financial 'interests' (such as having strong views or special expertise that is generally but not specifically relevant to the decision) will not justify disqualification or invalidation even if the decision-maker was aware of the conflict because a fair-minded observer would not perceive a real possibility of bias.[16]

Because the rule against bias is a common law rule, it may be excluded by statute; and a party can waive the right to have a tribunal that appears to be unbiased.[17] The acceptance of a tribunal that could reasonably be suspected of bias would bind a person only if they had a free choice to accept or reject,[18] and probably only if the tribunal was not in fact biased. In some cases, necessity may justify disregard of the rule if all the available qualified decision-makers could reasonably be suspected of bias.[19] This would not mean, however, that if it could be shown that the decision-maker had in fact acted with partiality, the decision would not be invalidated.

4.1.1.2 What is a fair hearing?

A great many procedural protections might be demanded in the name of a fair hearing—notification of the date, time, and place of the hearing, notification in more-or-less detail of the case to be met, adequate time to prepare one's case in answer, access to all material relevant to one's case, the right to present one's case orally or in writing or both,[20] the right to examine and cross-examine witnesses (including one's opponent), the right to be represented (perhaps by a qualified lawyer), the right to have a decision based solely on material which has been available to (and so answerable by) the parties, the right to a reasoned decision which takes proper account of the evidence and addresses the parties' arguments. However, it has long been recognized that these various procedural

[16] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *R v Secretary of State for the Home Department, ex p Al Hasan* [2005] 1 All ER 927, [9]–[11] (Lord Rodger of Earlsferry). This issue is particularly important in relation to lay members of tribunals who are chosen because they have relevant skills, knowledge, or experience: *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781.

[17] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

[18] *Jones v DAS Legal Expenses Insurance Co Ltd* [2004] IRLR 218.

[19] However, the decision of the ECtHR in *Kingsley v UK* (2002) 35 EHRR 177 casts doubt on the compatibility of the doctrine of necessity with the ECHR: I Leigh, 'Bias, Necessity and the Convention' [2002] *PL* 407.

[20] Concerning oral hearings see *Booth v Parole Board* [2010] EWCA Civ 1409.

protections may not all be appropriate to decision-making in public administration. The law's basic approach is that the requirement of a fair hearing (much more than the rule against bias) should be applied flexibly and with sensitivity to circumstances. It is not possible to spell out the characteristics of a fair hearing in the abstract. This can make life difficult for the administrator, who may be left in real doubt about what the law requires in particular cases.

That said, by focusing on decisions of courts and tribunals dealing with particular classes of decisions in particular areas of public administration, it would be possible to get some guidance on the legal requirements of administrative procedure. However, in this book we must satisfy ourselves with identifying various reasons why it has not been thought appropriate to apply the fair hearing requirement universally to decision-making in public administration. One is that hearings are expensive of both time and money. So, for example, it was held in *Re HK*[21] that given the circumstances in which airport immigration officers work and the fact that they have to make on-the-spot decisions whether to allow people to enter the country, an officer could not be expected to conduct a full-scale inquiry in the nature of a trial as a preliminary to deciding whether a person claiming a right to enter the UK was over 16 years of age. All that could be required was that the officer should tell the immigrant that they were suspected of being over 16 years of age and give the immigrant a chance to dispel the suspicion. In general terms it seems reasonable that the right to a hearing should not be seen as something to be secured at any cost. Elaborate procedures may be out of place when deciding relatively unimportant matters.[22] Timeliness in the conduct of government business is important: justice delayed may be justice denied. On the other hand, the fair hearing rule is partly designed to promote fair outcomes, which are themselves an aspect of good and efficient government.

A second reason for doubt about the universal appropriateness of the various requirements of a fair hearing in administrative contexts is that they are, in essence, a skeletal version of the elaborate rules of judicial procedure found in their fullest form in the Civil Procedure Rules (CPR). English judicial procedure takes the form it does because our courts operate under what is called the 'adversary system', which is usually contrasted with an 'inquisitorial' (or 'investigatory') system. The basic idea underlying the adversary system is that the truth is best

[21] [1967] 2 QB 617.
[22] eg *Mclnnes v Onslow-Fane* [1978] 1 WLR 1520.

discovered by allowing parties who allege conflicting versions of what happened (or of what the law is) each to present, in its strongest possible form, their own version of the truth, and leave it to an impartial third party to decide which version more nearly approximates to the truth. An inquisitorial system depends much more on the decision-maker actively seeking and eliciting evidence with a view to deciding where the truth lies.[23]

While impartiality is equally important in both systems, the rules of procedure that determine how the case is to be presented and decided will be different according to whether an adversarial or a non-adversarial mode of discovering the truth is adopted. In particular, procedural rules will reflect the fact that under the adversarial model the decision-maker contributes very little to the fact-finding process whereas under an inquisitorial system, the decision-maker's input is much greater. Furthermore, the adversary system tends to operate in a rather formal and technical way (partly because people in conflict usually want to stand on their rights), while inquisitorial methods of fact-finding can be (although they are not always) more informal. The fact-finder can attempt to foster a spirit of cooperation in the search for truth which is inimical to the adversary system.

There is one very obvious reason why adversarial procedures might not be entirely appropriate for administrative decision-making. The adversarial model is tripartite: it assumes two competing parties and an impartial third-party decision-maker. By contrast, in many administrative contexts, there are only two parties: an applicant (for a benefit or a licence, for instance) and a decision-maker. In that context, certain procedural steps (such as cross-examination of witnesses) might simply be inapplicable. More generally, investigation by the decision-maker may seem more appropriate and less problematic in two-party than in three-party situations; and that may, in turn, affect the need for or appropriateness of an oral hearing, for instance, or allowing the subject of the decision to be represented.

A third reason why the requirement of a fair hearing can present difficulties in the context of public administration is that it may require the government to disclose information which it would rather keep secret. This concern has become particularly significant since 9/11 in the context of detention and deportation of suspected terrorists, and we will consider it in more detail later.

[23] For a judicial discussion see *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890, esp 903–8 (Lord Donaldson).

A fourth reason why the fair hearing rule may seem problematic concerns its relationship with statutory procedural rules. Suppose a statute prescribes a procedure that is less protective of the individual than the common law requirement of a fair hearing. Should the statutory procedure be treated as exhaustive of the individual's procedural rights or should the common law reinforce the statutory protection by requiring a fair hearing? There is no simple answer to this question because it can often be argued that there are good reasons why the statutory protection is less than what the common law would provide. Should courts defer to the legislature's views about fair administrative procedure or should they stand their ground?

4.1.1.3 When is a fair hearing (not) required?

4.1.1.3.1 The nature of the affected person's interest

In *Ridge v Baldwin*[24] Lord Reid said that any body having the power to make decisions affecting rights[25] was under a duty to give a fair hearing. Unfortunately, the term 'rights' is a vague one. Clearly, it covers property rights[26] and (at least some) statutory rights.[27] It does not necessarily include contractual rights. For instance, according to the common law of contract, an employee can be dismissed without being given a hearing.[28] One reason for this appears to be that an employee owes duties only to the employer and not to the public at large, and so there is no relevant public interest that would justify an application of the requirements of procedural fairness, which are seen as part of public law. By contrast, an employee (sometimes called an 'officer') who does have responsibilities towards the public as well as towards the employer (eg a police officer) cannot be removed from office without a fair hearing. It is by no means easy to decide in some cases whether the public's interest in a particular activity is strong enough to justify treating a practitioner of that activity as a public officer.[29]

One explanation for the distinction between employees and officers is that the law is unwilling to enforce a contract of service by requiring an

[24] [1964] AC 40.

[25] A person may have a right to be heard even if they are not the subject of the decision, if they will be indirectly affected by it: *R v Life Assurance Unit Trust Regulatory Organisation, ex p Ross* [1993] QB 17.

[26] eg *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

[27] eg the right to complain of unlawful racial discrimination: *R v Army Board of the Defence Council, ex p Anderson* [1992] QB 169.

[28] *Ridge v Baldwin* [1964] AC 40.

[29] This issue has generated a lot of litigation in the context of determining the availability of judicial review: see 11.3.5.

employer to continue employing an employee they no longer want. To hold a dismissal invalid for breach of procedural fairness amounts to an order for reinstatement. The trouble with this explanation is that it proves too much: even if the dismissed person is an officer a court may decline to order reinstatement.[30] Sometimes this difficulty does not arise because the employee's interest is not in reinstatement but, for example, in preserving pension rights that are dependent on the worker's not having been validly dismissed,[31] or in clearing his or her reputation.

At all events, the line between dismissals of purely private concern and those of sufficiently public concern is a very hazy one. Further, it seems clear that although at common law the dismissal of an employee cannot be challenged for failure to comply with the fair hearing rule, such a failure can make a dismissal 'unfair' under statutory provisions concerning unfair dismissal.[32] Since the court has power under the legislation either to award compensation for unfair dismissal or to order reinstatement,[33] there seems little to justify adherence to the traditional distinction between servants and officers.[34]

Although the contractual rights of an employee may not be protected by the fair hearing rule, it appears that there may be an obligation to observe the rules of procedural fairness even in the absence of a contract between the claimant and the decision-maker, if the claimant's livelihood is at stake.[35] The 'right to work' is a right in the relevant sense for the purposes of Lord Reid's formula even though it is not enforceable against any particular individual but is in the nature of a 'fundamental human right'.[36]

In *McInnes v Onslow-Fane*[37] Megarry VC drew a distinction between three types of case according to the nature of the interest at stake. In what he called the 'forfeiture cases' the claimant is deprived of some right or position which he or she already holds; where, for example, a person is expelled from a society or an office. In such cases the claimant is entitled to a high degree of procedural protection. A high degree of protection would also be due in cases where the claimant was

[30] eg *Chief Constable of North Wales v Evans* [1982] 1 WLR 1155.
[31] eg *Ridge v Baldwin* [1964] AC 40.
[32] Employment Rights Act 1996, Part X.
[33] See generally *Polkey v Dayton* [1988] AC 344.
[34] *R v British Broadcasting Corporation, ex p Lavelle* [1983] 1 WLR 23, 31–6.
[35] *McInnes v Onslow-Fane* [1978] 1 WLR 1520.
[36] See *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487; *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242 (freedom of contract and movement).
[37] [1978] 1 WLR 1520.

complaining of having been the victim of some serious wrong, such as unlawful racial discrimination;[38] or where a person is facing a serious charge of misconduct. In 'legitimate expectation cases' the claimant seeks the renewal or confirmation of some licence, membership, or office already held. In such cases, apparently, the claimant would be entitled to be told, before being refused renewal or confirmation, the grounds on which the application was to be refused so that he or she could say something in reply or defence. Thirdly, in 'application cases' a person seeks a licence, membership, or office which has not previously been held. Here the decision-maker's only obligation is to act 'fairly'. It must reach its decision honestly and without bias or caprice (ie without abusing its decision-making power); but provided it does so, it is under no duty to tell the claimant even the gist of the reasons for its refusal of the application, or to give the claimant a chance to address it unless, perhaps, the refusal of the licence would cast a slur on the claimant's character (as in the *Gaming Board* case below).

This exposition raises difficulties of fundamental importance. First, the distinction between expulsion, expectation, and application cases seems to run counter to ideas such as the right to work. In each of these types of case a person's livelihood may be at stake. The same objection can be levelled at the concept of a privilege. In *R v Gaming Board for Great Britain, ex p Benaim & Khaida*[39] the claimants sought to challenge the refusal of a certificate necessary to support an application for a licence to run a gaming establishment. Lord Denning said that since the claimants were seeking a privilege rather than enforcing a right, the Board had no duty to give them detailed reasons for the refusal of the certificate, but only to tell them its impressions and give them a chance to disabuse the Board if the impressions were wrong. Yet the grant of the certificate was essential to the applicants' ability to earn their living by running a lawful casino. It is undesirable that the law concerning procedure should contain within it concepts that pull in opposite directions and can be manipulated to support whatever outcome accords with a court's view of the 'merits'. It would be better to tailor the right to procedural protection according to the effects on the applicant of denial of the application, regardless of whether the claimant's interest was technically a right, a legitimate expectation, or a 'mere privilege'.[40] If a person's livelihood or reputation is at stake they deserve a fair hearing.

[38] *R v Army Board of the Defence Council, ex p Anderson* [1992] QB 169.
[39] [1970] 2 QB 417.
[40] See eg *R v Norfolk CC, ex p M* [1989] QB 619.

A second unfortunate aspect of Megarry VC's approach in *McInnes* is its use of the concept of legitimate expectation, which has at least three different meanings. First, it may refer to an interest (eg in being granted parole,[41] or in having a licence renewed, or in not having an immigration entry permit revoked before its expiry date[42]) which is less than a right but more substantial than the mere hope of a favourable exercise of a discretion. A legitimate expectation in this sense is an interest which is protected by the claimant's right to be told the gist of the case against them and to be given a chance to meet that case before a decision is made which adversely affects the interest. In Megarry VC's exposition, a legitimate expectation seems to require and deserve less procedural protection than certain more important interests, but in other cases no conclusion about the degree of procedural protection due has been drawn from the fact that the claimant's interest is a legitimate expectation. In this first sense, the term 'legitimate expectation' is redundant: the basis of procedural protection is the claimant's interest, and calling it a legitimate expectation does not make the interest any stronger.

Secondly, 'legitimate expectation' may refer to a situation in which an agency gives an undertaking,[43] or adopts and publishes a policy guideline,[44] or follows a course of conduct,[45] which justifies a person dealing with the agency in expecting that they will be given some sort of hearing before being treated in a particular way.[46] In this sense, the term 'legitimate expectation' is not redundant. It expresses the idea that a person may be entitled to some sort of hearing before a decision is made even if that person's interest in the decision, considered in isolation, might not require or justify a hearing.

The term 'legitimate expectation' has also been used in a third sense to refer to whether the claimant deserves a hearing or whether a hearing would do any good. A clear illustration of this meaning is found in Lord Denning's judgment in *Cinnamond v British Airports Authority*[47] where the authority

[41] *O'Reilly v Mackman* [1983] 2 AC 237.

[42] *Schmidt v Secretary of State for the Home Department* [1969] 2 Ch 149.

[43] *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299; *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.

[44] *R v Secretary of State for the Home Department, ex p Khan* [1984] 1 WLR 1337.

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

[46] There may be cases in which a person legitimately expects to be treated in a particular way rather than to be heard before being treated in a particular way: see 6.3.4. See also P Reynolds 'Legitimate Expectation and Protection of Trust in Public Officials' [2011] *PL* 330.

[47] [1980] 1 WLR 582. See also *Glynn v Keele University* [1971] 1 WLR 487. For a similar approach to the question of whether there should be an oral hearing see *Booth v Parole Board* [2010] EWCA Civ 1409.

sought to prohibit taxi-drivers, who had been prosecuted on numerous occasions for loitering and touting for business on airport property, from entering the airport. The drivers claimed that they ought to have been given a hearing before being excluded. Clearly something of considerable importance was at stake for them (in fact, in terms of Megarry VC's classification, the case looks like a forfeiture case, not a legitimate expectation case), but Lord Denning held that because of their repeated misconduct, and because of the fact that they must have known that this was why they were being banned, and since a hearing would have done them no good, they had no legitimate expectation of being heard. This is an objectionable use of the concept of legitimate expectation because it enables the court, in the name of procedural fairness, to judge the merits of the case.

There is, you might think, a lot to be said for avoiding the time and expense involved in a hearing when it seems clear that the hearing will not affect the outcome. If a decision is clearly good in substance, why should a claimant be able to improve an unmeritorious case by seeking to have the decision quashed on procedural grounds? There are four important objections to such an approach.[48] The first is that it gives insufficient weight to the important idea that justice should not only be done but also be seen to be done. Procedural rules are not merely of instrumental importance in producing fair decisions; they are also independently important in expressing respect for individuals whose interests are affected by decisions and in maintaining confidence in the decision-making process. Secondly, it assumes that the claimant will have nothing to say in his or her favour. Yet it cannot be concluded from the fact that there are certain things that the claimant could not say that there is nothing they could say, even if only in mitigation of penalty. Thirdly, if administrative decision-makers are given a message that their decisions are not liable to be quashed for procedural defects provided the decision itself is clearly 'right', they may be tempted to dispense with proper procedure in any case in which they think that the right answer is obvious. The trouble with this is that what seems obvious to one person is not necessarily obvious to another, especially without the benefit of hearing both sides. Good procedure aids good decision-making, and insisting on good procedure has a symbolic and hortatory effect which is independent of the merits of any particular case.

Fourthly, by pronouncing on the merits of cases courts take upon themselves a power of decision which has been entrusted to another

[48] *R v Chief Constable of Thames Valley Police, ex p Cotton* [1990] IRLR 344, 352 (Bingham LJ).

body, either by statute or contract. The classic position is that a court exercising supervisory jurisdiction should not, when presented with a challenge on procedural grounds, concern itself with the merits of the case. This principle was reaffirmed by the House of Lords in *Chief Constable of North Wales v Evans.*[49] Unfortunately it is not clear that judges will be prepared to exercise such restraint in cases where they are not in sympathy with the claimant.

The temptation to pronounce on the perceived merits of a case can take subtle forms. In *Calvin v Carr*[50] the Privy Council had to decide when an appeal properly conducted in accordance with the rules of procedural fairness will make good a defect in procedure at the original hearing. The case concerned a contractual decision-making power and the question was whether, as a matter of interpretation of the contract, the claimant was entitled to have two proper hearings or whether he must be taken to have agreed to accept the result of a proper hearing on appeal, despite an earlier improper one. The Privy Council said that this depended on 'whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties may fairly be taken to have accepted when they joined the association'. In other words, whether a proper hearing mends an improper one depends, in part, on whether the appeal produces what the court considers to be a substantially fair result.

4.1.1.3.2 The circumstances in which the decision is made

Besides the nature of the applicant's interest, the circumstances in which the decision is made are also relevant to the applicability of the fair hearing rule. For example, in the *Gaming Board* case[51] it was held that the claimants were entitled to know the gist of the case against them but not the details: the court was concerned that otherwise, confidential sources of valuable information would dry up or be put in danger.[52] In another case it was held that a prisoner was entitled to be told only the gist of reports prepared in connection with the annual review of his security classification, because the decision was 'administrative' in character, was subject to review, and was important not only to the prisoner but also for the general running of the prison.[53] In some cases the need to act quickly as a matter of emergency may justify dispensing with a full

[49] [1982] 1 WLR 1155; applied in *Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192.
[50] [1980] AC 574.
[51] [1970] 2 QB 417.
[52] The issue of protecting sources is examined in greater detail in Chapter 5.
[53] *R v Secretary of State for the Home Department, ex p McAvoy* [1998] 1 WLR 791.

hearing. For example, in one case it was held that a permit to carry passengers by air could be provisionally suspended with only a minimum of procedural protection if the safety of passengers was in issue.[54] In *Re HK*[55] the court was clearly influenced by the impracticability of requiring an airport immigration officer to mount a full hearing in the physical surroundings of an airport and given the volume of entrants to be processed.

Undoubtedly one of the most important and controversial circumstances affecting the obligation to disclose the case against an applicant is national security. For example, in the *GCHQ* case[56] the House of Lords held that the demands of national security relieved the government of any obligation of consultation before banning employees at the government's intelligence headquarters from belonging to unions. In *R v Secretary of State for the Home Department, ex p Cheblak*[57] the claimant challenged the validity of a deportation order made against him on the ground that he had not been told in detail why it had been made. The court held that since the information relevant to the making of the order was highly sensitive from the point of view of national security, the normal requirement of disclosure of the case against the claimant did not apply and that fairness only required that the immigrant be allowed to make representations to the Home Secretary's advisory panel set up to consider appeals against deportation orders. In *Chahal v UK*[58] the ECtHR held that this process did not provide deportees alleging breaches of Art 3 of the ECHR with an 'effective remedy' as required by Art 13 of the ECHR. In response, legislation was passed providing for an appeal to a Special Immigration Appeals Commission (SIAC) that could hear 'closed material' not made available to the deportee and representations in relation to that material made on the deportee's behalf by a specially appointed, security-cleared, advocate.[59]

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

[55] [1967] 2 QB 617. See also *Wandsworth LBC v A* [2000] 1 WLR 1246.

[56] [1985] AC 374.

[57] [1991] 1 WLR 890. See also *R v Secretary of State for the Home Department, ex p. Hosenball* [1977] 1 WLR 766.

[58] (1997) 23 EHRR 413.

[59] For an assessment of closed material procedures see G Van Harten, 'Weaknesses of Adjudication in the Face of Secret Evidence' (2009) 13 *International Journal of Evidence and Proof* 1. Concerning special advocates see J Ip, 'The rise and spread of the special advocate' [2010] *PL* 717; and for a negative assessment by a special advocate see M Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 *CJQ* 314.

The closed-material procedure is clearly a significant qualification to the basic common law principle that a person should be told the case against them and given a chance to answer it.[60] Nevertheless, it has been held that in appropriate circumstances, the Parole Board has power to adopt such a procedure even in the absence of express statutory authorization.[61] In the context of the detention of suspected terrorists, the ECtHR has held that where the closed material provides the sole or decisive basis for detention, the closed-material procedure will satisfy the right to a fair trial under Art 5(4) of the ECHR[62] only if the suspect is told enough about the material to enable him or her to give effective instructions to the special advocate.[63] However, the ECtHR has also held that the analogous right to a fair trial under Art 6 (see 4.1.3)[64] does not apply to deportation proceedings, and it has not yet had the opportunity to decide whether the closed-material procedure complies with Art 13.[65] Nor has the Supreme Court had the opportunity in the deportation context to consider the compliance of that procedure with the common law.

One objection to the closed-material procedure is that it potentially displaces well-established procedures for dealing with claims by government agencies that they should not be required to disclose evidence where this would damage the public interest—so-called 'public-interest immunity' (PII) claims (see 5.1.7). Under the PII procedure, if the claim for non-disclosure does not succeed, the agency must either disclose the evidence or not use it. The closed-material procedure, by contrast, enables the agency to use the evidence without disclosing it to the other party. In the criminal context, the basic rule is that all evidence that weakens the prosecution's case or strengthens the defendant's should be disclosed to the maximum extent consistent with protecting competing interests such as national security and the effective investigation of crime; and the use of closed-material procedures is a last resort.[66] It has been said that a closed-material procedure may be

[60] This objection may not apply where the issue in the deportation proceedings to which the closed material relates concerns not the deportee but rather conditions in the destination country: *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512.

[61] *Roberts v Parole Board* [2005] 2 AC 738.

[62] See 4.1.3, n 102.

[63] *A v United Kingdom* (2009) 49 EHRR 29.

[64] Lord Hoffmann has said that the requirements of Art 5(4) are 'pretty much indistinguishable' and 'little different' from those of Art 6: *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512, [175]–[176].

[65] See also n 113 below.

[66] *R v H* [2004] 2 AC 134. Full disclosure is not a universal requirement of Art 6: *Edwards v UK* (2005) 40 EHRR 24.

appropriate in judicial review proceedings brought by a member or former member of the security service.[67] However, the Court of Appeal has held that in the absence of statutory authorization, the closed-material procedure is not available in trials of civil claims against the administration unless the issues involved 'have a significant effect on a third party, or where a wider public interest is engaged'.[68]

4.1.1.3.3 The nature and content of the decision

A hearing will not generally be required in making a decision that is merely preliminary to a later decision for which a hearing must be given; 'preliminary' in the sense that no issue will be conclusively settled by the earlier hearing in such a way as to prevent its being raised at the later hearing.[69] A related rule is that in cases of emergency, a decision may be made, for example, to remove an officer from office without a hearing pending investigations;[70] but the person cannot, of course, be finally removed from office without being heard. The justification for this approach is that it avoids unnecessary duplication of hearings and undue interference with timely administration. On the other hand, preliminary recommendations may influence later decisions, and some procedural protection may be desirable even in relation to preliminary decisions. So it has been held that proceedings before advisory panels (with no power of decision) may be challenged for breach of natural justice.[71] On the other hand, the procedural protection required may be limited.[72]

A hearing is unlikely to be required when making decisions such as whether a student ought to be admitted to an educational institution or to a course, or should be awarded a scholarship; or whether a student's examination script has been given the right mark. Such decisions require a high degree of expert or professional judgment and not merely the application of objective criteria of merit that might be subjected to scrutiny by adjudicative techniques. On the other hand, if an institution decided, for example, to expel a student on non-academic grounds, such as misbehaviour, a fair hearing would be required.[73] Similarly, a hearing

[67] *R v Shayler* [2003] 1 AC 247, [34].

[68] *Al Rawi v The Security Service* [2010] EWCA Civ 482, [33].

[69] *Pearlberg v Varty* [1972] 1 WLR 534; but contrast *Wiseman v Borneman* [1971] AC 297; *Norwest Holst Ltd v Department of Trade* [1978] Ch 201.

[70] *Lewis v Heffer* [1978] 1 WLR 1061.

[71] *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890.

[72] '[A]t the low end of the duties of fairness': *R v Secretary of State for Transport, ex p Pegasus Holdings (London) Ltd* [1988] 1 WLR 990.

[73] eg *Glynn v Keele University* [1971] 1 WLR 487.

would not be required before removing a person from a local authority's list of approved foster parents on grounds of reputation, character, or temperament; but a hearing would be necessary if the ground of removal was misbehaviour towards, or abuse of, a fostered child.[74]

A further relevant consideration in the case of medical treatment, for example, is that judicial techniques might not be thought particularly appropriate for the making of what have been called 'tragic choices',[75] that is, choices about the allocation of scarce resources between highly desirable human goals such as health and education; although whether such choices should be made on technical (as opposed to political) grounds may also be contentious. It is probably felt, too, that professionals ought to be accorded a high degree of autonomy in making professional and technical judgments; and if they can, courts prefer to stay out of highly technical areas.

4.1.1.3.4 Exclusion of the fair hearing rule

Because the fair hearing rule is part of the common law, it may be excluded by legislation. Express and specific exclusion of the fair hearing rule is unlikely. Typically, the relevant question is whether legislative procedural requirements are exhaustive of the procedural rights of the claimant or, in other words, whether the legislation impliedly excludes some common law procedural protection. In general, courts hesitate to interpret statutes as having this effect. It has been recognized for almost 150 years that the common law can 'make good the omission of the legislature';[76] and if the statutory scheme provides less procedural protection than the common law, the rules of procedural fairness can be used to fill the gap. However, the more detailed the statutory scheme the more likely it is that the common law rules will not operate. In the end, whether or not the procedural safeguards provided by the statutory scheme are considered adequate will depend on whether and to what extent the judicialized model of procedure reflected in the fair hearing rule is thought appropriate to the sort of decision in question.[77]

The fair hearing rule may apply to decision-making by 'domestic tribunals', such as trade unions or private licensing bodies, whose

[74] *R v Wandsworth LBC, ex p P* (1989) 87 LGR 370.

[75] G Calabresi and P Bobbitt, *Tragic Choices* (New York: Norton, 1978). See further 6.4.1.

[76] *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

[77] See, eg, *Local Government Board v Arlidge* [1915] AC 120; *Selvarajan v Race Relations Board* [1967] 1 WLR 1686; *R v Commission for Racial Equality, ex p Cottrell and Rothon* [1980] 1 WLR 1580.

powers are derived solely from a contract between the body and its members rather than from a statute. If such a body exercises powers of discipline or expulsion against one of its members or refuses an applicant a licence to engage in some activity controlled by it then, provided something of sufficient value is at stake—such as the applicant's ability to exercise a trade or profession—a term may be implied into the contract requiring compliance with the rules of procedural fairness in the exercise of such powers. What if such a contract purports to exclude the rules of procedural fairness? Although the law is not clear on the point, it may be that such a provision could be held invalid on grounds of public policy, at least where a person's livelihood is at issue.[78] The notion of public policy (as opposed to contractual agreement) is important in this context because technically, until a licence is granted there is no contract between an applicant for a licence and the licensing body; nevertheless courts have been prepared to exercise control over licensing activities of bodies that control entry to a trade or profession even in the absence of a contract.[79] By extension, there may be limits, imposed by public policy, on the ability of a domestic body to exclude the operation of the rules of procedural fairness by contractual provision.

4.1.1.3.5 Representation

Many people who are affected by administrative decisions do not have the training or ability to put their case in its most convincing form. This is true whether the 'hearing' is oral or in the form of written submissions. Does fairness require a right to have a representative put one's case? In theory, it might seem easier to justify such a right in the case of three-party adversarial proceedings than in the case of two-party proceedings, especially if, in the latter case, the decision-maker takes an active part as investigator or facilitator.

Such theoretical arguments are reinforced by research conducted in the 1980s which showed that representation significantly increased the chance of success of claimants before four different types of tribunal;[80] and by more recent research suggesting that changes in tribunal practice

[78] See *Edwards v SOGAT* [1971] Ch 354.

[79] *Nagle v Fielden* [1966] 2 QB 633. This was not a procedural fairness case, but it was relied on in relation to procedural fairness in *McInnes v Onslow-Fane* [1978] 1 WLR 1520.

[80] H Genn and Y Genn, *The Effectiveness of Representation at Tribunals* (Lord Chancellor's Department, 1989). For useful summary and discussion see T Mullen, 'Representation at Tribunals' (1990) 53 *MLR* 230.

in the past twenty years towards a more investigatory and enabling style have reduced the advantage to be gained by representation.[81]

The common law rule is that the decision-maker has discretion whether or not to allow representation, which must be exercised in the interests of fairness.[82] In a particular case, fairness may require representation, but not *legal* representation. It is often argued that the presence of lawyers tends to make proceedings longer and more formal and legalistic, and in some contexts this may be undesirable. Furthermore, the 1980s research just mentioned suggests that non-legal representatives who specialize in welfare law have higher success rates on behalf of clients appearing before social security tribunals than do lawyers.

A right to legal (or other) representation may also be conferred by statute.[83] There is (somewhat old) authority that a provision in a contract purporting to exclude the right to legal representation would not, for that reason, be contrary to public policy;[84] and that secondary legislation that excluded such a right would not, on that ground, be invalid.[85]

Independently of representation, a litigant before a court is entitled to reasonable assistance in presenting his or her case.[86] This right does not require the court to allow the assistant to address the court unless he or she has a 'right of audience' (ie unless the assistant is a qualified lawyer). It is not clear whether the right to assistance applies to proceedings before bodies other than courts.

While a right to be represented is very important, it is by itself of little value if, for lack of available representatives or of funds, a claimant cannot secure representation. As a general rule, legal aid is not available for representation before administrative tribunals, and there is no organized system of funding lay representatives.

[81] M Adler, 'Tribunals Ain't What They Used to Be', <http://www.ajtc.gov.uk/adjust/articles/AdlerTribunalsUsedToBe.pdf>, accessed 4 January 2011.

[82] *R v Board of Visitors of Her Majesty's Prison, The Maze, ex p Hone* [1988] AC 379.

[83] eg *Bache v Essex County Council* [2000] 2 All ER 847.

[84] *Pett v Greyhound Racing Association Ltd* [1968] 2 All ER 545; [1969] 2 All ER 221; *Enderby Town Football Club v Football Association Ltd* [1971] Ch 591; *Maynard v Osmond* [1977] QB 240.

[85] *Maynard v Osmond* [1977] QB 240.

[86] *R v Leicester City Justices, ex p Barrow* [1991] 2 QB 260. But it may not always be 'in the interests of justice' to allow a litigant to bring an assistant to court: *R v Bow County Court, ex p Pelling* [1999] 1 WLR 1807.

4.1.1.3.6 Reasons

Here we are concerned not with informing a claimant of the case to be answered but with the giving of reasons for the decision once it has been made.[87] If the right to be heard is to have any real meaning, it must entail a duty on the part of the decision-maker to take account of the claimant's arguments in reaching the decision and to address the points made by the claimant, and either to accept or reject them in a reasoned way. Furthermore, unless reasons for the decision are given, those affected by a decision are deprived of a proper chance to challenge the decision if it is thought to be wrong. For example, it is only if reasons are given that a person can know whether a decision-maker took account of some irrelevant consideration.

A decision-maker may be under a statutory duty to give reasons for its decisions.[88] Where there is no statutory duty to give reasons, the common law may, in the name of procedural fairness, impose such a duty, although there is no 'general' common law duty to give reasons. There may be a duty to give reasons where an administrator has, by words or conduct, raised a legitimate expectation that reasons will be given.[89] In the absence of such an expectation, a person may be entitled to reasons if their interest in the decision is sufficiently weighty;[90] or if, given the circumstances of the case, the decision appears odd and in need of explanation.[91] However, the nature of the decision may make the giving of substantive reasons inappropriate—for instance, if it is an exercise of academic judgment[92] or of a power to make a competitive grant.[93]

The issue of the relationship between procedural safeguards and the merits of individual decisions (see 4.1.1.3.1) is relevant in this context.

[87] The distinction drawn in the text was critical in *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228. For general discussion of reasons see G Richardson, 'The Duty to Give Reasons: Potential and Practice' [1986] *PL* 437; M Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet? [2011] *PL* 56.

[88] eg Tribunals and Inquiries Act 1992, s 10; Local Government Act 1988, s 20. See AP Le Sueur, 'Legal Duties to Give Reasons' (1999) 52 *CLP* 150; E Jacobs, *Tribunal Practice and Procedure* (London: Legal Action Group, 2009), 14.180–14.194.

[89] *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310.

[90] eg *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531; *R v Corporation of the City of London, ex p Matson* [1997] 1 WLR 765; *R v Ministry of Defence, ex p Murray* [1998] COD 134.

[91] *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310.

[92] *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242. See also *Gupta v General Medical Council* [2002] 1 WLR 1691 (credibility of witnesses and reliability of evidence).

[93] *R (Asha Foundation) v Millenium Commission* [2003] EWCA Civ 88.

The question is whether, in a case where reasons are required by law, failure to give reasons, by itself, will invalidate a decision or whether it will have that effect only if the failure supports a conclusion that the decision-maker had no legally satisfactory or relevant reason for the decision, or did not consider the matter properly, with the result that the decision itself is suspect.[94] There is high authority for the proposition that inadequacy of (as opposed to total failure to give) reasons will invalidate a decision only if the gap in the reasons raises a substantial question as to whether there was a flaw in the decision that would invalidate it on some other ground than failure to give reasons.[95] If this is the law, failure to give adequate reasons, in and of itself, would not invalidate a decision.[96] On the other hand, it has been said that where the subject matter of the decision is sufficiently important and serious, or of great public interest, failure to give reasons may justify setting the decision aside regardless of whether the decision itself is flawed.[97] It might be thought that this should be the general approach because of the difficulty of determining whether or not a decision is flawed in the absence of reasons. One of the justifications for reason-giving is to allow the quality of the decision to be assessed. It is perverse to require a person to establish that a decision is flawed as a precondition of being entitled to reasons for the decision. Reason-giving is also important in its own right as a means of showing respect to a person adversely affected by a decision.

Where there is a duty to give reasons, the reasons must satisfy a minimum standard of clarity and explanatory force, and must deal with all the substantial points that have been raised.[98]

Even if a decision-maker is under no duty to give reasons, once its decision is challenged it will be forced to explain itself to a greater or lesser extent.[99] It is, however, obviously undesirable that a person should have to challenge a decision in order to discover the grounds on which it was made.

4.1.2 STATUTE

The only general point to be made about statutory procedural requirements concerns the effect of non-compliance. A decision made in breach

[94] *R v HEFC, ex p Institute of Dental Surgery* [1994] 1 WLR 242, 257–8.
[95] *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153.
[96] See also *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498.
[97] *R v Director of Public Prosecutions, ex p Manning* [2001] QB 330.
[98] *South Bucks District Council v Porter* [2004] 1 WLR 1953.
[99] *R v Lancashire CC, ex p Huddleston* [1986] 2 All ER 941.

of the common law rules of procedural fairness is 'invalid' (and 'illegal' or 'unlawful'). The traditional approach to non-compliance with a statutory procedural requirement is that it makes the decision invalid only if the requirement is 'mandatory' rather than merely 'directory'. The nature of any particular provision is ultimately a matter of statutory interpretation. Since the statute will usually not identify the nature of the requirement, the court will normally have to classify the requirement in the light of all the facts of the case including the terms of the statute, the seriousness of the procedural defect, and the seriousness of its effects on the claimant and the public. In general, it seems that the courts will consider it in their discretion to choose the classification that achieves 'justice' in all the circumstances of the case.[100] This position produces considerable uncertainty and allows courts to pronounce on the merits of a case in the name of procedural review in a way similar to that noted in relation to the common law.

Even if a statutory procedural requirement is classified as being 'mandatory', failure to comply may not result in invalidity if there was 'substantial' compliance or if holding the decision illegal would have 'unjust and unintended consequences'.[101] The fact that so many escape routes have been devised illustrates the more general point that courts tend to be unwilling to quash administrative decisions (and rules) merely for procedural irregularity unless something seems to be wrong with the decision itself.

4.1.3 ECHR

Article 6 of the ECHR provides that 'in the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time[102] by an independent and impartial tribunal established by law'.

Before considering this provision in some detail, it is necessary to say something about the status of the ECHR in English law. The ECHR is an international treaty. International treaties to which the UK government is a party have the direct force of law in England only if they are

[100] *London & Clydeside Estates Ltd v Aberdeen DC* [1980] 1 WLR 182, 189–90.

[101] *R v Secretary of State for the Home Department, ex p Jeyeanthan* [2000] 1 WLR 354, 358–9, 362 (Lord Woolf MR).

[102] Under Art 5(4), 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court . . .' According to Lord Hoffmann, the requirements of Art 5(4) are 'pretty much indistinguishable' and 'little different' from those of Art 6: *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512, [175]–[176].

incorporated into English law by statute. The Human Rights Act 1998 (HRA) does not directly incorporate the ECHR into English law. Instead, it imposes various obligations on governmental institutions in relation to the ECHR and rights it protects ('Convention rights'). In determining questions about Convention rights, courts and tribunals must take account of decisions of the European Court of Human Rights (ECtHR) (HRA, s 2). Primary and secondary legislation must, as far as possible, be interpreted in a way compatible with the ECHR (s 3). Secondary legislation that is incompatible with the Convention is invalid. Certain courts have the power to declare primary legislation to be incompatible with the ECHR. This does not affect its validity; but a Minister may, by making secondary legislation, amend the statute to remove the incompatibility (s 10).[103] 'Public authorities', including courts and tribunals,[104] must act compatibly with the Convention. This includes the Supreme Court; and it follows that a decision of the Supreme Court may be challenged in the ECtHR on the basis of incompatibility with the Convention. One result of this complex scheme is that although decisions of the ECtHR are of great significance, they are not, as such, part of English law. In case of conflict between a decision of the Supreme Court and a decision of the ECtHR, English courts are bound by the former, not the latter. In such a case, the UK government would be under a treaty obligation to bring English law into line with the decision of the ECtHR; but unless and until that was done, the decision of the Supreme Court would bind other English courts. The Supreme Court, not the ECtHR, is the final appeal court in the English legal system. However, although the Supreme Court is not bound by decisions of the ECtHR, it is not realistically in a position to refuse to apply them if they are unequivocal and clearly applicable.[105]

So far as public administrators are concerned, the general effect of the HRA is to impose an obligation to act compatibly with the ECHR. The obligation to interpret legislation as far as possible compatibly with the ECHR applies as much to administrators as to courts and tribunals.[106] Secondary legislation and decisions that are incompatible with the

[103] Parliament could also amend the legislation, of course.

[104] But not either House of Parliament.

[105] *Secretary of State for the Home Department v AF* [2009] 3 WLR 74; *Manchester City Council v Pinnock* [2010] 3 WLR 1441 [48].

[106] For a discussion of problems that this may cause for administrators see D Feldman, 'Changes in Human Rights' in M Adler (ed), *Administrative Justice in Context* (Oxford: Hart Publishing, 2010), 113–17.

ECHR are illegal and invalid unless they are authorized by a provision of primary legislation which is itself incompatible (ss 3(2)(c), 6(2)).[107]

This is not a book on human rights law and the following discussion is necessarily selective. Its focus is on the relevance of Art 6 to English administrative law. Readers needing more information about Art 6 should consult a human rights text.[108]

4.1.3.1 Civil rights and obligations

Article 6 applies to determinations of civil rights and obligations and of criminal charges, and it confers more extensive rights in relation to the latter than the former. Administrative agencies typically do not have power to determine criminal charges because this has traditionally been considered a core function of the judicial branch of government; and so the focus here is on civil rights and obligations.[109] A 'determination' is, roughly, a final resolution of the merits of a claim. The requirement of a determination is analogous to the common law principle that preliminary decisions do not attract the fair hearing rule (4.1.1.3.3). As at common law, the line between preliminary and final decisions is unclear and depends to some extent on the effect of the decision, not just its timing.[110] To be a determination, a decision need not concern whether or not a right or obligation exists but need only 'affect' the right or obligation.

It is now accepted that subject to specific exceptions and qualifications, the common law rules of procedural fairness are of general application to administrative decision-making. By contrast, Art 6 applies only to a subset of administrative decisions: those concerning civil rights and obligations. Private-law rights, such as property rights and contractual rights (under an employment contract, for instance), and private-law obligations, such as the duty of reasonable care in tort

[107] Section 6(2)(a) covers cases where an administrator has a duty to implement a statutory provision and s 6(2)(b) covers cases where the administrator has a power not to implement a statutory provision but chooses to do so. The relationship between these two provisions is contested: *R v Secretary of State for Work and Pensions, ex p Hooper* [2005] 1 WLR 1681. Section 6(2)(b) has been given a broadly protective interpretation: *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, criticized by D Feldman, 'Changes in Human Rights' in M Adler (ed), *Administrative Justice in Context* (Oxford: Hart Publishing, 2010), 108–9.

[108] A major reference work is R Clayton and H Tomlinson, *The Law of Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009).

[109] The two categories—civil and criminal—may not be exhaustive. There may be some determinations of legal rights and obligations that are not covered by the ECHR: *R v Parole Board, ex p Smith* [2005] 1 WLR 350.

[110] *R (Wright) v Secretary of State for Health* [2009] 1 AC 739, [20]–[22] (Baroness Hale).

law, clearly fall within this phrase. By contrast, it is clear that not all public functions affect civil rights or obligations. For instance, although a decision of a regulatory body banning a person from practising a profession would affect the person's civil rights, a disciplinary reprimand that did not prevent practising might not.[111] Recall of a prisoner released on licence does not affect the prisoner's civil rights.[112] The ECtHR has held that deportation proceedings against a person who has no right to remain in the country do not fall within Art 6 even if the deportee claims that deportation would infringe rights under other articles of the ECHR.[113] The status of claims to welfare services and benefits has proved particularly problematic. In *Tomlinson v Birmingham City Council*[114] the Supreme Court held that a decision, made under a statutory provision by a local authority, that it had discharged its obligation to a homeless person who refused an offer of accommodation made by the authority, was not a determination of the person's civil rights. The ECtHR has held that monetary social security benefits are civil rights. The Supreme Court distinguished the homeless person's entitlement from such rights on the basis that it was not defined with any precision in the statute and its content depended to a considerable extent on the discretion of the authority.

Lord Hope (with the agreement of Lady Hale and Lord Brown) expressed concern about the 'over-judicialization' of the administration of social and welfare benefits. Given that the common law fair hearing rule presumably applies to homelessness decision-making, this statement must relate to such procedural requirements of Art 6 as exceed those of the common law or to the fact that by virtue of the HRA, the ECHR is a sort of UK bill of rights which is in practice, if not technically,[115] beyond the control of the UK legislature. The Art 6 rights have proved to be amongst the most powerful and significant in the ECHR, and the Supreme Court (it seems) wants to maximize

[111] *R (Thompson) v Law Society* [2005] 1 WLR 2522.

[112] *R v Parole Board, ex p Smith* [2005] 1 WLR 350.

[113] *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR 512. In such a case, however, Art 13, which requires an effective domestic remedy for infringements of Convention rights, would apply.

[114] [2010] 2 WLR 471.

[115] Parliament could repeal the HRA; but unless the UK—inconceivably—withdrew as a party to the ECHR, its requirements would continue to have a significant impact on English law. The HRA did not bind the UK to the ECHR; it merely 'domesticated' Convention rights. There are various techniques by which the UK can free itself of its obligations under the ECHR short of withdrawal, but these may have considerable political costs.

the freedom of Parliament to design administrative institutions and procedures.

4.1.3.2 Fair and public hearing

Article 6 guarantees not only a fair hearing once 'in court' but also access to a 'court or tribunal' for the determination of civil rights and obligations.[116] There is an analogous principle of English common law: legislation will be interpreted as denying access to a court only if there are clear words to that effect.[117] This does not mean, of course, that all decisions that determine civil rights and obligations must be made by a court or tribunal. Most such decisions are made by public administrators in the first instance, and only if and when challenged do they reach a court or tribunal. As we will see in more detail in 4.1.3.4, the fundamental question under Art 6 is whether the 'decision-making process as a whole' satisfies Art 6, not whether its individual components do. If this were not so, the ECHR would cause chaos in public administration. It follows that the ECHR does not require that bureaucratic decision-making meet all the requirements of Art 6. Which of those requirements it must satisfy will depend on the circumstances. So, for instance, even if Art 6 requires an oral hearing, it does not follow that it must precede the initial determination; it may be sufficient that it is provided later by a court or tribunal. The same is true at common law where the question is put in terms of whether review of or appeal from a decision can 'cure' lack of procedural fairness in the making of the original decision.[118]

The basic principle underlying Art 6 is that 'justice' should be administered publicly; but it also qualifies that principle in various ways. In general, the English law on open justice is consistent with the approach of Art 6. Of course, public administration is not typically conducted 'in public'; but once again, the question is whether the decision-making process as a whole is sufficiently open.

The closed-material procedure (see 4.1.1.3.2) derogates from the openness principle. The issue of the permissibility of such procedure

[116] *Golder v UK* (1979–80) 1 EHRR 524. Art 6 can be used only to overcome procedural barriers to enforcing rights and obligations already recognized by English law: *Matthews v Ministry of Defence* [2003] 1 AC 1163; *R v Secretary of State for Work and Pensions, ex p Kehoe* [2006] 1 AC 42. See also T Hickman, 'The "Uncertain Shadow": Throwing Light on the Right to a Court under Article 6(1) ECHR' [2004] *PL* 122.

[117] *R v Lord Chancellor, ex p Witham* [1998] QB 575; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[118] *Calvin v Carr* [1980] AC 574.

under Art 6 has arisen in the context of the making of control orders against suspected terrorists. The House of Lords, applying a decision of the ECtHR, has held that where closed material provides the sole or determinative basis for making a control order, closed material proceedings are permissible only if sufficient information is provided to the suspect to enable him or her to give effective instructions to the special advocate.[119]

In general terms, the concept of a fair hearing in the common law and under the ECHR has similar content and is similarly fact-sensitive.[120] For instance, the proper approach to the question of whether or not an oral hearing is required is essentially the same under the ECHR as at common law.[121] As Lord Hope of Craighead has said: '. . . the Convention can and does inform the common law, and the common law informs the Convention'.[122] Does the ECHR impose any procedural obligations that the common law does not? Article 6 impliedly confers a right to 'legal assistance'[123] whereas at common law, allowing legal representation is in the discretion of the decision-maker. Like other discretions, this one must be exercised reasonably in the light of relevant circumstances, and where much is at stake for a party, denying legal representation may be illegal. It is not clear that the position under Art 6 is significantly different in this respect. However, Art 6 potentially, at least, deals with barriers to full 'access to justice' that the common law has nothing to say about, such as lack of financial resources and procedural complexity. Article 6 has also been interpreted as implying a right to reasons, although it is not clear whether this applies to administrative decision-making in the same way that it applies to judicial decision-making.

4.1.3.3 Within a reasonable time

Although timeliness is probably implicit in the common law concept of a fair hearing, the explicitness of the ECHR's requirement adds significantly to the common law. So, for instance, in one case the ECtHR held that the five-and-a-half years taken to determine proceedings brought

[119] *Secretary of State for the Home Department v AF* [2009] 3 WLR 74. In the context of Art 5(4) of the ECHR, a similar approach was taken to closed material procedures adopted by the Parole Board in dealing with mandatory lifers in *Roberts v Parole Board* [2005] 2 AC 738.

[120] *R v Parole Board, ex p Smith* [2005] 1 WLR 350; *R (Thompson) v Law Society* [2005] 1 WLR 2522.

[121] *R v Parole Board, ex p Smith* [2005] 1 WLR 350.

[122] Ibid, [74].

[123] *Airey v Ireland* (1979–80) 2 EHRR 305. In the case of criminal trials, the right is express.

by the Secretary of State for disqualification of company directors breached Art 6.[124]

4.1.3.4 Independent and impartial tribunal

Impartiality is a personal characteristic and a frame of mind. Independence is an institutional characteristic and a function of the relationship between various public officials and agencies. According to the ECtHR, independence depends on factors such as the manner of appointment of members of the institution, their term of office and the existence of guarantees against outside pressure.[125] However, the two concepts are related: both require not only that the desired characteristic be present but also that it should appear to the objective observer to be present. Lack of independence, or the appearance of independence, could lead the objective observer reasonably to suspect lack of impartiality.

The common law has traditionally focused on impartiality. In this respect, the requirements of the common law rule against bias and the demands of Art 6 are essentially similar. Indeed, it has been said that the 'common law approach is to be assimilated' to that under the ECHR;[126] and even that there is 'no difference between the common law test of bias and the requirement under article 6 . . . of an independent and impartial tribunal'.[127] There is an analogy between the concept of independence and the idea underlying cases at common law in which the basis for objecting to the decision-maker is their relationship with one of the parties. On the other hand, independence is more concerned with institutional design than personal relationships.[128]

The structural independence of courts and tribunals has, until recently, not been a notable feature of the UK constitution. For instance, until the creation of the UK Supreme Court (which began sitting in 2009), England's highest court was technically a committee of the legislature. Until 2005, the Lord Chancellor was the head of the judiciary, a member of the Cabinet, and the Speaker of the House of Lords. Until the creation of the Judicial Appointments Commission (which began operating in 2006), judges were appointed by the government and

[124] *Davies v United Kingdom* (2002) 35 EHRR 29. See also eg *Crompton v United Kingdom* (2010) 50 EHRR 36.

[125] *Findlay v United Kingdom* (1997) 24 EHRR 221, [73].

[126] *In re P* [2005] 1 WLR 3019, [107].

[127] *R v Abdroikof* [2007] 1 WLR 2679, [14] (Lord Bingham of Cornhill).

[128] Some common law cases have institutional overtones: eg *Davidson v Scottish Ministers* 2004 SLT 895, [2004] HRLR 34; *R v Secretary of State for the Home Department, ex p Al-Hasan* [2005] 1 All ER 927.

the appointment procedure lacked transparency. The principle that tribunals should be structurally independent of the agencies from whose decisions they heard appeals was not properly established until the enactment of the Tribunals, Courts and Enforcement Act 2007 and the creation of the First-tier and Upper Tribunals.[129] Such developments have been direct or indirect responses to the requirements of Art 6 and decisions of the ECtHR.

So far as public administration is concerned, the most important thing to bear in mind is that the appointed, non-political bureaucracy is not, and is not expected to be, independent of the elected, political executive. Bureaucrats are public *servants*, and the core function of the bureaucracy is to implement government policy. The civil service is not structurally independent of the executive but part of it. At central government level there are various administrative agencies that operate at some distance from the political executive. For example, Jobcentre Plus and other 'executive agencies' are organizations separate from the departmental components of their respective ministries. Some public bodies, such as utility regulators, operate at even greater remove from the departmental structure. However, none of these units of public administration would be 'independent' of the executive in the way required by Art 6.

In the English system, it is mainly courts and tribunals in the traditional sense that inject into public administration the element of independence demanded by the ECHR.[130] The basic principle is that the process for determination of civil rights and obligations must be taken as a whole; and the question is whether so viewed, it provides a 'fair hearing'. In the typical case where the initial determination is made by a non-independent bureaucrat or administrative agency,[131] the issue is whether that decision can be appealed to or reviewed by a court or tribunal that has 'full jurisdiction to deal with the case as the nature of

[129] Concerning the Parole Board see *R (Brooke) v Parole Board* [2007] HRLR 46; and concerning the system of naval courts see *Grieves v United Kingdom* (2004) 39 EHRR 2.

[130] However, the independent element in the decision-making process need not be a court or tribunal in the traditional sense.

[131] Administrative decisions are often subject to internal review by another official within the same agency. Such a reviewer will not be independent. An external review body will not be independent if it contains members of the agency in which the original decision was made: *R (Chief Constable of the Lancashire Constabulary) v Preston Crown Court* [2002] 1 WLR 1332; or if the administrator responsible for the decision under review can give it binding directions about how to decide individual cases (*R (Girling) v Parole Board* [2007] QB 783) or can remove its members without independent review (*R (Brooke) v Parole Board* [2008] 1 WLR 1950).

the decision requires'.[132] Indeed, this principle applies generally: whether any of the various requirements of Art 6 have been met must be determined by reference to the whole process for making determinations and by asking whether it includes consideration by a court or tribunal with full jurisdiction.[133]

An aspect of English public administration that attracted early attention in this regard is the land-use planning system. This is not surprising when its basic structure is understood: planning decisions, which affect property rights, are made in the first instance by elected local authorities. Most appeals from local authority decisions are decided by 'inspectors' after a public inquiry. Whereas appeals from bureaucratic decisions are typically heard by tribunals that are separate from the relevant department, inspectors are officials of the department (although housed in an executive agency). A small proportion of planning appeals are decided directly by the Secretary of State after a public inquiry conducted by an inspector.

The common law assessed the fairness of such arrangements in terms of the requirement of impartiality. *Franklin v Minister of Town and Country Planning*[134] concerned a proposal for the establishment of a new town. Under the relevant legislation, the department had responsibility for initiating the proposal, and the Minister had the final power of deciding whether it would be adopted. The Minister made certain public statements which, it was argued, indicated that the government was determined that the particular proposal should go ahead regardless of objections. It was held that provided the Minister complied with the statutory procedure for processing such proposals, his adoption of the proposal could not be challenged on the ground of bias. The relevant question was not whether the Minister appeared to be biased against the objectors, but whether he had in fact genuinely considered their objections. There was no evidence that he had not done this. In another case it was held that a land-use planning decision of a local authority could not be attacked under the rule against bias simply because the majority group on the council had previously adopted a policy in relation to it, provided the issues at stake were given proper consideration.[135] In these

[132] *Albert and Le Compte v Belgium* (1983) 5 EHRR 533; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 295, [87] (Lord Hoffmann).

[133] *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 25.

[134] [1948] AC 87.

[135] *R v Amber Valley DC, ex p Jackson* [1985] 1 WLR 298; see also *Persimmon Homes Teesside Ltd v R (Lewis)* [2009] 1 WLR 83 and 6.2.5 below. It would be different if the local

cases, the alleged bias arose not out of a personal interest of the decision-maker, but from what might be called an 'institutional' interest in furthering the decision-making body's policy in relation to the subject matter of the decision. According to the common law, such an institutional interest is not bias, and the lack of an 'independent' element in the decision-making process did not make it unfair.

The HRA and the ECHR have necessitated a radical change of approach. *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*[136] involved cases in which appeals were decided by the Secretary of State after a public inquiry by an inspector. The House of Lords held that although the Minister was not independent and impartial, the requirements of Art. 6 were met because the Minister's decisions were subject to judicial review. The House held that judicial review amounted to 'full jurisdiction' in this context despite the fact that it would be limited to the issue of 'legality' and could not address the 'merits' of the decisions. So far as issues of fact were concerned, the public inquiry procedure provided a fair hearing and so the limited review of findings of fact available in judicial review proceedings (see 7.2) was adequate. So far as issues of policy were concerned, it was democratically proper that they should be committed to the Secretary of State, subject only to the limited review of such issues available in judicial review proceedings (see 7.3), because the Minister was accountable to Parliament and, ultimately, to the electorate.

Since the late nineteenth century, judicial review has been considered a manifestation and requirement of 'the rule of law'. By making the availability of judicial review necessary and sufficient for compliance of the planning system with Art 6, the House of Lords may be said to have 'entrenched' judicial review into the UK constitution.[137] More generally, Art 6 has increased the significance of control of administrative

authority had a financial interest in the decision: *Steeples v Derbyshire CC* [1985] 1 WLR 256 (but see *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [55] (Lord Slynn); [130] (Lord Hoffmann). For a discussion of the constitutional context of these cases see I Leigh, *Law, Politics and Local Democracy* (Oxford: Oxford University Press, 2000), 187–95. Similar issues can arise in non-governmental contexts, as where a significant proportion of the members of a professional complaints or disciplinary body are members of the profession: *Re S (A Barrister)* [1981] QB 683.

[136] [2003] 2 AC 295.

[137] This is not the only context in which judicial review may have constitutional significance. In *R v Shayler* [2003] 1 AC 247 the availability of judicial review supported a decision that ss 1 and 4 of the Official Secrets Act 1989 are not incompatible with Art 10 of the ECHR. See also *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42 (judicial review of decision of water industry regulator satisfies Art 8).

decision-making by courts and tribunals. Some have described this development as 'judicialization' of public administration. The extent of this judicialization depends on the interpretation of the concepts of 'civil rights and obligations' and 'full jurisdiction'.[138] The wider the former and the greater the demands of the latter, the greater will be the judicialization of public administration.

What does the requirement of 'full jurisdiction' entail? First, the body with such jurisdiction must be a judicial body. For example, it has been held that the General Medical Council is not a judicial body for these purposes.[139] Secondly, the judicial body must have appropriate powers. In general terms, this depends on factors such as the subject matter of the challenged decision, the manner in which it was reached, and the content of the dispute.[140] The most important issue is whether the independent decision-maker's jurisdiction is limited to issues of law or whether it extends to 'the merits' which, in this context, means 'the facts'. As we will see, errors of fact only exceptionally provide grounds for a successful claim for judicial review or appeal on a point of law. In *Bryan v UK*[141] the ECtHR held that judicial review of the decision of a planning inspector constituted full jurisdiction at least where the inspector's findings and inferences of fact were not challenged. In *Runa Begum v Tower Hamlets LBC*[142] the House of Lords held that where issues of fact were only 'staging posts on the way to much broader judgments'[143] a local housing authority has to make in discharging its obligations to house the homeless, an appeal on a point of law would constitute full jurisdiction. In *Tsfayo v UK*[144] the ECtHR distinguished *Runa Begum* and held that judicial review would not constitute full jurisdiction where the challenged decision was on a 'simple question of fact', required no expertise, and was not incidental to broader judgments of policy or expediency properly committed to a politically responsible decision-maker. In *Farzia Ali v Birmingham City Council*[145] the Court of Appeal rejected the distinction between simple facts and

[138] *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430, [5]–[6] (Lord Bingham of Cornhill).

[139] *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* [2010] ICR 101.

[140] *Bryan v UK* (1995) 21 EHRR 342, [45].

[141] (1996) 21 EHRR 342.

[142] [2003] 2 AC 430. It was assumed that the decision affected civil rights, but the Supreme Court has since held that it did not: *Tomlinson v Birmingham City Council* [2010] 2 WLR 471.

[143] [2003] 2 AC 430, [9] (Lord Bingham of Cornhill).

[144] (2009) 48 EHRR 18. See also *Crompton v UK* (2010) 50 EHRR 36.

[145] [2009] 2 All ER 501.

'policy-laden' facts and held that in the context of homelessness decision-making (as in *Runa Begum*) an appeal on a point of law would constitute full jurisdiction even in relation to simple facts.

These decisions raise two important issues. First, although they are concerned with whether recourse to an independent court or tribunal can cure the initial decision-maker's lack of independence, the quality of the initial decision-making process is relevant to answering this question. The more independent the original decision-maker and the stronger the procedural safeguards built into the original decision-making procedure, the less will be the requirements of full jurisdiction. In *Bryan*, for instance, the court stressed the fact that the procedure followed by the inspector was fair and robust, while in *Tsfayo* it observed that the initial decision-maker not only lacked independence but also included members of the local authority that would bear the cost of a decision in the applicant's favour. Secondly, the Court of Appeal in *Farzia Ali* was strongly motivated by what it called 'utilitarian arguments', such as the resource implications of a decision in favour of the applicant, and by a conviction that the existing system provided adequate protection to applicants for public housing. Here we see in operation the tension between procedural values and a concern for efficiency in public administration.

Finally, remember that the issue of full jurisdiction only arises once it has been decided that the initial decision-making process does not comply with the ECHR,[146] whether because it does not provide a fair hearing or because the decision-maker is not independent. One way of dealing with such non-compliance is to provide for review or appeal to an independent court or tribunal with full jurisdiction; but another is to change the initial decision-making process to make it compliant. This is the course the House of Lords thought appropriate when it made a declaration of incompatibility in relation to the statutory scheme for provisional placement of individuals on a list of persons banned from working with children.[147] One of the issues canvassed in *Runa Begum*[148] was whether contracting-out the review of homelessness decision-making might strengthen the independence of the process. Doubts were expressed about whether this would be lawful. Those doubts

[146] A statutory provision ousting judicial review of the decisions of a tribunal will not fall foul of Art 6 if the tribunal is independent and impartial and provides a fair hearing: *R (A) v B* [2010] 2 WLR 1.

[147] *R (Wright) v Secretary of State for Health* [2009] 1 AC 739.

[148] [2003] 2 AC 430.

were resolved in favour of legality in *Heald v Brent London Borough Council*,[149] in which the Court of Appeal also expressed the opinion that in the circumstances of the case, the effect of contracting-out on independence was neutral.

4.1.3.5 Obligations to inquire

The ECHR not only protects individuals from abuse of power (eg by deprivation of liberty or by interference with free speech) but also imposes positive obligations on states. Some of these obligations are procedural. For instance, the right to a fair hearing requires states to provide courts and tribunals and, in some cases, legal aid and assistance to those whose legal rights and obligations are being determined. Just as importantly, certain provisions of the ECHR—notably Art 2 (right to life)[150] and Art 3 (the right not to be tortured or treated in an inhuman or degrading way)[151]—impose an obligation on states to provide procedures for inquiring into events that involve alleged infringements of Convention rights. Such an obligation is 'parasitic' in the sense that it arises only when there has arguably been a breach of the ECHR.[152] By contrast, the procedural obligations imposed by Art 6 are not parasitic in this sense: they attach (only) to determinations of civil rights and obligations and criminal charges, and they are not attracted by alleged breaches of Convention rights.

However, obligations to inquire do bear certain similarities to Art 6 obligations. For instance, the inquiry must be timely, public, and independent of anyone implicated in the events; and the complainant must have effective access to the inquiry. The basic purpose of such an inquiry is to ensure effective implementation of laws that protect the relevant right and to secure accountability of agents of the state involved in relevant infringements of rights.[153] In some cases, a criminal prosecution or even the availability of a civil claim for damages (or, perhaps, a right to complain to an ombudsman) may satisfy the obligation. In other cases, however, a public inquiry (in the form of an inquest, for instance)[154] may be necessary depending on the nature of the alleged infringements of Convention rights.[155]

[149] [2009] HRLR 34; noted P Cane, 'Outsourcing Administrative Adjudication' (2010) 126 *LQR* 343.
[150] eg *R v Secretary of State for the Home Department, ex p Amin* [2004] 1 AC 653.
[151] eg *R (AM) v Secretary of State for the Home Department* [2009] EWCA Civ 219.
[152] *R (Gentle) v Prime Minister* [2008] AC 1356.
[153] These may include failure to prevent death (for instance), not merely causing death.
[154] *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.
[155] *Legal Services Commission v R (Humberstone)* [2010] EWCA Civ 1479.

4.1.3.6 The scope of the ECHR

The ECHR is an international treaty to which the signatories are nation states. However, the concept of 'the State' is far from straightforward and, in Britain, has been significantly destabilized by the programme of privatization of state assets and enterprises, contracting-out of the provision of services, and creation of public/private partnerships begun by the Thatcher government in the 1980s. Privatization and contracting-out involve the transfer of assets and activities from government agencies to non-government entities. The ECHR obviously applies to government agencies, which are part of the State. To what extent does it apply to non-government entities that are the beneficiaries of privatization and contracting-out? This is the issue addressed in s 6 of the HRA, which makes it 'unlawful' for a 'public authority' to act incompatibly with Convention rights. The term 'public authority' is defined to include 'any person certain of whose functions are . . . of a public nature'. Section 6 has been interpreted as creating two categories of public authority: 'core' public authorities all of whose 'acts' must be compatible with the ECHR; and 'hybrid' public authorities, certain of whose functions are public for the purposes of the HRA but who are not public authorities in relation to 'private' acts.

The concept of a core public authority is best understood institutionally as covering government officials and agencies because it seems clear that even if all the 'functions' of such authorities are public, not all their acts are. For instance, when an agency buys stationery from a commercial supplier or a government official drives a government car from A to B in the course of their employment, the agency or official is not doing a public act even it is done in the performance of a public function. Nevertheless, all the functions and acts of public authorities, whether public or private, are subject to the ECHR. The concept of a hybrid public authority is functional: such an entity is defined in terms of its functions. Hybrid public authorities are not subject to the ECHR either in respect of private functions or private acts done in performance of public functions.

The distinction between functions and acts is complex. At one level the distinction is one of degree: a function may be understood as a set of acts.[156] However, both functions and acts can be described at various levels of abstraction. For instance, the function of providing subsidized accommodation can be described as both providing housing and

[156] 'Act' includes 'failure to act': HRA, s 6(6).

providing social housing; and gaining possession of such accommodation from the tenant can be described as both exercising a contractual power and managing the social housing stock. The choice of description may be crucial to the classification of the function or act. For instance, in *YL v Birmingham City Council*[157] a company ran aged care homes. Some of the residents were self-funded, but most were funded by local authorities under contracts between the authority and the company made in discharge of the former's statutory care obligations. The issue was whether the company would be subject to the ECHR when it exercised a contractual power to expel a publicly funded resident from a home. By a 3/2 majority, the House of Lords decided that it was not.[158] Although it was unanimously agreed that the proper approach to answering the question was 'multi-factorial', the majority made their negative conclusion almost inevitable by describing the function as the provision of aged care under a contract. Conversely, the minority made the affirmative conclusion almost inevitable by describing the function as provision of aged care to persons in need. Each judge's consideration of the various factors relevant to answering the question was coloured by their abstract description of the function. Similarly, in *R (Weaver) v London and Quadrant Housing Trust*[159] the majority described the act of obtaining possession from a tenant as managing the social housing stock while the dissenting judge described it as the exercise of a contractual power.

Another complexity in the distinction between functions and acts lies in the relationship between the two concepts. It seems clear that acts done in the performance of a public function may be either public or private. Logically, it is also possible that acts done in performance of a private function might be public, although in practice this is perhaps unlikely.[160] At all events, the architecture of s 6 suggests a two-stage reasoning process that asks, first, whether the entity in question has any public functions and secondly (assuming an affirmative answer to the first question), whether the act in question was private. However, in *YL* only one of the judges (Lord Scott) approached the question in this way. The other judges asked whether the 'function' the company was performing was public and assumed that if that question were answered affirmatively, the proposed act would be public; but also that if it were

[157] [2008] AC 95.
[158] This decision has been reversed by statute: Health and Social Care Act 2008, s 145.
[159] [2010] 1 WLR 363.
[160] Ibid, [100] (Lord Collins of Mapesbury).

answered negatively, the proposed act would be private. In *Weaver*, it was (rightly or wrongly) conceded that the Trust was a hybrid public authority and therefore the question in issue was whether the act of terminating the tenancy was private in nature. Even so, both of the majority judges (who held that it was a public act) expressly held that the nature of the act depended partly on the nature of the function in the course of which the act was done. Even the dissenter, who stressed the distinction between functions and acts, conflated the two concepts in his analysis.

As we shall see in more detail later (11.1.2), the issue of whether an entity is performing public or private functions also arises in the context of judicial review. However, the relevance of decisions about the scope of judicial review to cases about the scope of the ECHR is questionable because the underlying issues in the two areas are quite different. In the ECHR context the issue is whether non-governmental entities should be required to respect human rights, whereas in the judicial review context the issue is whether public-law procedure is applicable and whether public-law remedies are available. In deciding cases about the scope of the ECHR, English courts are, of course, required to take account of decisions of the ECtHR. Once again, however, the relevance of such decisions to the interpretation and application of s 6 of the HRA is unclear. This is because the ECHR binds only states, and only states can be sued before the ECtHR. In that court, the question will be whether the conduct of a non-state actor puts the state in breach of its obligations under the ECHR, not whether the non-state actor is bound by the ECHR. In other words, the basic issue will be whether the state should have taken steps to ensure that the non-state actor complied with the ECHR—such as, for instance, including a clause requiring the service provider to comply with the ECHR in contracts with non-state actors for the provision of public services to citizens.

It is clear that the proper approach to deciding whether a non-state actor is bound by the ECHR under s 6 of the HRA is 'multi-factorial'. The relevant factors are many and variously formulated. They include 'the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service'.[161] The extent to which the performance of the function is subject to statutory regulation and the degree of involvement of a core

[161] *Aston Cantlow Parochial Church Council v Wallbank* [2004] 1 AC 546, [12] (Lord Nicholls of Birkenhead).

public authority in the performance of the activity may be important.[162]

As suggested earlier, the weight given to these various factors by any particular judge is likely to reflect an underlying normative judgment about the appropriate scope of human rights obligations beyond the core public authorities. Should the government, by contracting-out provision of services, be able to immunize the activity from human rights obligations? Those who favour an affirmative answer to this question may argue that one of the aims of contracting-out is precisely to subject the provision of services to market forces and to protect it from constraints that would apply if the government provided the service. There is little doubt that this is one motivation for at least some instances of contracting-out. By contrast, those who favour a negative answer may argue that the main aim of contracting-out is to provide services more efficiently and effectively, not to relieve service-providers of legal obligations. On the other hand, some might say that efficiency and effectiveness will be increased by contracting-out only if service-providers are relieved of at least some public-law obligations. In *YL* Lord Neuberger suggested that because there are competing 'policy' views about contracting-out, the courts should ignore policy when deciding the scope of the ECHR.[163] However, it could be argued that it is only by confronting the policy issue that the multi-factorial analysis can be made to yield a determinate conclusion.

4.2 FAIR PROCEDURE IN RULE-MAKING

We may very briefly summarize the discussion so far by saying that administrative decision-making procedure is heavily regulated by law. It may come as a surprise, therefore, to learn that administrative rule-making is much more lightly regulated. The common law rules of procedural fairness do not apply to the making of subordinate legislation;[164] nor does the ECHR have anything to say about rule-making as such. The most common explanation is that it would be inefficient and inappropriate to give everyone potentially affected by a rule the chance to be heard before the rule is made. In one respect, this position is similar to that in the US where the 'due process' requirements of the Fifth Amendment to the Constitution apply to decision-making but not rule-making. In another respect, however, the situation in the US is very

[162] *Weaver*, [69]–[71] (Elias LJ).
[163] [2008] AC 95, [152].
[164] *Bates v Lord Hailsham* [1972] 1 WLR 1373.

different from that in England. There, the Administrative Procedure Act 1946 expressly (but briefly) regulates administrative rule-making; and on the back of the Act, US courts have built a complex set of norms dealing with administrative rule-making.

Such legal regulation as there is in English law deals with the process leading up to the making of rules and with the promulgation of rules. So far as the latter is concerned, the Statutory Instruments Act 1946 requires statutory instruments that are subject to its provisions to be printed and put on sale to the public once they have been made. It is not clear whether failure to comply with the statutory requirement renders a statutory instrument unenforceable. Because the Act does not say anything about this, it depends on the position at common law. There is disagreement about whether, at common law, subordinate legislation becomes enforceable as soon as it is made (in the case of statutory instruments this is when the instrument is laid before or approved by Parliament) or only when it is published.[165] The latter would seem preferable as a general rule, although there may be cases where it would be desirable for regulations to come into force as soon as they are made so as to minimize the possibility of large-scale evasive conduct in anticipation of a change in the law. It seems highly desirable that the matter be resolved by legislation. Statutory instruments subject to the Act, as well as other governmental rules, are often required by statute to be laid before Parliament. It appears that failure to satisfy such a requirement would not render an instrument invalid.[166]

Laying and publication requirements for subordinate legislation not covered by the Act may be found in the various statutes conferring the rule-making power. Common law rules affecting the publication of soft law will be discussed in 6.3.2.

So far as the rule-making process is concerned, it is not uncommon for statutes to provide that before a Minister or other governmental agency makes a rule it should (or may) consult interested parties or a specified body (such as an advisory committee set up for the purpose, or a non-departmental agency, or both).[167] A significant difference between

[165] D Lanham, 'Delegated Legislation and Publication' (1974) 37 *MLR* 510; AIL Campbell, 'The Publication of Delegated Legislation' [1982] *PL* 569.

[166] AIL Campbell, 'Laying and Delegated Legislation' [1983] *PL* 43.

[167] J Garner, 'Consultation in Subordinate Legislation' [1964] *PL* 105; AD Jergensen, 'The Legal Requirements of Consultation' [1978] *PL* 290; AG Jordan and JJ Richardson, *Government and Pressure Groups in Britain* (Oxford: Oxford University Press, 1987), ch 6. Consultation may also be required before the making of a 'decision' that has wide implications and affects many individuals: eg *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env LR 623.

consultation and a fair hearing lies in the relationship between what those heard or consulted say and the decision or rule made. A hearing will be fair only if there is a quite tight relationship between the case put and the decision made. This is why the giving of reasons is (or should be) a core requirement of a fair hearing. By contrast, the purpose of consultation is not so much to inform the rule itself as to inform the mind of the rule-maker. This difference can be illustrated by noting that in the US, where rule-making is subject to greater legal regulation than in the UK, the law puts a heavy burden on the rule-maker to show that there is a rational relationship between the comments of interested parties and the rule made. In other words, legally required US rule-making procedure looks more like a fair hearing than its UK counterpart.

The common law recognizes no 'general' obligation to consult parties before making rules that will affect them.[168] However, the common law may impose an obligation to consult before making a decision that will deprive a group of individuals of some significant benefit.[169] If an administrative agency has published policy guidelines about how it will exercise its powers, the doctrine of legitimate expectation may prevent it from departing from its policy without (at least) first consulting affected parties.[170] If an agency has in the past followed a practice of consulting particular individuals or bodies before making rules on certain topics, it may be held to have acted illegally if it abandons that practice.[171] Similarly, if an agency has undertaken to consult[172] or has published codes of practice requiring consultation,[173] failure to consult may be illegal.

Statutory duties (as opposed to powers) to consult will normally be held to be mandatory, and failure to comply will render a rule invalid.[174] On the other hand, the effects of invalidity may be limited: if some of the parties affected by the rule were consulted and others were not, the rule may be invalid only as it applies to the parties who ought to have been, but were not, consulted.[175] It has been said that a court may decline to

[168] For an argument that it should, see G Richardson in G Richardson and H Genn (eds), *Administrative Law and Government Action* (Oxford: Clarendon Press, 1994), ch 5.

[169] eg *R v Devon CC, ex p Baker* [1995] 1 All ER 73 (closure of an old people's home).

[170] See 6.3.2.

[171] See 6.3.4.

[172] eg *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env LR 623.

[173] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

[174] eg *Howker v Secretary of State for Work and Pensions* [2003] ICR 405.

[175] *Agricultural, Horticultural and Forestry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 WLR 190.

exercise its discretion to invalidate a rule if the claimant makes no real complaint about the substance of the rule but only about lack of consultation; or if the court thinks that to revoke the rule would generate undue administrative inconvenience;[176] or would have a significant detrimental impact on the interests of third parties but minimal impact on the interests of the applicant.[177] However, the basic principle appears to be that if the procedural defect is substantial, the rule should normally be invalidated precisely because of its effect on a large number of people.[178]

A body may fail to comply with a duty to consult not only by total inaction, but also by consulting inadequately. Consultation must take place at a time when proposals are still at a formative stage; all those entitled must be consulted; the consultation must cover all relevant issues and the consulting party must give adequate information about what it proposes to do and why;[179] the consulted party must be given sufficient time to consider the proposals and formulate a response to them; and the 'product of the consultation must be conscientiously taken into account in finalising any... proposals'.[180] If substantial relevant material emerges after the consultation is complete, affected parties should be given an opportunity to consider and respond to it.[181]

Although statutory obligations resting on public bodies to consult interested parties before making rules are by no means uncommon, they are certainly not universal. We might ask, therefore, whether there is a case for greater use of mandatory publicity and consultation in this context.[182] One of the most obvious features of the Parliamentary legislative process is that proposed legislation is usually subjected to a considerable amount of public discussion and scrutiny both inside and outside Parliament. Before and during the drafting process the government will usually consult interested groups and will often publish

[176] *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 WLR 1.

[177] *R v Secretary of State for the Environment, ex p Walters* (1998) 10 Admin LR 265.

[178] *R (C) v Secretary of State for Justice* [2009] QB 657.

[179] *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353, 371 (Taylor LJ); *R v Devon CC, ex p Baker* [1995] 1 All ER 73, 91 (Simon Brown LJ); *R v North and East Devon Health Authority, ex p Coughlan* [2001] 1 QB 213, [108] (Lord Woolf MR).

[180] *R v Devon CC, ex p Baker* [1995] 1 All ER 73, 91.

[181] *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env LR 623.

[182] R Baldwin and J Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' [1986] *PL* 239, 272–4; PP Craig, *Public Law and Democracy* (Oxford: Clarendon Press, 1990), 160–82.

discussion documents (Green Papers) and White Papers (firmer statements of policy) on the subject matter of the legislation which Parliament and members of the public can discuss and comment on. Although the content of the legislation will be largely decided by the government, Parliamentary and concerted public pressure can sometimes force changes even in legislation which is at an advanced stage of its progress though the legislative machine.

The process of non-Parliamentary rule-making is usually not so public as this.[183] It is certainly the case that the government often consults interested parties before making rules even when it is not required to do so by statute.[184] Such consultation can serve various functions: to obtain information and to explore policy options; to provide information about government plans; to legitimate government action; to avoid unnecessary dissatisfaction with the rules made; and to reduce the chance of legal challenges to rules in the future. However, much government rule-making does not pass through any significant public stage. Local authority by-laws will no doubt often be subjected to a certain amount of local scrutiny; but typically they must receive ministerial approval before they come into force, and often this procedure is short-circuited by local authorities adopting model by-laws drafted by central government departments. Much central government legislation has to be laid before Parliament but, as we will see later,[185] most receives little or no discussion. Furthermore, many rules are not made in exercise of statutory rule-making powers and are probably made without any significant consultation of interests outside government; such rules are not even required to be laid before Parliament, let alone scrutinized by it. It would seem, therefore, that despite the volume and importance of administrative rule-making, much of it is subject to relatively little public scrutiny, and such consultation as takes place is largely at the initiative of the law-maker and with bodies of its choice. This, coupled with the low-key nature and the infrequency of judicial control of rule-making, might lead one to expect considerable dissatisfaction with the system—but there is not.

By contrast, as we have noted, US courts have developed an elaborate body of law to regulate rule-making by administrative agencies.[186] Yet

[183] EC Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Oxford: Hart Publishing, 1999), chs 1 and 7.

[184] R Baldwin, *Rules and Government* (Oxford: Oxford University Press, 1995), 74–80, 111–19.

[185] See 17.1.

[186] Useful discussions include M Asimow, 'Delegated Legislation: United States and United Kingdom' (1983) 3 *OJLS* 253; R Baldwin, *Regulating the Airlines* (Oxford:

administrative rule-making in the United States is a matter of acute and continuing controversy. This is partly because much rule-making in the US is undertaken by regulatory agencies that are more-or-less separated and insulated from control by the political executive. This freedom is designed to enable agencies to develop relevant technical expertise and to reflect that expertise in the rules they make. Such agencies have had considerable difficulty in establishing their legitimacy as rule-makers. There are several reasons for this. First, some fear that agencies that are not controlled by the executive will be 'captured', or at least unduly influenced, by those adversely affected by the rules they make. Secondly, others believe that while technical expertise is necessary to ensure that government rules establish a practicable and efficient regulatory regime, at the end of the day the extent to which, and the way in which, government should control the activities of its citizens is a political issue. Technical expertise does not help in the choice between alternative regulations that are equally acceptable on technical grounds; and sometimes there may be sound political reasons for preferring a technically inferior scheme.

The limited relevance of technical expertise also gives rise to another reason for discontent. If governmental regulation does involve political choices, it is undesirable that the decision-makers should be independent of the political process. The more politically contentious the matters with which the authority has to deal, the more dissatisfaction there is likely to be with the technical solution, whatever it is. An intrusive and detailed system of judicial control over rule-making by regulatory agencies may plausibly be seen as a response to worries about the legitimacy of agency rule-making. Requiring agencies to publicize their proposals and to hear and take account of objections injects a popular and political element into the law-making process. Judicial control adds a further element of publicity, as well as giving a say to groups which may not have been properly consulted earlier. Procedural requirements and judicial control are legitimizing techniques.

The position in Britain is very different. Here most statutory rule-making powers reside in officials or bodies which are not, and are not seen as being or required to be, politically independent. Although rule-makers no doubt have the benefit of expert advice when deciding what rules to make, their function is seen as that of putting flesh on the bones

Clarendon Press, 1985), 242–50; H Pünder, 'Democratic Legitimation of Delegated Legislation—A Comparative View on the American, British and German Law' (2009) 58 *ICLQ* 353.

of the policy objectives laid down by Parliament in the enabling legislation. In other words, rule-making by government is seen very much as a political activity. The legitimacy of political rule-makers in the British system tends to derive more from the mode of their selection than from the substance of the rules they make. The government is expected to make rules that give effect to declared policies, and Britons are not so concerned with influencing or controlling particular decisions so long as they feel that the electoral process is reasonably fair and democratic.

Another reason that may account for the lack of any real dissatisfaction with the British system of control over government rule-making is that rule-making plays a smaller part in British governmental arrangements than it does in the US. Although British governments make a great many rules, much governmental regulation of economic and social life is conducted not through rule-making but through more individualized (and discretionary) modes of decision-making.[187] In Britain too, regulatory agencies have traditionally been much more involved in monitoring and enforcing compliance with the law than in making rules.

The main advantages of a more formalized procedure of rule-making are said to be that it gives the citizen a greater chance to participate in decision-making and that it improves the quality of the rules made. However, if the participants object to the rules made, despite extensive involvement, and feel that participation has only 'worked' if the result they favour is reached, then participation by itself may be of limited value. The formalized procedures used in the United States do not seem to have reduced dissatisfaction with the administrative rule-making. It may be that Americans are much less happy than the British about having their lives regulated by government at all, and that this, rather than the actual content of the regulation, is the main source of discontent. No amount of formalized procedure can overcome this problem.

As for the second alleged advantage, the concept of increased quality of rule-making is a very difficult one to pin down. If quality refers to technical matters such as drafting, participation of non-experts may not improve quality. On the other hand, consultation of those whose interests will be affected may assist the rule-maker to design a rule that will effectively and efficiently achieve desired policy objectives by providing detailed information about the circumstances in which the rule will operate. If 'quality' is really a surrogate for political acceptability, then

[187] D Vogel, *National Styles of Regulation: Environmental Policy in Britain and the United States* (Ithaca, NY: Cornell University Press, 1986).

once again there may be reason to doubt that increased popular participation will make rules more acceptable to those who dislike them.

There are considerable problems associated with more formal participatory forms of rule-making. They take a lot of time and money; and so groups with the greatest resources tend to have an advantage over less-well-endowed interest groups. It is unlikely that statutory obligations to consult would overcome such inequalities in resources. Furthermore, it is not clear that hearing a wide diversity of conflicting views makes it easier to frame a rule; the result may simply be that the rule finally formulated fails to satisfy many of those views. On the other hand, consultation at an early stage may at least increase levels of compliance later on and reduce the chance that those dissatisfied with any rules made will seek actively to challenge them.

5

Openness

One of the values underpinning the principle of procedural fairness is open government. Fair hearing rights promote this value in administrative decision-making and consultation obligations promote it in administrative rule-making. However, the principle that public administration should be carried on 'in the sunshine' extends beyond these two contexts, as the discussion in this chapter will show. The chapter deals with two main topics: obligations of the administration to disclose documents in civil litigation, and freedom of information.

5.1 OPENNESS AND LITIGATION

The administrative fair hearing is an analogue of the judicial fair trial. The requirements of fairness in judicial trials are strongest in the criminal context; but because deciding criminal matters is the exclusive province of courts, we need not consider that aspect of the fair trial in this book.[1] The requirements of fairness in civil trials are elaborated in detail in the Civil Procedure Rules (CPR) and in related Practice Directions (PDs). These are relevant to this book because they regulate judicial review proceedings and private-law proceedings (in contract and tort, for instance) against public administrators. They are also relevant to civil proceedings in which information is sought from an administrative agency that is not a party to the action. Analogous principles apply to proceedings before administrative tribunals. In these contexts, the basic principle is that each party must disclose to the other the basis of their claim (in pleadings) and all evidence within their control relevant to the claim. In the administrative decision-making context, the disclosure obligations of public administrators relate most relevantly to

[1] The leading case is *R v H* [2004] 2 AC 134.

information about what the administrator proposes to do. In proceedings before courts and tribunals, disclosure obligations relate most relevantly to information about what public administrators have done.

5.1.1 DISCLOSURE AND INSPECTION OF DOCUMENTS

Although, in the English system, the purpose of adjudicating factual disputes is not to 'discover the whole truth', it is important that parties should be able to collect evidence relevant to their case and to do this, as far as possible, before any hearing in order to prevent surprise. The main formal technique for doing this is 'disclosure and inspection of documents'.[2] Disclosure involves revealing the existence of a document, and inspection involves revealing its contents. A party to whom a document has been disclosed has a prima facie right to inspect it. There are two grounds on which the (correlative) obligation to allow inspection can be resisted: that the document is no longer in the party's control, and that to require inspection would be 'disproportionate to the issues in the case'.[3] By means of disclosure and inspection (hereafter called simply 'disclosure') a party can obtain access to documents that are in the control of the other party. Disclosure is designed to save time at the hearing; to enable a party to know, as fully as possible in advance, the case that may be presented by the other party and to prepare as effective an answer as possible; and, if appropriate, to reach a settlement out of court. In judicial review proceedings, disclosure is not required unless the court so orders.[4] Traditionally, courts have rarely made such orders for disclosure. However, a more flexible approach has now been adopted, especially in cases involving alleged breaches of Convention rights.[5]

There are grounds on which a party may be entitled not to disclose a document. For example, a professional person, such as a doctor or solicitor, is entitled, in certain circumstances, to refuse to disclose documents received in confidence in their professional capacity. Most importantly for present purposes, a party may refuse to disclose

[2] CPR Part 31.

[3] CPR 31.3(1)(a) and 31.3(2) respectively.

[4] Practice Direction (PD) 54A, 12.1. This is partly because errors of fact resulting from defective assessment of evidence only exceptionally provide a basis for judicial review, and judicial review procedure reflects this limitation: see 11.3.2.3. This is also why cross-examination is rarely allowed in judicial review proceedings. The result is that in judicial review proceedings factual disputes must normally be resolved in favour of the administration: *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin), [17].

[5] *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650; *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin).

documents if it can be established that the public interest justifies or requires non-disclosure.[6] This is referred to as 'public-interest immunity' (PII).

5.1.2 PUBLIC-INTEREST IMMUNITY, NOT CROWN PRIVILEGE

The rule that disclosure of documents can be resisted on the ground of public interest used to be referred to by the phrase 'Crown privilege', signifying that the Crown had a privilege against disclosure.[7] The word 'privilege' was derived from the private-law rules of evidence; for example, the right of a lawyer not to disclose certain documents is called 'legal professional privilege'. The nature of this right as a 'privilege' has two corollaries in private law. First, the right of non-disclosure attaches not to the document but to the witness asked to give it. If some other person who does not enjoy such a right can be found who can disclose the required document, there is nothing to stop them doing so. Secondly, a party who enjoys the right of non-disclosure has a choice whether or not to claim it. If the party chooses not to exercise the privilege then there is nothing to stop the document being disclosed; only the privileged party can raise the issue of privilege. It has never been clear whether either (or both) of these corollaries also attached to the use of the term 'privilege' in the public-law context.

The term 'Crown privilege' is misleading and incorrect in a number of respects. First, the claiming of PII appears to be a duty, not a right.[8] However, contrary to the advice given by the Attorney-General to Ministers in relation to the notorious Matrix Churchill trials,[9] the duty is to claim immunity only when the public interest demands it.[10] A Minister should not sign a certificate claiming PII (a PII certificate) without first being satisfied that the public interest demands non-disclosure, even

[6] CPR 31.19.

[7] The Crown's absolute immunity from disclosure (then called 'discovery') was abolished by s 28 of the Crown Proceedings Act 1947.

[8] *Makanjuola v Commissioner of Police of the Metropolis* [1992] 3 All ER 617, 623 (Bingham LJ), approved by Lord Woolf in *R v Chief Constable of the West Midlands Police, ex p. Wiley* [1995] 1 AC 274, 295–6.

[9] The collapse of which precipitated the Scott inquiry into the 'arms to Iraq affair'; as to which see *The Scott Report* [1996] *PL* 357–527; A Tomkins, *The Constitution after Scott: Government Unwrapped* (Oxford: Clarendon Press, 1998).

[10] The government has accepted this principle: G Ganz, 'Volte-Face on Public Interest Immunity' (1997) 60 *MLR* 552.

though it is ultimately for the court to decide whether or not disclosure should be ordered.[11] Secondly, once it has been decided that the public interest demands non-disclosure, immunity attaches to the document and not to the person in control of it (ie the government agency from which disclosure is sought). If the public interest demands non-disclosure, the duty not to disclose cannot normally be waived—in principle at least; although in practice, no doubt, PII is not always asserted even in cases where, as a matter of law, it is available.[12] There appears to be at least one exception to the non-waiver principle. Bodies such as the Customs and Excise Commissioners and the National Society for the Prevention of Cruelty to Children (NSPCC) have successfully claimed immunity from disclosing the sources of their information on the ground that if confidentiality were not maintained, their sources of information would dry up. In such cases, the particular source being protected can waive the immunity because people will not be discouraged from coming forward if they know that it is only by their own choice that their identity may become known.[13]

A third reason why the term 'Crown privilege' is misleading is that any party to the litigation—not just the government—can raise an issue of public policy immunity, and the court itself can raise the issue. On the other hand, if a Minister decides that the public interest does not require non-disclosure, a court is unlikely to question this conclusion. A court is more likely to consider ordering non-disclosure on its own initiative if the decision not to claim immunity has been made by someone other than a Minister.[14] Fourthly, the term 'Crown' is inaccurate because it implies that public policy immunity only attaches to documents in the control of departments of central government. It is now clear, however, that the demands of 'public policy' can justify non-disclosure of material in the control of local government and other public agencies.

5.1.3 INSPECTION TO DETERMINE RELEVANCE

To understand how PII claims are dealt with it is necessary to draw a distinction between two different questions: what might be called 'the disclosure question' on the one hand, and 'the immunity question' on

[11] *R v Chief Constable of West Midlands Police, ex p Wiley* [1995] 1 AC 274.

[12] C Forsyth, 'Public Interest Immunity: Recent and Future Developments' [1997] *CLJ* 51, 55–6.

[13] *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, 298–9. See also *Lonrho Plc v Fayed (No 4)* [1994] QB 749.

[14] *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, 296–7.

the other. The disclosure question concerns whether a party is under a prima facie obligation to disclose a particular document and whether, where such an obligation exists, the party may refuse disclosure on some ground other than PII. The immunity question concerns whether a party is entitled to claim immunity from disclosure on public-interest grounds. In the present context, the disclosure question is essentially a private-law question because the fact that the document is in the control of a public functionary does not, in theory, affect the issue of whether the conditions for the existence of a prima facie obligation of disclosure laid down in the CPR are satisfied. The immunity question, on the other hand, is a public-law question because it turns on the balance between the public interest in the due administration of justice (which may require disclosure) and the public interest in non-disclosure.

The basic principle governing the disclosure question is that documents should be disclosed if they are relevant to questions in dispute.[15] Only if the disclosure question is answered in favour of disclosure does any question of immunity arise. There is a difficulty here because, in order to know whether the conditions for disclosure are met in relation to any particular document, it is necessary to know what it contains. But if a claim of PII is made and is found to be justified, it would require the contents of the document not to be revealed. A solution to this problem would be to allow the court to examine the documents in private to ascertain whether the conditions for disclosure were met. A judge should inspect documents for which immunity is claimed only if satisfied that they are more likely than not to contain material which would give substantial support to the contentions of the party seeking disclosure.[16] This is a high[17] standard, and it imposes a considerable restriction on the power of the court to inspect documents.

The importance of this restrictive attitude to inspection by the court is not limited to the disclosure question. If a claim of PII is made, the only way the court can judge the strength of the claim without actually allowing the contents of the documents to be disclosed is to inspect the documents in private. If inspection is not allowed because the claimant has not passed the 'relevance threshold' for inspection, the court has no alternative but to accept the claim of

[15] For a more detailed formulation see CPR 31.6.
[16] *Air Canada v Secretary of State for Trade* [1983] AC 624.
[17] But not insurmountable: eg *Re HIV Haemophiliac Litigation* [1990] *New LJ* 1349.

immunity; otherwise it risks causing exactly that damage to the public interest which the government alleges will flow from the disclosure. Thus an unwillingness to inspect for relevance leads to an inability to question claims of immunity. It is important to realize that the upshot of a denial of discovery may not just be that some relevant documents are unavailable. If the essential elements of the claimant's case are buried in documents which the court refuses to inspect or refuses to allow the claimant to see, the case may never get off the ground.

5.1.4 INSPECTION TO DETERMINE IMMUNITY

At one time the courts took the view that if a suitably senior government officer (usually a Minister) certified that the public interest required non-disclosure, such a certificate would be treated as conclusive by the court.[18] Since *Conway v Rimmer*[19] courts have been less prepared to accept the views of the executive as conclusive of the question of immunity: hence the practice of inspection in private by the court, this being the only way to adjudicate properly on a claim of immunity without revealing the contents of the documents. This change of attitude shifted power from the executive to the courts. The courts took upon themselves the task of deciding what public policy demands in respect of the disclosure of government information. As a result, no government document, however exalted in origin (eg Cabinet documents), is necessarily entitled to immunity, although the higher the origin of the document and the closer its connection with matters of high policy (as opposed to routine public administration), the less likely that a claim for immunity made in respect of it will be questioned.[20] Although it has never been spelt out, this change in the treatment of PII claims made by central government implies that a court should never defer to PII claims made by other public agencies.

The task of the court when it inspects documents in order to adjudicate on a claim of immunity is to balance the alleged public interest in non-disclosure against the *public* interest in the due administration of justice (which, in an adversarial system, requires that all information having more than marginal relevance to the case be made available to the parties and the court), and to decide, on the basis of this balancing, whether or not the documents ought to be disclosed. It is important to note that what is weighed against the alleged public interest in non-disclosure is not the

[18] *Duncan v Cammell Laird & Co Ltd* [1942] AC 624.
[19] [1968] AC 910.
[20] *Burmah Oil v Bank of England* [1980] AC 1090.

interest of the individual litigant but the public interest in the due administration of justice. This is not to say that the interests of the litigant are irrelevant. The public interest can be measured only with reference to the strength of the claimant's case as a matter of law and fact, and the importance of the interest sought to be vindicated by the action. But at the end of the day, what the courts are seeking to uphold is the integrity of the legal process. The courts are, in a special sense, guardians of the legal process, and their responsibility to protect it from encroachment by administrative action is greater than their responsibility to protect purely private interests from such encroachment.

As is the case with any balancing operation requiring detailed reference to the facts of particular cases, not all decisions will necessarily sit easily with one another. Consider, for example, the following two cases. In *Gaskin v Liverpool City Council*[21] the claimant sought disclosure of documents relating to his behaviour and treatment when, as a child, he had been in the care of a local authority which he was now suing because of alleged maltreatment while he was in care. It was held that the proper functioning of the care services demanded that their records be kept confidential and that they should not be inspected by the judge. *Campbell v Tameside MBC*[22] concerned disclosure of documents relating to the behaviour of a delinquent schoolboy, not in care, who assaulted a teacher. The teacher sought to sue the local authority in negligence. It was held that the court was right to inspect the documents and decide, on the basis of their significance, whether the demands of justice outweighed the desirability that records of education authorities on individual problem children be kept confidential.

A close reading of these two cases suggests that the court was unsympathetic to Gaskin's claim but sympathetic towards Campbell's. We have noted that there is an unavoidable link between the strength of the claimant's case and the propriety of allowing disclosure. However, it is important that rules of disclosure should not be used to prejudge the merits of the case. It may be undesirable that complaints against care authorities such as Gaskin's (he claimed that he had suffered

[21] [1980] 1 WLR 1549. In the end, Gaskin was given access to documents on his file, the makers of which agreed to their disclosure. The ECtHR subsequently held that the makers of the documents should not have been given such a veto, and that there ought to have been some procedure under which the interests of Gaskin and the makers of the documents could have been balanced by an independent third party: *Gaskin v UK* (1989) 12 EHRR 36. Facts similar to those in this case would now be covered by the Data Protection Act 1998, which is discussed in 5.5.

[22] [1982] QB 1065.

psychological injuries and anxiety neurosis as a result of maltreatment) should be made in the courts given the complex nature of the relationship between child and care authority. However, if such actions are to be countenanced, they should not be frustrated by denying claimants access to their personal records.

5.1.5 CLASS AND CONTENTS CLAIMS

Unwillingness to accept official certificates that the public interest requires non-disclosure is also reflected in a greater scepticism about claims of immunity made on the basis that the documents in question belong to a class of documents that ought not to be disclosed (class claims), than about claims made on the basis that the documents in question contain sensitive material (contents claims). The leading case is *Conway v Rimmer*,[23] which involved an action for malicious prosecution by a former probationary constable against his one-time superintendent. The Home Secretary objected to the production of a number of internal reports on the conduct of the claimant during his probation, but the claim of immunity was rejected. It was a class claim, and the main argument for non-disclosure was based on candour and confidentiality: that internal reports on individual police officers would be less frank if the writer feared disclosure to the subject. The House of Lords asserted the right of the court, in all but the clearest cases, to assess for itself any claim of immunity, especially a class claim; and it encouraged scepticism towards the candour argument.

However, the history of the distinction between class and contents claims has been somewhat chequered, and not all judges take the same sceptical attitude to class claims. In *Air Canada,*[24] for example, Lord Fraser suggested that the court might be *less* well equipped to controvert a class claim than a contents claim because the court would not be in a good position to judge the importance of the particular class of documents to public administration as a whole.[25] In *Ex p Wiley,* Lord Slynn expressed the view that although class claims 'may sometimes have been pushed too far . . . on occasions in the past they have been necessary and justified, indeed valuable'.[26]

[23] [1968] AC 910.
[24] [1983] 2 AC 394, 436.
[25] Inspection of documents may not assist in assessing the strength of a class claim because such claims do not relate to the contents of the documents. For this reason, too, the balancing exercise may be harder to carry out.
[26] [1995] 1 AC 274, 282.

An area in which the courts are likely to be prepared to accept without question a claim of immunity, even if it is a class claim, is that of defence and foreign affairs. In *Duncan v Cammell Laird*[27] a claim for immunity was upheld in respect of certain documents and plans relating to a submarine that sank during sea trials. Although the deferential approach to executive claims of privilege in this case has been in some degree departed from, the actual decision seems to be accepted as correct.[28] Although class claims are typically based on candour and confidentiality arguments, in the area of defence and national security a class claim may be made on the basis that all of the documents in the class contain material, disclosure of which might damage the public interest.

5.1.6 CONFIDENTIALITY

Another litmus test of the judicial attitude to the sanctity of executive claims of immunity is the approach taken to the issue of confidentiality. Claims of immunity (especially class claims, as we have just noted) often rest partly on the argument that desirable candour and frankness in public administration will be discouraged if officials are aware that they risk disclosure of internal departmental documents.[29] Lord Keith in *Burmah Oil Ltd v Bank of England*[30] was dismissive of such arguments and thought it 'grotesque' to suggest that 'any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in litigation'. Such views reflect the conventional wisdom that confidentiality as such is not a ground of immunity. The idea of 'confidentiality as such' is a very doubtful one. Confidentiality is always in aid of some end, and if the end is important enough and is likely to be jeopardized by lack of frankness, it can be said that immunity is protecting the end, not the confidentiality. At all events, some judges have shown themselves more sympathetic to the candour argument than Lord Keith. In *Burmah Oil Ltd* Lord Wilberforce said that he

[27] [1942] AC 624.

[28] See eg *Balfour v Foreign and Commonwealth Office* [1994] 1 WLR 681.

[29] To the extent that the information has already entered the public arena, the confidentiality argument is weakened: *R v Governor of Brixton Prison, ex p Osman* [1991] 1 WLR 281, 290–1. Confidentiality is a relative, not an absolute, concept. This is reflected in the principle that documents disclosed for one purpose (such as use in particular litigation) must not be used for any other purpose, subject to some overriding public interest in the collateral use: eg *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208.

[30] [1980] AC 1090, 1133.

thought the candour argument had received an 'excessive dose of cold water'.[31]

It is certainly true that not all claims of candour and confidentiality are treated with equal suspicion. In *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise*[32] a claim of immunity was upheld in respect of a class of documents containing, amongst other things, information given voluntarily by third parties about the commission of excise offences. This was done in part so as not to discourage third parties from giving information for fear of being later identified. With *Crompton* can be contrasted *Norwich Pharmacal Co v Commissioners of Customs and Excise*[33] in which the claimant sought an order requiring the defendant to reveal the names of illicit importers of a compound over which they had a patent. In this case the litigant's interest was strong and clear—to enforce its legal patent rights—and the argument for secrecy was weak because the identity of the importers was revealed by commercial documents supplied in the ordinary course of business and not some sensitive or confidential source. So there was no reason not to make the order sought.

The ambivalence of the courts to the candour argument is clear in cases concerning inquiries under s 49 of the Police Act 1964, which established an internal procedure for dealing with complaints of police malpractice.[34] In *Neilson v Laugharne*[35] and *Hehir v Commissioner of Police*[36] it was held that demands of candour and public interest in the proper investigation of complaints against the police would generally support a claim of immunity against disclosure of records of a s 49 inquiry in a civil action against any of the police officers involved. These cases were overruled in *Ex p Wiley*[37] in which it was held that statements by complainants in such inquiries were not, as a class, immune from disclosure. Subsequently, however, the Court of Appeal held that reports of officers conducting such inquiries are, as a class, immune from disclosure in order that they should 'feel free to report on professional colleagues or members of the public without the apprehension that their

[31] Ibid, 1112.

[32] [1974] AC 405. See also *R v Lewes Justices, ex p Secretary of State for the Home Department* [1970] AC 388; *D v NSPCC* [1978] AC 171; *Hassleblad v Orbinson* [1985] QB 475.

[33] [1974] AC 133.

[34] See now Police Reform Act 2002, Part 2.

[35] [1981] QB 736.

[36] [1982] 1 WLR 715.

[37] [1995] 1 AC 274.

opinions may become known to such persons'.[38] On the other hand, such class immunity is subject to two qualifications: first, it protects documents and their contents, but it does not prevent a person who knows what the documents contain from using that knowledge, for instance to launch a ('collateral') defamation action against the investigating officer.[39] Secondly, the immunity would not prevent a judge, in such collateral proceedings, ordering disclosure of documents in a protected class if the public interest favouring disclosure *in those proceedings* outweighed the public interest in non-disclosure.[40]

The bottom line appears to be that there may, in certain circumstances, be a public interest in non-disclosure of documents based on considerations of candour and confidentiality, and that this interest may outweigh the public interest in disclosure to ensure the due administration of justice. But whether or not this is so will depend on the facts of individual cases.[41]

5.1.7 PII AND CLOSED-MATERIAL PROCEDURE

In civil proceedings, PII is typically claimed in respect of information about the conduct of public administration. By contrast, in criminal proceedings and administrative contexts it may be claimed in respect of information about a citizen. It is in such contexts that closed-material procedure (discussed in 4.1.3.2) has been developed as an alternative to claiming PII. The bases on which PII claims are made are very similar to those that are said to justify closed-material procedure: national security, foreign relations, and the investigation of crime. The fundamental difference between a PII claim and closed-material procedure is that if a PII claim fails, the material either has to be disclosed or not used by the administration. By contrast, if closed-material procedure is permitted, the administration can use the material without disclosing it to the person affected. The Court of Appeal has held that closed material should not be used in 'ordinary' civil proceedings (eg where a citizen sues the government in tort for damages).[42] The compatibility with Art 6

[38] *Taylor v Anderton* [1995] 1 WLR 447, 465.

[39] *Ex p Wiley* [1995] 1 AC 274, 306. A party to whom documents are disclosed for the purposes of particular litigation is under an obligation not to use them for any other purpose (such as instituting further litigation): *Taylor v Serious Fraud Office* [1999] 2 AC 177.

[40] As occurred in *Ex p Coventry Newspapers Ltd* [1993] QB 278.

[41] *Frankson v Home Office* [2003] 1 WLR 1952.

[42] *Al Rawi v Security Service* [2010] EWCA Civ 482. The upshot of this decision was that the government, without admission of liability, settled the damages claims made in the

of the ECHR of the procedures for dealing with PII claims in civil cases has not been considered either by the ECtHR or the Supreme Court. However, the ECtHR has held that the procedures followed in criminal cases[43] are generally compliant with Art 6;[44] and it can probably be assumed that the procedures used in civil cases are also generally compliant.

5.1.8 DISCLOSURE OF DOCUMENTS AND FREEDOM OF INFORMATION

The law of disclosure of documents and the PII rules were developed against a background of government secrecy and control over information about the conduct of public administration. As we will see in 5.2, the legal landscape has been significantly changed by the Freedom of Information Act 2000 ('FOI Act'). The FOI Act creates a legally enforceable right, subject to a long list of exceptions, to be supplied with information by public authorities.

What impact will the FOI regime have on the law of disclosure? The first thing to note is that the FOI Act is concerned with access to 'information', whereas the law of disclosure relates to documents. The FOI Act does not create a right that public authorities disclose the existence of documents, or a right to inspect documents in the control of public authorities.[45] Rather it creates a right to the 'communication' of information 'held' by public authorities. In some cases, a litigant may be concerned to establish whether or not a particular document or class of documents exists. For this purpose, the law of disclosure will be more relevant than FOI law. However, the typical reason why a litigant seeks disclosure of documents is to gain access to the information they contain, and in that case, the FOI regime may provide litigants with a useful alternative or adjunct to disclosure.

In one respect, at least, the FOI regime has a significant advantage for citizens over the disclosure regime. Documents need not be disclosed

proceedings by Guantanamo detainees alleging complicity in torture. The reason given was that defending the claims would have been very expensive and might not have been possible without compromising national security. The amount and terms of the settlement were not publicly disclosed. A public inquiry into the claimants' allegations is planned.

[43] Since elaborated in *R v H* [2004] 2 AC 134.

[44] *Jasper v UK* (2000) 30 EHRR 441.

[45] This leads to the criticism that the FOI regime gives authorities 'editorial discretion': R Austin, 'The Freedom of Information Act 2000: A Sheep in Wolf 's Clothing?' in J Jowell and D Oliver (eds), *The Changing Constitution,* 6th edn (Oxford: Oxford University Press, 2007), 398.

unless they are relevant to litigation that is already underway. This rule prevents the disclosure regime being used to conduct 'fishing expeditions' designed to discover whether a public authority has in its control documents that may provide a basis for initiating litigation. By contrast, a person who seeks information under the FOI Act does not need to specify the purpose for which the information is sought, and so may be able to request information to facilitate litigation against the authority that holds the information or some other public agency or, indeed, against a private individual. The FOI regime may also be useful in cases where litigation has commenced but the public authority from whom information is sought is not a party to the litigation. Under the law of disclosure, a non-party (unlike a party) is required to disclose documents in its control only if a court so orders; and quite stringent conditions have to be satisfied before such an order will be made.[46] By contrast, information could be obtained from a non-party public authority under the FOI Act without the intervention of a court. The FOI regime is of even greater potential value in judicial review proceedings where disclosure, even by a party to the proceedings, is required only if the court so orders. A person making a claim for judicial review might be able to avoid the need for court involvement by using the FOI regime.

Finally, note that whereas the public-interest limits of disclosure are specified by the common law rules of PII discussed earlier, the public-interest exemptions from the obligation to communicate information under the FOI regime are contained in Part II of the FOI Act. The common law PII rules are abstract and give the courts considerable discretion, whereas the exemptions under the FOI Act are formulated much more concretely. It is not clear what impact the statutory regime of exemptions will have on the formulation and application of the common law PII principles. One view is that 'the courts will be forced to modify substantially the doctrine of public-interest immunity, so as at least to parallel the statutory exemptions'.[47]

5.2 FREEDOM OF INFORMATION

A precondition of effectively holding public administrators accountable is knowledge and information about their activities. Secret government

[46] CPR 31.17.

[47] R Austin, 'Freedom of Information: The Constitutional Impact' in J Jowell and D Oliver (eds), *The Changing Constitution,* 4th edn (Oxford: Oxford University Press, 2000), 363.

is unaccountable government. The traditional ethos of British government is reflected in the fact that legislation criminalizing the unauthorized disclosure of government-controlled information—the Official Secrets Act—predated freedom of information legislation by more than a century.[48] Nor was the common law much concerned to promote freedom of information. For instance, as recently as 1992 it was held that the parents of a soldier who died in an accident in the Falkland Islands were not entitled to disclosure of the report of the enquiry into his death even though the judge thought the refusal to disclose was unreasonable and illegal.[49] For most of the twentieth century, British government was conducted, if not in the dark, at least in very dim light.

However, things began to change in the 1980s, first in local government. The Local Government (Access to Information) Act 1985 in essence gave the public access to meetings of local authorities and to agenda and other relevant documentation.[50] The operation of the Act was extended to other bodies such as community health councils.[51] Legislation was also passed dealing with access to information about the environment held by governmental agencies.[52] Related to the idea of freedom of information is that of transparency of government decision-making processes. The cause of openness in government was significantly advanced by the Citizen's Charter (first introduced in 1991), one of the principles of which was provision of information about the delivery of public services. A 1993 White Paper on *Open Government*[53] was followed in 1994 by publication of a *Code of Practice on Access to Government Information*.[54] A non-binding code was chosen in

[48] The first Official Secrets Act was passed in 1889. Official secrets legislation (the current legislation was passed in 1989) and freedom of information legislation are not incompatible, of course, because there are important classes of information—relating to national security, for instance—which all governments (justifiably) want to keep secret no matter how committed they are in principle to openness. So protections for 'whistleblowers' under the Public Interest Disclosure Act 1998 do not apply to employees of the security and intelligence services (s 11, amending s 193 of the Employment Rights Act 1996). On the relationship between official secrets legislation and freedom of speech see *R v Shayler* [2003] 1 AC 247.

[49] *R v Secretary of State for Defence, ex p Sancto* (1992) 5 Admin LR 673. Subsequently, the Ministry changed its policy in favour of disclosing reports.

[50] See also Local Government Act 2000, s 22; P Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal,* 4th edn (Cambridge: Cambridge University Press, 2010), 369–71.

[51] Community Health Councils (Access to Information) Act 1988.

[52] J Macdonald and CH Jones (eds), *The Law of Freedom of Information* (Oxford: Oxford University Press, 2003), ch 16; Birkinshaw, *Freedom of Information* (n 50 above), ch 7.

[53] Cm 2290.

[54] Birkinshaw, *Freedom of Information* (n 50 above), 238–50.

preference to legally binding freedom of information legislation partly because it was considered that an informal approach would, in the long run, be more effective in creating an attitude of openness in government, and partly to prevent the courts becoming more heavily involved in scrutinizing the processes of government.

The common law also made some advances in securing more open government. In *Birmingham City DC v O*[55] a city councillor, who was not a member of the council's social services committee, sought access to that committee's documents about a particular adoption application because she had reason to believe that the adopting parents were unsuitable persons to be allowed to adopt a child. It was held that although the councillor had no right to see the documents, it was ultimately for the council as a whole to decide whether a councillor who was not a member of a particular committee should have access to its papers. It was also held that the decision to allow access to the files was not an unreasonable one because, despite the sensitivity and confidentiality of the information, the councillor had made out a case for being allowed to see the documents. The Local Government (Access to Information) Act greatly improved access to local government information for both councillors and citizens, but the documents in this case would have been exempt from disclosure under the Act.

The principle underlying the *Birmingham City* case was that a member of a council was entitled to access to confidential information if he or she needed it in order properly to perform functions as a member of the council; in a nutshell, access was given on a 'need to know' basis. This principle was also applied to the question of whether a council member should be allowed to attend meetings of council committees of which he or she was not a member. The answer was 'yes', if attendance at the meeting was a reasonable way of obtaining information that the member needed to know.[56]

Despite these various developments, British citizens still lacked a legally enforceable right of access to information held by public authorities.[57] This was finally achieved in the FOI Act. The Act was preceded in 1997 by a White Paper, *Your Right to Know,* which foreshadowed a

[55] [1983] 1 AC 578. For explanation of the background to this case and a more negative assessment of the principles it establishes see I Leigh, *Law, Politics and Local Democracy* (Oxford: Oxford University Press, 2000), 221–4.

[56] *R v Sheffield CC, ex p Chadwick* (1985) 84 LGR 563. For background to and further explanation of this case see Leigh, *Law, Politics and Local Democracy* (n 55 above), 191–3.

[57] The ECHR does not protect freedom of information, as such: Macdonald and Jones, *Law of Freedom of Information* (n 52 above), paras 21.39–21.53.

considerably more open regime than that which (after much consultation and debate) was eventually enacted. Indeed, one commentator has described the FOI Act as 'a sheep in wolf's clothing, purporting to give a legally enforceable right of access to government information' and to impose 'general publication duties' but in reality doing neither.[58] This judgment is partly based on the number and breadth of the exemptions from the obligation to disclose and partly on a review of the first two years of operation of the FOI Act (which was implemented in 2005). Nevertheless, the Act did create, for the first time in Britain, a general right to be told, on request, whether a public authority holds information of a particular description and, if it does, to be given that information. In place of the legal principle, that unauthorized disclosure of 'official information' is unlawful, was put the presumption that such information should be made available unless there is some good reason for non-publication.

Here is not the place to consider the FOI regime in detail. However, a few points, particularly relevant to matters dealt with elsewhere in this book, are worth making. The first concerns the scope of the FOI Act. We have already seen that the scope of the HRA and the ECHR is defined in terms of the abstract concepts of 'public authority', 'public function', and 'private act';[59] and we will see that such concepts also define the scope of judicial review.[60] By contrast, although the scope of the FOI Act is also defined in terms of 'public authorities', the meaning of this term is elaborated in a very long list of entities (both governmental and non-governmental) that are to be treated as public authorities for the purposes of the Act.[61] Although this approach seems a little cumbersome, it has some advantage in terms of clarity and certainty.[62]

Secondly, as was noted in 5.1.8, the FOI regime may provide a valuable alternative to disclosure of documents as a means of gathering evidence for the purposes of litigation concerned with performance of

[58] R Austin, 'Freedom of Information: The Constitutional Impact' in J Jowell and D Oliver (eds), *The Changing Constitution,* 6th edn (Oxford: Oxford University Press, 2007), 397.

[59] See 4.1.3.6.

[60] See 12.1.2.

[61] FOI Act, Sch 1. Central to the operation of the FOI regime in relation to entities performing public functions under contract are the exemptions in ss 41 and 43: S Palmer, 'Freedom of Information: A New Constitutional Landscape?' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003), 240–5; M McDonagh, 'FOI and Confidentiality of Commercial Information' [2001] *PL* 256.

[62] Entities can be added to the list of public authorities provided they satisfy the criteria laid down in s 4(2).

public functions. More generally, greater openness will make it easier for citizens to hold public authorities to account for their conduct of public affairs, whether through courts and tribunals or other avenues, such as an internal complaints mechanism. Thirdly and, in some ways, much more importantly, the FOI Act imposes on public authorities an obligation to 'adopt and maintain' publication schemes (s 19). A publication scheme specifies the types of information a public authority 'publishes or intends to publish'. In adopting a publication scheme an authority is required to have regard to the public interest in allowing public access to information held by the authority and 'in the publication of reasons for decisions made by the authority'. The FOI Act[63] does not impose, as such, an obligation to give reasons for decisions; but it does, at least, suggest that when reasons are given, they should be communicated.

Publication schemes must be approved by the Information Commissioner, who may also prepare and approve model publication schemes.[64] The real value of publication schemes does not lie in telling people what sorts of information are available on request, but rather in encouraging public authorities to make information available (on the Web, for instance) independently of any request that it be communicated. Identification of and access to unpublished material is facilitated by the Information Asset Register.

A fourth point to note concerns the exemptions contained in Part II of the FOI Act.[65] The exemptions operate to relieve public authorities of the obligation to 'confirm or deny' the existence of information, or the obligation to communicate information, or both. Some of the exemptions protect classes of information (eg information held for the purposes of a public investigation),[66] while others are designed to avoid prejudice to a specified interest as a result of disclosure of information (eg the economic interests of the UK).[67] Some of the exemptions are absolute—those relating to national security and court records, for instance. Others are not absolute but apply if, 'in all the circumstances of the case', the public interest in secrecy outweighs the public interest in openness. The non-absolute (or 'conditional') exemptions, unlike the

[63] Unlike the 1994 *Code of Practice on Access to Government Information* referred to earlier.
[64] FOI Act, s 20.
[65] The FOI Act regime is residual in the sense that information 'reasonably accessible' without recourse to the Act is exempt from its provisions: ss 21, 39.
[66] FOI Act, s 30.
[67] FOI Act, s 29.

absolute exemptions, require the authority which holds the information[68] to do a balancing exercise similar to that involved in PII law.

The number and width of the exemptions has led one commentator to observe that the FOI Act is more like a system of 'access to information by voluntary disclosure' than a 'legal right to information subject to specific exemptions'.[69] Amongst the most startling exemptions are those relating to information about the formulation of government policy[70] and information likely to prejudice the effective conduct of public affairs.[71] The latter exemption is absolute so far as it relates to information held by either of the Houses of Parliament.[72] Otherwise, both exemptions are conditional. The former exemption is class-based whereas the latter is prejudice-based.

It has been said that these two exemptions 'reflect long-standing practice that advice to government should not be disclosed'.[73] It is certainly true that the policy-making process in Britain has traditionally been secretive and subject to little or no legal regulation.[74] However, participation by individuals and groups in the policy-making process has become a standard feature of the political landscape, and it may be questioned whether the approach adopted in these exemptions is necessary, desirable, or even consistent with a serious commitment to 'open government'. Is it appropriate, for instance, to use the law to prevent publicity being given to differences of opinion amongst Ministers?[75] And what should we think about the argument underpinning s 36(2)(b) of the FOI Act—that people will only speak freely and frankly under a blanket of confidentiality—in the light of the judicial approach to this matter discussed in 5.1.6? As a matter of principle, it would seem not unreasonable to conclude that legal entrenchment of the secrecy of the policy-making process is a retrograde step that represents the very antithesis of informational freedom. This is not to say that all the processes of government decision-making can or should be conducted

[68] Or, in the case of s 36, a 'qualified person'.

[69] G Ganz, *Understanding Public Law,* 3rd edn (London: Sweet & Maxwell, 2001), 67.

[70] FOI Act, s 35.

[71] FOI Act, s 36. For discussion see R Hazell and D Busfield-Birch, 'Opening the Cabinet Door: Freedom of Information and Goverment Policy Making' [2011] PL 260.

[72] FOI Act, s 2(3)(e).

[73] Macdonald and Jones, *Law of Freedom of Information* (n 52 above), 283.

[74] P Cane, 'The Constitutional and Legal Framework of Policy-Making' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford: Clarendon Press, 1998).

[75] FOI Act, s 36(2)(a); A Tomkins, *Public Law* (Oxford: Oxford University Press, 2003), 139–40.

in the full glare of publicity. The question is whether these extremely broad exemptions define a legitimate sphere of state secrecy.

A final point to note about the FOI Act concerns the enforcement mechanisms in Parts IV and V of the Act. A person who is dissatisfied with the response of a public authority to a request for information is required first to use any internal complaints mechanism provided by the authority in question.[76] If still dissatisfied, the complainant can apply to the Information Commissioner. If the Commissioner decides that the authority has not dealt with the request in accordance with the provisions of the FOI Act, he or she can serve a 'decision notice'[77] or an 'enforcement notice'[78] on the authority specifying steps to be taken by the authority to comply with the law. Failure to comply with such a notice may constitute contempt of court,[79] but cannot form the basis of a civil action against the authority.[80] The complainant or the authority may appeal against a decision notice, and the authority may appeal against an enforcement notice, to the First-tier Tribunal (Information Rights) (FtT). An appeal on a point of law lies from the FtT to the Upper Tribunal (UT).

5.3 PROTECTION OF SOURCES

As we have seen (5.1.6), one of the concerns underlying the confidentiality argument against disclosure of documents is a desire not to discourage candour, especially within government. Another is a desire not to discourage the supply of information, particularly to law-enforcement bodies, by persons who fear that if their identity were made known they might become victims of reprisals. Law-enforcement bodies rely heavily on the activities of informers and whistleblowers.

Protecting the anonymity of sources of information is also important for the operation of the media in general and the press in particular. In a free society the media play an important (though unofficial) part in keeping the public informed about the activities of the administration and in investigating alleged misconduct by public administrators. 'Leaks' play a part in communicating information to the public about the activities of government. This was particularly so before the enactment of the FOI Act. As we have seen, however, the right to information created by the FOI Act is subject to many exceptions; and so leaking will continue to provide an important channel of communication between

[76] FOI Act, s 50(2)(a). [77] FOI Act, s 50(3)(b). [78] FOI Act, s 52.
[79] FOI Act, s 54(3). [80] FOI Act, s 56(1).

public authorities and citizens in relation to information not covered by the right to information. The informal communication of information to the media is often allowed or even initiated by the government itself. Our concern here is with unauthorized leaks.

Information about sources of information is not, as such, an exempt category under the FOI Act; but many of the exemptions could be used to protect sources. Under s 10 of the Contempt of Court Act 1981 no court may require the disclosure of sources of information unless such disclosure is necessary in the interests of justice, or national security, or the prevention of disorder or crime.[81] The section[82] requires the court to balance the interest in anonymity of the source against the interest asserted by the party seeking disclosure. It creates a presumption in favour of non-disclosure[83] subject to the three stated qualifications, and on its face it embodies a powerful statement of the importance of maintaining a flow of information to the public *via* the media.[84] In practice, however, the attitude which the courts have taken to the section has somewhat weakened its force. For example, although the government cannot simply assert that disclosure of the identity of a source is necessary in the interests of national security but must provide adequate evidence of necessity, courts have shown themselves very deferential to claims that national security is at stake,[85] and there is no reason to doubt that this attitude will affect the approach of the courts to this provision.

The phrase 'for the prevention of . . . crime' does not refer just to the prevention of particular crimes but to the general project of deterring and preventing crime.[86] Similarly, the phrase 'in the interests of justice' does not refer only to 'the administration of justice in the course of legal

[81] The section says that the information must be contained 'in a publication', but it has been held that the section applies to information supplied for the purpose of being published: *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1. The principles contained in s 10 have also been applied to other situations to which they are not strictly applicable: *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660.

[82] Like Art 10 of the ECHR (freedom of speech).

[83] The party seeking disclosure must establish that it is 'necessary'.

[84] The principle underlying s 10 is freedom of speech/freedom of the press (*Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033 at [38]), not freedom of information. This explains why it creates a qualified presumption against disclosure of information about the identity of sources whereas the FOI Act creates a qualified presumption in favour of disclosure of information including information about the identity of sources.

[85] eg *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339. The ECHR does not protect freedom of information as such. A right of access to personal information has been read into Art 8: *Gaskin v UK* (1989) 12 EHRR 36.

[86] *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660.

proceedings in a court of law' but more widely to the freedom of persons to 'exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to achieve these objectives'.[87] On the other hand, the mere fact that a party needs to know the identity of the source in order to take action against the source will not justify disclosure unless the interest which the party seeking disclosure is trying to protect is important enough to outweigh the presumption in favour of anonymity.[88] It appears that the interest in anonymity is more likely to prevail against an interest in asserting private legal rights than against either the interest in national security or the interest in the prevention of disorder or crime.

The House of Lords has also strongly reasserted the principle that a party ordered to disclose the identity of a source must do so on pain of punishment for contempt of court. A person who contests the correctness of an order for disclosure is not free to refuse disclosure pending appeal.[89]

5.4 BREACH OF CONFIDENCE

Not all informers, whistleblowers, and 'leakers' of confidential information seek to remain, or succeed in remaining, anonymous. Those whose identity is or becomes known may open themselves to civil liability for breach of (an obligation of) confidence. The law of confidence can be used to protect not only private confidential information but also government secrets. The most famous example of this is the *Spycatcher* litigation in which the government sought injunctions in various countries to prevent the publication of the memoirs of ex-MI5 officer, Peter Wright. Because Wright lived abroad and his book was not published in Britain, the defendants to the actions in this country

[87] *X v Morgan-Grampian* [1991] 1 AC 1, 43 (Lord Bridge of Harwich).

[88] *Financial Times v UK*, ECtHR, 15 December 2009. For instance, a health authority's interest in preserving the integrity of its patient records: *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033. The privacy of patients, protected by Art 8 of the ECHR, reinforces this interest. See *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101 for the sequel to this case.

[89] *X v Morgan-Grampian* [1991] 1 AC 1, criticized on this point by TRS Allan, 'Disclosure of Journalists' Sources, Civil Disobedience and the Rule of Law' [1991] *CLJ* 131. The ECtHR subsequently held that the order for disclosure and the fine for disobedience imposed on the journalist in this case infringed Art 10 of the ECHR because they were disproportionate: *Goodwin v UK* (1996) 22 EHRR 123.

were newspapers that wished to publish extracts from the memoirs. In this way the affair became overlaid with issues of press freedom,[90] and in a related case it was held that a newspaper might be in contempt of court if it published material that another newspaper had been ordered not to publish.[91] In the main litigation *(Attorney-General v Guardian Newspapers Ltd (No 2)*[92]) it was held that members of the security services are under a lifelong obligation of confidence in respect of secrets which they learn in their capacity as Crown servants. On the other hand, it was also held that when the government seeks to prevent the disclosure of confidential information it is not enough to show (at least where the publication is by a person other than the original recipient of the information) that the defendant was under an obligation to keep the information confidential. The government must also show that disclosure would be likely to cause some damage to the public interest.[93] It would then be open to the defendant to convince the court that there was a stronger public interest in disclosure such that the breach of confidence was justified.

The law of breach of confidence is complicated and in a state of development, and this is not the place to examine it in detail. Some points, however, need to be made. The first is that the common law recognizes that disclosure of confidential information may sometimes be in the public interest by providing a public-interest defence to an action for breach of confidence. So, for example, in one case it was held that employees of a company that manufactured breathalyser machines were justified, in the public interest, in disclosing information about the reliability of such machines which they had received in confidence in their capacity as employees.[94] In another case it was held that a doctor was justified in the public interest in releasing to the managers of a

[90] The ECtHR held that continuation of interlocutory injunctions restraining publication of extracts from Wright's book after its publication in the US constituted a breach of the ECHR: *The Observer and the Guardian v UK* (1991) 14 EHRR 153.

[91] *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191. There is an informal system, called the 'DA-notice' system, by which the government seeks to regulate the publication of specific categories of information by newspapers: Birkinshaw, *Freedom of Information* (n 50 above), 357–8; P Sadler, *National Security and the D-Notice System* (Aldershot: Dartmouth, 2001).

[92] [1990] 1 AC 109.

[93] Cf the idea in the law of disclosure of documents that confidentiality is not *per se* a ground of non-disclosure. Matters relevant to the public interest in non-disclosure include the extent to which the information has already been published (see *Attorney-General v Guardian* itself); and how long ago the events to which the information relates took place (*Attorney-General v Jonathon Cape Ltd* [1976] QB 752).

[94] *Lion Laboratories Ltd v Evans* [1985] QB 526.

secure hospital a confidential report which revealed that a patient had a long-standing and continuing interest in home-made bombs.[95]

Recognition that there may be a public interest in the disclosure of information supplied or acquired in confidence underpins statutory provisions that require auditors, in certain circumstances, to communicate to the Financial Services Authority information acquired in the capacity of auditor; and that relieve the auditor of any responsibility for breach of duty in so doing.[96] More generally, Part IVA of the Employment Rights Act 1996[97] protects workers, who (in good faith) blow the whistle on their employers by communicating certain classes of information[98] to specified recipients,[99] from being dismissed or subjected to other forms of detriment for having done so. Any confidentiality agreement between a worker and an employer that 'purports to preclude the worker from making a protected disclosure' is void.[100]

A second point to note is that there is an important alternative to the civil law of confidence as a means of controlling the leaking of public information, namely a criminal prosecution under the Official Secrets Act 1989[101] or one of a large number of other relevant statutes. It has been said that an action for breach of confidence should not lie in respect of public information the disclosure of which would not constitute an offence under official secrets legislation,[102] but it is not clear that the law will develop in this way. Unclear, too, is the relationship between the law of confidence and the FOI Act. Prima facie, one would expect that an action for breach of confidence would not lie in relation to information which a public authority would have an obligation to communicate on request. However, s 41 of the FOI Act exempts, from the obligations to confirm or deny and to disclose, information the disclosure of which would constitute an actionable breach of confidence. This exemption is

[95] *W v Edgell* [1990] Ch 359.

[96] Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001 (SI 2001/2587) and Financial Services and Markets Act 2000, s 342(3) respectively.

[97] Inserted by the Public Interest Disclosure Act 1998. For a valuable analysis of the Act against the background of a discussion of the phenomenon of whistleblowing see J Gobert and M Punch, 'Whistleblowers, the Public Interest and the Public Interest Disclosure Act 1998' (2000) 63 *MLR* 25. See also D Lewis, 'Ten Years of the Public Interest Disclosure Act 1998: What Can We Learn from the Statistics and Recent Research?' (2010) 39 *ILJ* 325.

[98] Such as information that a criminal offence has been committed or that the environment is being damaged.

[99] Such as a Minister in a case where the employer is a public authority.

[100] Employment Rights Act 1996, s 43 J.

[101] S Palmer, 'Tightening Secrecy Law: The Official Secrets Act 1989' [1990] *PL* 243.

[102] *Lord Advocate v Scotsman Publications Ltd* [1990] 1 AC 812, 824 (Lord Templeman).

absolute, and not conditional on disclosure being contrary to the public interest. This leaves the public-interest issue to be dealt with in terms of the public-interest defence to an action for breach of confidence. As a result, the operation of the defence may be affected by decisions of the Information Commissioner and the Information Tribunal about the scope of the s 41 exemption.

Use of the civil law has certain advantages for the government when compared with the criminal law. First, it removes the risk that a person prosecuted for an offence under the official secrets legislation will be acquitted by a jury on grounds other than failure to prove the constituents of the offence beyond reasonable doubt: actions for breach of confidence are tried by a judge sitting alone. Secondly, an action for breach of confidence offers the prospect of preventing or restricting publication of the information in question by means of an injunction; and also the possibility of obtaining an 'account of profits'—a remedy by which a person who has made a profit out of a breach of confidence can be required to 'disgorge' that profit.[103] Thirdly, because of the wording of s 5(1) of the 1989 Act, it may be easier successfully to sue a subsequent recipient of information for breach of confidence than to bring a successful prosecution against the subsequent recipient for breach of the Act.[104] On the other hand, the 1989 Act contains no public-interest defence; and under the Act it is an offence to disclose certain categories of information[105] even if the disclosure did not damage the public interest.

5.5 ACCESS TO PERSONAL INFORMATION

One of the important contributions of the 1980s to breaking down ingrained habits of secrecy was the first legislation designed to give people a legal right of access to files concerning themselves. The aim was to enable individuals to know what personal information was held, to have any inaccuracies corrected or erased, and, in the case of information held

[103] Such an order was made against *The Times* newspaper in the *Spycatcher* litigation. In another action arising out of publication of the memoirs of a former spy, it was held that the government was entitled to the profits earned by the author from the publication, but on the basis of breach of contract, not breach of confidence (the information in question was no longer secret when the memoirs were published): *Attorney-General v Blake* [2001] 1 AC 268.

[104] The section does not appear to apply to disclosure of information received from former civil servants.

[105] Those covered by ss 1(1) and 4(3).

on computer, to obtain compensation for loss suffered as a result of inaccuracy. Concern about misuse of personal information initially focused on electronic files, but gradually spread to other forms of information gathering and storage. A patchwork of legislative provisions was enacted in the 1980s and 1990s, but the matter is dealt with comprehensively in the Data Protection Act 1998 (DP Act). As a result of s 68 of the FOI Act, the scope of the DP Act is wider in relation to personal information held by public authorities than in relation to information held by private 'data controllers'.

Whereas freedom of information legislation promotes open government, data protection legislation promotes personal privacy and various other interests that individuals have in the collection and use of their personal details. Data protection legislation gives people access only to information about themselves. Section 40 of the FOI Act prevents individuals using the FOI regime as an alternative to the data protection regime as a means of gaining access to information about themselves, and regulates the use of the FOI Act to gain access to personal information about other people.

Under the DP Act, data controllers must be registered, and must comply with eight 'data protection principles' when collecting and using data. 'Data subjects' have various rights, such as a right to prevent data-processing that is likely to cause substantial damage or distress, and a right to claim compensation from the data controller for damage or distress caused by any contravention of the Act. The operation of the Act is subject to various exemptions to protect national security, and the prevention or detection of crime, for instance. Responsibility for registration of data controllers and for enforcement of the Act rests with the Information Commissioner (who also performs these functions under the FOI Act). There is a right of appeal to the FtT from enforcement decisions of the Commissioner; and a right of appeal on a point of law from the FtT to the UT.

5.6 CONCLUSION

The main pieces of legislation discussed in this chapter—the Official Secrets Act, the Freedom of Information Act, the Public Interest Disclosure Act, and the Data Protection Act—and the common law of disclosure of documents, together form a dense and complex interlocking patchwork of legal rules designed to strike a balance between personal privacy, public secrecy, and 'open government'. The broad

landscape of information law in Britain has changed dramatically in the past thirty years or so. Information is the life-blood of accountability, and the growth of a complex body of information law has greatly increased the role of law and legal institutions in promoting accountability for the performance of public functions.

6

Reasoning

6.1 DISCRETION AND RULES

In Chapter 4 we discussed legal requirements for administrative procedure in making decisions and rules. This chapter focuses on legal norms concerned with the reasoning process that leads to the making of decisions and rules. In making decisions and rules public administrators often have choice or—in legal jargon—'discretion'. Even when an administrator has a duty—which is the antithesis of discretion—if that duty is couched in abstract terms it may give the administrator choices about how to act (see 3.2). In this chapter we discuss what the law says about how administrative discretion should be exercised.

Discretion has advantages and disadvantages.[1] It has the advantage of flexibility: it allows the merits of individual cases to be taken into account. Discretion is concerned with the 'spirit of the law', not its 'letter', and it may allow government policies to be more effectively implemented by giving administrators freedom to adapt their working methods in the light of experience. It is useful in new areas of government activity because it enables administrators to deal with novel and perhaps unforeseen circumstances as they arise.

On the other hand, discretion may put the citizen at the mercy of the administrator, especially if the administrator is not required to tell the citizen the reason why the discretion was exercised as it was. Discretion also opens the way for inconsistent decisions, and demands a much higher level of care and attention on the part of the decision-maker; discretion is expensive of time and money. Conferring discretion on non-elected public administrators may be used by politicians to off-load onto front-line administrators difficult and contentious choices about the way a public programme ought to be implemented and the objectives

[1] CE Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins (ed), *The Uses of Discretion* (Oxford: Oxford University Press, 1992).

of the programme in the hope of avoiding political debate and opposition. If, as a result, the aims and purposes of the programme are never stated clearly, retrospective control (by courts, for instance) of the exercise of the relevant discretion may become difficult and itself a source of political controversy. When judges and civil servants are thus forced to make contentious choices, the legitimacy of their decisions may be threatened.

Discretion is often contrasted with rules. Carefully drafted rules, it is argued, can promote certainty and uniformity of result, and facilitate retrospective control by giving a standard against which decisions can be judged. Rules may also make the administrative process more efficient by reducing the number of choices administrators have to make in implementing programmes and the time that needs to be spent on individual cases. Rules can create rights and entitlements for citizens dealing with the administration. This is often thought particularly important in the area of social welfare—many think that citizens should receive the basic necessities of life from the State as a matter of entitlement, not as a matter of gift or charity. On the other hand, rules are less flexible than discretion: they may make it more difficult to take account of the details of particular cases. Rules may lead to impersonal administration that has little concern for the citizen as an individual.

A closer look at social security law provides a good illustration of this general discussion. At one stage an important part of the social security system was that persons claiming 'supplementary benefit' could, in certain circumstances, be given discretionary extra payments to cover extraordinary needs. The exercise of the discretionary power to make extra payments was under the control of the Supplementary Benefits Commission which, over the years, developed a long and detailed code of practice governing the award of discretionary benefits. According to Professor David Donnison[2] (who was at one time chair of the Commission), in some local social security offices extra rules of thumb were applied to cut down the number of cases which had to be considered for discretionary payments. Neither the code nor the informal accretions to it was published.

Professor Donnison thought that the discretionary system and the code suffered from a number of serious defects: it was often degrading for applicants to have to ask for help; it was inefficient because the payments involved were usually small; because the code was not

[2] *The Politics of Poverty* (London: Martin Robertson, 1982), 91–2.

published, claimants did not know where they stood; the system generated a very large number of appeals; it required experienced staff to operate it well and doing so often caused staff to become harassed. Donnison was of the view that much of the discretion needed to be taken out of the system. Discretion to deal with hardship created by urgent and unforeseeable needs should be clearly defined and limited. Payments to meet extraordinary needs should be clearly defined and should be a matter of rule-based entitlement, not discretionary charity. When social situations arose which the scheme had never had to deal with before, there would be a need for some discretion at first, but it should be quickly limited by legislation and judicial review. Donnison considered that discretion is often positively harmful. In a few exceptional cases it is positively beneficial, but experienced staff and careful planning are needed to deal with these cases.

In due course much of the discretionary element was purged from the supplementary benefits system and was replaced by legally binding regulations. One of the aims in doing this was to limit the amount spent on special payments. Perhaps predictably, these regulations came in for criticism—it was said that they were difficult to understand and unduly complex, and that they did not expel discretion from the system but just relocated it in the rule-makers and thereby weakened external control of its exercise.[3] Before long, the system swung back again: the making of special payments (out of what is called 'the Social Fund') to people in receipt of income support (as the successor of supplementary benefit is called) now involves, with some exceptions,[4] a significant element of discretion. The exercise of the discretion is controlled by the *Social Fund Guide,* which contains detailed guidance and directions issued by the Secretary of State which are, in practice, not all that different from the regulations which they replaced.[5] The new system was heavily criticized on the grounds that it subjected front-line decision-makers to a very high level of ministerial control; that the exercise of this control was itself subject to very little external check; and that there was no adequate system of external check of Social Fund decision-making.[6]

[3] C Harlow, 'Discretion, Social Security and Computers' (1981) 44 *MLR* 546.

[4] Funeral and cold-weather payments.

[5] The system of directions and guidance was unsuccessfully challenged: *R v Secretary of State for Social Services, ex p Stitt* (1991) 3 Admin LR 169; D Feldman, 'The Constitution and the Social Fund: A Novel Form of Legislation' (1991) 107 *LQR* 39.

[6] NJW, 'Reviewing Social Fund Decisions' (1991) 10 *CJQ* 15. There is no right of appeal to the FtT in respect of Social Fund decisions. Instead, decisions can be reviewed by a Social Fund Inspector (SFI) in the Independent Review Service, and decisions of SFIs are subject

This illustration makes two points very clearly. The first is that the ideal balance between discretion and rules is difficult to find.[7] The second is that although rules can offer certain benefits to citizens, they are also a very important means by which central governmental authorities can exercise control over large and geographically decentralized administrative networks.

Because it has advantages and disadvantages, administrative law is ambivalent about discretion. On the one hand, it aims to ensure that administrators exercise the discretion they have been given and do not allow someone else to exercise the discretion, or effectively eliminate the discretion by deciding to exercise it in the same way in every case regardless of circumstances. On the other hand, the law seeks to ensure that the freedom discretion gives to administrators is not exceeded, misused, or abused. In this chapter we will first examine general administrative law norms designed to preserve, protect, and promote discretion and secondly, norms that limit and constrain discretion.

6.2 PROMOTING DISCRETION

Discretion is the power to choose. However acceptable in substance a decision may be, if it is not the result of an exercise of free choice by the administrator to whom discretion has been given, it is not an exercise of that person's discretion. Even the fact that the decision-maker would have reached exactly the same decision if free choice had been exercised does not make the decision valid if it was not freely chosen. Moreover, choice is a personal thing: my choice may not be the same as your choice. This is reflected in the basic rule that discretion must be exercised by the person to whom it is given and not by anyone else. These two elements—the necessity of choice and its personal exercise—can be said to define the concept of discretion in administrative law. They can be encapsulated by saying that decision-making power must not be fettered and that it must not be transferred. We will consider these principles in turn.

to judicial review: M Sunkin and K Pick, 'The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund' [2001] *PL* 736.

[7] R Baldwin, *Rules and Government* (Oxford: Oxford University Press, 1995) approaches this issue by asking when rule-making is the best strategy for achieving governmental policy objectives. There are different types of rules, and choosing the most appropriate may be a complex task: J Black, '"Which Arrow?" Rule Type and Regulatory Policy' [1995] *PL* 94. The balance between discretion and rules may be affected by the use of computers and 'expert systems' as aids to human decision-making.

6.3 DISCRETION MUST NOT BE FETTERED

To fetter discretion is to limit it unlawfully. Limits on discretion do not, as such, constitute unlawful fetters. This section is concerned with drawing the line between lawful and unlawful constraints on public administrators' freedom of choice.

6.3.1 FETTERING BY DECISION

Suppose an administrator, in lawful exercise of discretion, makes a particular decision in particular circumstances. To what extent can that decision be used by the administrator as a justification for limiting future exercises of discretion? It is necessary to consider illegal decisions and legal decisions separately. In this context, 'decision' means a determination of a person's legal rights or obligations.

6.3.1.1 Illegal decisions

Suppose that a public authority purports to exercise a statutory discretion to provide a benefit (such as planning permission) to a citizen, and that this exercise of discretion is illegal on some ground or other; but that the citizen could not reasonably be expected to have known this. The basic rule, of course, is that illegal decisions are neither binding nor enforceable. Strict application of this basic rule would make it illegal for the authority to provide the promised benefit; and it could not be forced to provide it no matter how unfair this might seem to the citizen and no matter how much loss might have been suffered by the citizen in reliance on the purported exercise of power. To what extent is the law prepared to relieve parties of the strict consequences of the basic rule and to bind administrators to implement their illegal decisions?

In general, courts have been prepared to create exceptions to the basic rule only in the most obvious cases of injustice. Such exceptions as are recognized were largely the work of Lord Denning, and the Supreme Court is yet to consider the matter directly. Lord Denning's approach has been accepted only with a greater or lesser degree of reluctance by other judges. There are several reasons for such reluctance. One seems obvious enough: the logic of any distinction, between the strict legal position and exceptions to or relief from strict law in the name of 'fairness' or 'justice', requires that the exceptions be kept within relatively narrow and well-defined limits if they are not to threaten the general principle with extinction.

There are other reasons that relate more specifically to the position of public administrators. First, most public decision-making powers are

statutory in origin and, therefore, limited in scope by the terms of the statute. An extensive power to dispense with those limits in the name of some idea of (non-statutory) justice would make nonsense of the idea of powers limited by statutory provision. A second reason is implicit in the first and it relates to the idea of separation of powers. If courts could freely create exceptions to the basic rule, this would entail a considerable shift of power to the courts and away from the legislature and the executive. For example, suppose that a planning officer of a local authority purports to grant planning permission even though there is no authority to do so. The council later refuses permission. It might be thought that the aggrieved citizen ought to use the statutory method of appeal to the Secretary of State against refusal of planning permission rather than go to the courts and seek to have the purported grant by the officer upheld on the basis that 'fairness' requires the decision to be enforced. An appeal would allow the merits of the application for planning permission to be properly considered.

Thirdly, it is basic to the very structure of public law that sometimes the interests of individuals must suffer at the expense of some larger public interest. Therefore, it cannot be a ground for attacking a decision of a public administrator simply that it caused injury to a citizen. Conversely, it could not be a ground for waiving the basic rule simply that doing so is necessary to avoid injury to the citizen. If the doctrine is to be waived, there must be some additional ground. This need to find some additional ground itself produces a bias in favour of a narrow range of exceptions to the basic principle that illegal decisions are neither binding nor enforceable.

Fourthly, and related to the third reason, the mere fact that a private citizen will suffer injury if the basic rule is not waived in their favour cannot by itself justify such waiver, because to allow an illegal decision to stand might inflict injury on the public interest (which the basic rule is designed to protect), or on individual third parties. If an illegal grant of planning permission is allowed to stand, individuals who own property adjacent to or near the land may suffer by not having planning law enforced. A fundamental difference between the way we perceive private law and the way we perceive public law is that private law is concerned with two-party relations whereas public law is concerned with interests beyond those of the two parties (the public decision-maker and the citizen) actually in dispute. It is true, of course, that the resolution of private-law disputes often affects third parties; but we are generally prepared to ignore these external effects as unimportant. In public law, however, the public interest and the interests of individual third parties

always have to be considered of great importance in any dispute between a citizen and a public functionary.

6.3.1.1.1 The 'delegation' exception

In *Western Fish Products Ltd v Penwith DC*[8] Megaw LJ said that there are two exceptions to the basic rule that an illegal decision is invalid and unenforceable. The first exception deals with cases in which the power to make a decision resides in one official or agency but the decision is made by another official or agency on behalf of the former and the claimant reasonably thinks that the latter has the power to make the decision on behalf of the former. In some cases, public administrators have authority to delegate their powers.[9] If this has been duly done, then the decision of the delegate is as binding on the delegator as would be the same decision made by the delegator. If the delegator has no authority to delegate its power, or has such authority but has not properly exercised it, the decision of the supposed delegate will be illegal and not binding on the delegator.

There is authority,[10] which was accepted in *Penwith*, for the proposition that if there is evidence of a well-established practice of (unlawful) delegation that would justify a person dealing with the delegate in thinking that the delegate had the power to make the decision, the delegator could be bound by the delegate's decision. It is not enough that the decision was made by a person holding a senior office; this by itself would not justify a person in assuming that the official had authority. There would have to be some more positive ground for making this assumption. The Court of Appeal rejected wide dicta of Lord Denning MR[11] to the effect that any person dealing with officers of a government department or a local authority is entitled to assume that they have the authority which they appear to have to make the decisions which they purport to make.

Two points should be made about this rule. First, the exception is sometimes referred to in terms of whether the purported delegate had 'ostensible', or 'apparent', or 'usual' authority to make the decision in the citizen's favour. These phrases come from the private law of agency and refer to situations in which a principal can be bound by the acts of

[8] [1981] 2 All ER 204.
[9] See 6.4.2.
[10] *Lever (Finance) Ltd v Westminster Corporation* [1971] 1 QB 222.
[11] Similar dicta appear in *Robertson v Minister of Pensions* [1949] 1 KB 227, disapproved in *Howell v Falmouth Boat Co* [1951] AC 837.

an agent (who had no actual authority to bind the principal) because the principal represented, or put the agent in a position where the agent could make it appear, that they had the authority claimed. There is a clear difficulty in applying these agency rules to the exercise of statutory powers in public-law situations: they potentially conflict with the rule that the repository of a statutory power (the '*delegatus*') may not ('*non potest*'), in the absence of express or implied statutory authority, further delegate ('*delegare*') that power: *delegatus non potest delegare.* In public-law terms, an agent who exercises a statutory power but has no actual (ie express or implied statutory) authority to do so is (subject to exceptions) an unlawful delegate; in public law, appearances are irrelevant and cannot make good a lack of actual authority. It is better, therefore, not to use the language of agency to describe this exception to the strict application of the rule against delegation, but rather to define the exception simply in terms of the conditions which have to be fulfilled to establish it.

The second point to make is this: as just noted, the exception allows citizens to rely on appearances only in a very limited class of cases. This might be satisfactory when the citizen in question is a well-educated and articulate individual or a corporation, and can make the inquiries necessary to confirm that the officer in question has the authority they claim or appear to have. But the ordinary citizen dealing with a government agency would not necessarily think to question the authority of a front-line officer or know how to ascertain the true position. It was this, perhaps, that led Lord Denning MR in *Robertson v Minister of Pensions*[12] to make the sweeping statements he did. There a citizen relied, to his detriment, on an assurance by a government department (which it had no power to make) that he was entitled to a military pension.

6.3.1.1.2 The 'formality' exception

The second exception is exemplified by *Wells v Minister of Housing and Local Government*[13] in which a planning authority was not allowed to rely on the fact that a particular procedural requirement for the grant of planning permission had not been complied with because the authority itself had waived that requirement by initially ignoring non-compliance with it. In *Penwith*[14] Megaw LJ said that the operation of this exception would depend on the construction of the statute. By saying this, he may have wanted to convey the idea that whether or not a procedural

[12] [1949] 1 KB 227. [13] [1967] 1 WLR 1000.
[14] [1981] 2 All ER 204 (see n 8 above).

requirement could be waived would depend on the importance of that requirement in the total context of the statutory scheme of procedure. A similar idea is embodied in the distinction between mandatory and directory procedural requirements.[15] It should be noted, however, that if the requirement waived is merely directory, then its breach does not invalidate the decision and so enforcement of the decision does not involve a departure from the basic rule. The distinction between mandatory and directory requirements is a vague one and depends on all the circumstances of the case. This flexibility enables the courts, by classifying procedural requirements as being merely directory, to evade the basic rule without actually having to create exceptions to it.

It can be seen that this second exception deals with a rather different situation from the first. Here the issue is not the authority of one administrator acting on behalf of another but the validity of the decision. The first exception assumes that the only defect in the decision is that it was made by the wrong person, and that if it had been made by the delegator it would have been valid. On the other hand, in the case of each exception, the ground of invalidity in issue is a procedural one. There is no suggestion in the cases that a decision which is illegal on some non-procedural ground may be binding. The problems associated with too wide a power to dispense with the basic rule are much more acute in relation to non-procedural grounds of illegality than they are in relation to procedural grounds.

6.3.1.1.3 Further exceptions?

The law, then, appears to recognize two rather limited exceptions to the basic rule that illegal decisions are invalid and unenforceable. Beyond this, however, it does not go. So, for example, a local planning authority cannot be bound to grant planning permission by the fact that a clerk has mistakenly issued a notice saying that permission has been granted;[16] or has issued a notice of grant of permission in order to forestall litigation against a local authority which has, in fact, refused permission; or by the fact that the signature of a local authority clerk has been forged on a fake notice of grant of permission or that a notice of grant has been signed by a subordinate official without authority.[17] It may be possible for the aggrieved citizen to sue the clerk personally if

[15] See 4.1.2.
[16] *Norfolk CC v Secretary of State for the Environment* [1973] 1 WLR 1400.
[17] *Co-operative Retail Services Ltd v Taff Ely BC* (1980) P & CR 223.

the clerk has been fraudulent or negligent (or sue the council vicariously;[18] or personally, if it has been negligent or fraudulent). But to succeed it would not, of course, be enough for the citizen to show that they had been injured by a false appearance of validity. It would be necessary to show that this was the result of fraud or negligence on the part of the authority or its agents.

A possible explanation for this unwillingness to recognize further exceptions to the basic rule is that front-line administrators might become over-cautious in dealing with the public if they thought that any statement or decision they made would bind their employer even if it turned out to be wrong. Front-line administrators should be encouraged, to some extent at least, to be creative and spontaneously helpful, rather than always going exactly 'by the book'. On the other hand, there is no empirical evidence of the 'chilling effect' of litigation to support this argument.

6.3.1.1.4 Detriment

There is authority for the rule that a public administrator can be bound by an illegal decision only if the claimant suffered detriment as a result of acting in reliance on a false appearance of validity or finality.[19]

6.3.1.1.5 A balancing of interests approach

There is a quite different approach which could be taken to these cases.[20] Instead of adhering to the basic rule as the benchmark of enforceability of decisions, it would be possible to go to the heart of the matter and recognize that what these cases involve is a conflict between individual interests on the one hand, and government policy and public interest on the other.

On this approach, the basic question to be answered would be whether, balancing the various interests involved, the authority should be allowed to assert the invalidity and unenforceability of its decision or that of its officer, despite the claimant's reliance on its validity. A decision would be enforceable by a citizen, despite the fact that it was illegal, if not to enforce it would inflict injury on the individual without any countervailing benefit to the public (apart from the fact that

[18] *Lambert v West Devon BC* (1997) 96 LGR 45.

[19] *Norfolk County Council v Secretary of State for the Environment* [1973] 1 WLR 1400.

[20] PP Craig, 'Representations by Public Bodies' (1977) 93 *LQR* 398. A similar approach is taken in EU law: S Schønberg, *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press, 2000), 96–102. It remains to be seen whether it will spill over into English law.

an illegal decision would not be enforced). On the other hand, if enforcement of the decision would damage the public interest (or the interests of third parties) in a significant way, this would justify allowing the authority to plead its illegality, despite the fact that the claimant would be injured by the non-execution of the decision. For example, in *Robertson v Minister of Pensions*[21] the claimant sought to enforce against the defendant an illegal assurance that he was entitled to a pension. Clearly the impact on Robertson of not receiving the pension would be very considerable, whereas the impact on the public purse involved in paying it would be imperceptible. By contrast, the interests of particular third parties, and of the public generally, will often be significantly injured if illegal grants of planning permission are allowed to stand. Furthermore, such third parties will have no chance to put their side of the story if the disappointed landowner seeks to enforce the decision by court action.

It appears to be implicit in this 'benefit-maximizing' or 'utilitarian' approach that it would only apply to situations in which an individual who has detrimentally relied on an illegal decision seeks to enforce the decision against the maker of it. It does not seem to be contemplated that an administrator whose decisions are directly challenged by a claim for judicial review should be entitled to appeal to the balancing of interests approach to argue that its decision, though illegal, ought to be enforceable because it inflicts no appreciable injury on the person challenging it.[22]

Unlike the approach in *Western Fish*, which seeks to mitigate the harshness of the basic rule by creating two narrow procedural exceptions to it, this approach contemplates a 'substantive' exception to the principle: it involves looking at the substance of the decision in order to decide whether it ought to be allowed to stand or not. An important implication of this approach is that it may not be enough to ask whether or not the authority's decision ought to be executed. There is another theoretically possible remedy for an aggrieved citizen who has suffered loss by reliance on a false appearance of validity: monetary compensation

[21] [1949] 1 KB 227.

[22] It will be recalled, however, that there are (controversial) procedural fairness cases in which just such an approach has been adopted by the courts in favour of public bodies; these are cases in which procedural unfairness has been held not to invalidate a decision because no substantial injustice to the applicant has resulted from the decision: see 4.1.1.4.1. But it is also noteworthy that these are cases involving procedural *ultra vires*. Indeed, they rest on an assertion of the substantive correctness of the decision in question.

for the loss.[23] So, even if a court decides, as a result of balancing the interests involved, that a particular decision ought not to be allowed to stand, there may be no reason of public policy why the aggrieved citizen ought not to be compensated out of public funds for the loss. Conversely, it may be that if an illegal decision (for example, an illegal planning decision as in *Lever*) is allowed to stand, third parties who have to put up with the existence of the unauthorized development should be compensated for having to do so, for in that case they will have suffered injury as the result of an illegal decision.

There are two problems with this approach. In the first place, the task of balancing public and private interests in the unstructured way which the approach contemplates is not one which the courts or tribunals are likely to be willing to undertake. Is a court likely to be prepared to decide whether the loss to a developer, who has to abandon a development for which illegal approval was given, is greater than the loss that would be suffered by neighbours and the public at large if the development went ahead? However, this may be exactly what the court must do in a case where refusal to stand by an illegal decision arguably interferes with a Convention right, where the question will be whether the infringement is proportionate having regard to the public and private interests at stake.[24]

Secondly (and more seriously), when would this balancing approach be used? Would it only be appropriate where the decision in question was illegal on one of the two procedural grounds discussed in the *Pennwith* case? Or would it apply in any case where an individual sought to enforce an illegal decision? Suppose, for example, that a grant of planning permission is successfully challenged by a third party on the ground that it was made as the result of taking into account an irrelevant consideration. The person to whom the grant was made could surely not then argue that despite the fact that the decision was based on an irrelevant consideration (and not just made by a wrong procedure), nevertheless the balance of public and private interests was such that the decision ought to be allowed to stand. The basic rule embodies principles that deserve to be protected in their own right regardless of the economic desirability of allowing the decision to stand. Unless

[23] For detailed discussion of this option see, Schønberg, *Legitimate Expectations in Administrative Law* (n 20 above), chs 5 and 6.

[24] *Stretch v United Kingdom* (2004) 38 EHRR 12: claimant awarded compensation for pecuniary and non-pecuniary loss suffered as a result of inability to exercise an unlawful option to renew a lease.

exceptions to the basic rule are few and narrow, it is liable to be subverted. The basic rule should be waivable only where the defect in the decision issue is procedural and where refusing to enforce the decision would reward unmeritorious insistence by the decision-maker on the strict technical letter of the law.

Once this restriction is stated, however, it appears difficult to justify. Why should balancing of interests justify dispensing with the basic rule in some cases but not in others? Why *not* substitute balancing of interests for the basic rule as the test of legality and enforceability in public law? The answer is implicit in what has already been said: once balancing of interests is made the test of enforceability in some cases, there seems no reason why it should not be the test in all cases; and not just where an individual seeks to have a decision enforced, but also where they seek to have it invalidated. For this very reason, the courts are unlikely to be prepared to adopt a test that threatens to subvert the basic rule because it embodies, in theory at least, a principle of judicial restraint in reviewing administrative action which the balancing of interests test does not.

6.3.1.2 Legal decisions

The public always has some interest that an illegal decision should not be enforced; but it may have no interest in the non-enforcement of a lawful decision. So, the basic principle is that lawful decisions are legally effective and binding on the body that makes them.[25] This rule is sometimes put in terms of the principle of *res judicata*: once a matter has been determined, it cannot (subject to some statutory exceptions) be re-opened before the same body, or before another body of equivalent status. The use of this phrase is apt to mislead because it is confined to rule-based decisions about the existence of legal rights.[26] In relation to 'policy' decisions it is recognized that a certain amount of flexibility has to be allowed to take account of the fact that the public interest may change over time in a way that would justify revoking a lawful decision to the detriment of a private citizen. But the values of certainty and predictability in dealings between individual citizens and public functionaries demand that such flexibility be severely limited.

[25] As a general rule, a public functionary will be allowed to rely on a decision adverse to an individual once (but only once) that decision has been communicated to the affected person: *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604.

[26] *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273.

A public functionary may, therefore, be allowed to change a lawful decision. What the court has to decide is whether the public interest in changing the decision outweighs the interest of the claimant in not having it changed; or, in the words of Lord Denning MR in *Laker Airways Ltd v Department of Trade*,[27] whether the change inflicts injury on the claimant without any countervailing benefit to the public. In *Rootkin v Kent CC*[28] it was held that the defendant could reverse a decision to grant the claimant's daughter a free bus pass when it discovered that the distance between the family home and the daughter's school had been wrongly measured. The court also noted that no detriment had been suffered in reliance on the decision.

6.3.2 FETTERING BY SOFT LAW

In exercising their powers, public administrators must, of course, comply with any applicable hard-law rules, whether contained in primary or secondary legislation. Much public administration is also regulated by soft law.[29] Soft law (often referred to as 'policy') may deal with the same matters as are covered by relevant hard-law provisions although soft law will, of course, be unlawful if, and to the extent that, it is inconsistent with relevant hard law. Soft law may be indistinguishable in form from hard law, although it is often drafted in a more flexible and less formalistic and precise way than hard law,[30] thus leaving more leeway in its interpretation and application.[31]

Soft law plays a very important part in public administration and it is, therefore, surprising that there are no legal rules that regulate when a body, invested with a statutory power to make hard law on a particular subject, must exercise that power and when, by contrast, it may make soft law on the same subject without exercising that power. There are considerable advantages for the decision-maker in making soft law rather than hard law. Soft law need not be published unless 'it will

[27] [1977] QB 643, 707; see also *HTV v Price Commission* [1976] ICR 170, 185.
[28] [1981] WLR 1186.
[29] Baldwin, *Rules and Government* (n 7 above), 80–119.
[30] However, there is no legal or logical reason why hard law should not be loosely and flexibly drafted.
[31] *In re McFarland* [2004] 1 WLR 1289, [24] (Lord Steyn). On the interpretation of soft law see *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836, [107]–[123]. For an argument that soft law should be subject to more 'anxious scrutiny' not less, see M Cohn, 'Judicial Review of Non-Statutory Executive Powers after Bancoult: a Unified Anxious Model' [2009] *PL* 260.

inform discretionary decisions in respect of which the potential object . . . has the right to make representations.[32] Soft law is more easily changed than hard law to meet changing circumstances and increased knowledge of the matters with which it deals. Because soft law will normally not be scrutinized by Parliament, it may be used to implement policies that the government fears might be controversial if subjected to public debate.

In this light one might expect courts to be somewhat wary of soft law. However, in *British Oxygen Co Ltd v Minister of Technology*[33] (where the House of Lords held lawful a decision to deny a grant to the plaintiff based on a general policy adopted by the Board of Trade) Lord Reid said that where an authority has to deal with a large number of similar applications there can be no objection to its forming a policy (ie making a soft-law rule) for dealing with them, provided that authority is willing to listen to 'anyone with something new to say' and to change or waive its policy in appropriate cases.[34] Obvious advantages of policies for the citizen are that they may save time, promote consistency in administration, and (provided they are published) provide information about how legal powers will be exercised. Indeed, an administrator may exceptionally be required to make soft law in order, for instance, to meet a requirement of the ECHR that policies about the way the law will be administered should be 'accessible'.[35] But soft-law policies must not be applied without regard to the individual case. If the claimant raises some relevant matter that the authority did not take into account in forming its policy, it must listen and be prepared not to apply its policy if it turns out to be irrelevant or inappropriate to the particular case. In other words, soft law must be applied flexibly, not rigidly. On the other hand, if a policy is going to be of any use in structuring discretion, it must apply unless some good reason can be shown why it should not apply. There must be a bias in favour of a policy.[36] Soft law strikes a compromise between unregulated discretion and hard-law regulation.

[32] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [20], [27]–[39] (Lord Dyson); [302] (Lord Phillips).

[33] [1971] AC 610; see also *R v Port of London Authority, ex p Kynoch Ltd* [1919] 1 KB 176.

[34] A soft-law rule may be illegal if it makes no provision for exceptional cases: *R v North West Lancashire Health Authority, ex p A* [2000] 1 WLR 977. This does not mean, however, that consideration must be given to extending the scope of a soft-law benefits scheme every time a person applies who does not fall within the scheme as formulated: *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213. Indeed, in some cases, a soft-law rule might be illegal if it does allow for exceptions: *Nicholds v Security Industry Authority* [2007] 1 WLR 2067. Where this leaves administrators is anyone's guess!

[35] *R (Purdy) v Director of Public Prosecutions* [2009] 3 WLR 403.

[36] D Galligan, 'The Nature and Function of Policies within Discretionary Power' [1976] *PL* 332.

The interpretation or application of a soft-law rule may, therefore, be illegal if insufficient account is taken of facts of the particular case which render the policy inappropriate to it. On the other hand, a citizen cannot normally complain of the *non-application* of a soft-law rule even if it would have operated for his or her benefit if it had been applied. This is because although soft law is a legitimate tool for regulating the conduct of public administration, unlike hard law it cannot, of its own force, alter a citizen's legal rights and obligations. However, by publishing a policy a public authority may give a person a 'legitimate expectation' of being treated in accordance with the terms of the policy.[37] In that case, departing from the policy without giving adequate notice of the change may be illegal because 'unfair'.[38] In one case the Home Office was held to have acted unfairly in laying down conditions for the issue of entry certificates to immigrant children whom UK residents wished to adopt, and then adding further conditions without notice.[39] It seems that in some cases this rule will only require the decision-maker to give the citizen a chance to put a case for being treated in accordance with the original policy.[40] In other cases, however, the citizen may be entitled to be dealt with in accordance with the original policy or may be awarded a declaration that they should have been dealt with in that way.[41]

On the other hand, since legitimate expectations generated by the publication of soft law limit the exercise of discretionary powers, not every change of published policy will be illegal. The very nature of a discretionary power requires that its holder be given significant freedom in deciding what to do in exercise of it; and this includes a power, in suitable circumstances, of changing direction and replacing existing

[37] Where there is no legal obligation to publish, this rule may have the undesirable effect of discouraging publication.

[38] A legitimate expectation generated by soft law published by one government department may render illegal inconsistent soft law published by another department: *R (Bapio Action Ltd) v Secretary of State for the Home Department* [2008] 1 AC 1003.

[39] *R v Secretary of State for the Home Department, ex p. Khan* [1984] 1 WLR 1337. There can be no objection to changes that are announced before coming into effect, especially if transitional arrangements are made.

[40] See 4.1.1.3.1.

[41] eg *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 1 WLR 1482. In this case the defendant had failed to comply with its own telephone-tapping guidelines. It would have made no sense to protect the claimant's expectation that the guidelines would be followed by saying that the defendant should have consulted the claimant before inserting the tap. Failure to notify a person in advance that they are the target of secret surveillance does not constitute a breach of the ECHR: *Klass v Federal Republic of Germany* (1978) 2 EHRR 214.

policies with new ones.[42] In some cases, there may be an unfettered power to change the policy—as has been held in relation to the Immigration Rules.[43] In other cases, provided there is a good enough reason for the change of published policy, it will not be held to be unfair or illegal.[44]

An important feature of these legitimate expectation cases is that, viewed in isolation, the original policy statement was valid; and so also was the new policy.[45] But put side by side, two policies lawful in themselves can create unfairness if the authority making them can give no good reason for changing its mind, having created a legitimate expectation that it would act in a particular way. The idea of having (and giving) good reasons for decisions is of central importance in judging the validity of the use and alteration of policy guidelines. All discretionary powers are created for particular purposes, and public administrators must be able and prepared to give reasons for their decisions that explain how their decisions further (or, at least, do not frustrate) those purposes. The idea of unfairness implies not only that decisions must be reasoned but also that any reason given for a decision must be properly related to the purposes for which the power was given—an authority could not repel a charge of unfairness by giving a totally spurious or irrelevant reason, or by giving a claimant a hearing and then ignoring the reasons put forward as to why the citizen should be treated in the way expected.

At first sight, there may seem to be a conflict between the *British Oxygen* principle and the doctrine of legitimate expectation: does not the latter allow, in effect, a fettering of the decision-maker's discretion? Two points need to be made. The first is that a legitimate expectation will arise only if there is no good reason of public policy why it should not. This is why the word 'legitimate' is used rather than the word 'reasonable': the matter is not to be judged solely from the citizen's point of view. The interest of the citizen in being treated in the way expected has to be balanced against the public interest in the unfettered exercise of the administrator's discretion. Secondly, the *British Oxygen* principle is concerned with ensuring that policies are properly applicable to the particular case at hand, whereas the legitimate expectation principle is

[42] *In re Findlay* [1985] AC 318, 338.
[43] *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230.
[44] *Oxfam v Her Majesty's Revenue and Customs* [2010] STC 686, [59] (Sales J).
[45] Of course, soft law inconsistent with hard law cannot create a legitimate expectation.

designed to prevent the alteration of a policy that the citizen accepts as being applicable.[46]

There may be a conflict between the legitimate expectation principle as applied to soft law and the principles governing the revocation of lawful decisions. The cases on revocation of decisions suggest that an individual would be entitled to complain of a change of policy only if detriment had been suffered as a result of reliance on the decision. However, the cases about soft law make no mention of this requirement, and some of them[47] are inconsistent with a detrimental reliance requirement. Indeed, it has been said that administrative agencies should stand by their published policies regardless of whether the person affected relied to their detriment on the policy or even knew about it,[48] simply in the name of fairness and for the sake of predictability in dealings between governors and governed.

6.3.3 FETTERING BY CONTRACT

Because valid contracts create legally enforceable rights, they provide administrative agencies with means by which they can achieve their ends in a way that may be less open to reversal by successors than legislative and administrative measures.[49] In *Stringer v Minister of Housing and Local Government*[50] a local authority agreed with Manchester University that it would discourage development in a particular area so as to protect Jodrell Bank telescope from interference. In pursuance of this agreement it rejected a development application. Cooke J held that this refusal was illegal because in honouring the agreement the authority had ignored considerations that the statute made relevant to the fate of the planning application.

Four points are worth noting about this decision. First, it was held to be irrelevant whether or not the agreement between the authority and the university was legally binding; the important point was the effect it had on the consideration by the council of the application. It follows that an undertaking by a public functionary to act in a particular way may not be binding even if it is contained in a contract. On the other hand, the fact that an undertaking has contractual force may provide *a* reason for enforcing it, additional to whatever other reasons (if any) there may be

[46] For a detailed analysis of this point see Y Dotan, 'Why Administrators Should be Bound by Their Policies' (1997) 17 *OJLS* 23.

[47] eg *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 1 WLR 1482.

[48] *Oxfam v Her Majesty's Revenue and Customs* [2010] STC 686, [54] (Sales J).

[49] eg *Verrall v Great Yarmouth BC* [1981] 1 QB 202.

[50] [1979] 1 WLR 1281.

for doing so. Secondly, the fact that the authority's refusal of permission on the basis of the agreement was illegal did not mean that protection of the telescope was not a relevant consideration on the basis of which, and without reference to the agreement, the Minister could uphold the refusal of permission on appeal. Thirdly, the agreement in this case related expressly and directly to the way a particular discretion would be exercised in the future. The relevance of this point will be taken up in a moment.

Fourthly, in *Stringer* the attack by the claimant (who was not a party to the agreement) was on the exercise of the discretion. Sometimes, in cases such as this, the attack might be on the contract itself by one of the parties to it. For example, a successor of the original contracting authority might want to get out of the contract, as happened in *Ayr Harbour Trustees v Oswald*,[51] where the trustees wanted to be free of a covenant, given by their predecessors, not to build on Oswald's land. A mirror image of such a case (where it is the other contracting party who objects to the contract) is *William Cory & Son Ltd v London Corporation.*[52] Cory contracted with the Corporation to remove garbage in its barges; later the Corporation passed new health regulations making it more expensive for Cory to perform its contract. Cory argued that a term ought to be implied into the contract to the effect that the Corporation would not exercise its power to make by-laws in such a way that the contract became more expensive for Cory to perform. The Court of Appeal held that since such a clause, if put expressly into the contract, would be void as a fetter on the Council's power to make health regulations, it could not be implied into the contract so as to protect Cory. Indeed, in one case it was held that a term should be implied into a lease to the effect that, in making the lease, the Crown (the lessor) was not undertaking not to exercise its power to requisition the premises should they be needed in case of war emergency.[53] It might be thought that the willingness of courts to enforce (or imply) discretion-constraining undertakings might vary according to the identity of the party seeking to constrain the agency's freedom of action. It is one thing for the beneficiary of an undertaking to seek to enforce it against the agency that made it, but quite another for the agency to seek to enforce it against a third party who argues that it is a void fetter on the agency's powers.

Not all contracts which in some way limit the exercise of statutory discretionary powers are, for that reason, void as fetters on the

[51] (1883) 8 App Cas 323. [52] [1951] 2 KB 476.
[53] *Commissioners of Crown Lands v Page* [1960] 2 QB 274.

discretion. The difficult task is to identify those that are void. In the first place, it might be useful to draw a distinction between contracts that are specifically intended[54] to regulate the exercise of a discretion, as in *Stringer* (above), and contracts the purpose of which is not to limit an authority's action but, on the contrary, to exercise one of its powers. At first sight it might be thought that contracts of the first type would be more likely to be void, and in some cases such contracts have indeed been held void. For example, in the *Ayr Harbour* case (above) the covenant not to build on Oswald's land was held to be a void fetter on the powers of the trustees to build. Contrast *Birkdale District Electric Supply Co Ltd v Southport Corporation*.[55] In this case the company agreed not to raise the price of its electricity above the price charged for power supplied by the Corporation. When the company tried to raise its prices and the Corporation attempted to stop it doing so, the company argued that the agreement was a void fetter on its power to fix prices. This argument was rejected on the ground that the agreement did not run counter to the intention of the legislature in setting up the company. It was not intended that it should make a profit, and there was no reason to think that any of the statutory functions of the company had been or would be adversely affected by compliance with the agreement.

So it would appear that the question of incompatibility of a contract with a discretionary power is a question of statutory interpretation—has the contract already seriously limited, or is it reasonably likely in the future seriously to limit, the authority in the exercise of its statutory powers or the performance of its statutory functions? Ultimately a choice has to be made: what is more important—the interest of the other party to the contract and the principle that contracts should be kept, or the public interest in the exercise of the statutory power? There can be no general answer to such a question; it all depends on the facts of the particular case. And although the terms of the statute provide the basic material for answering this question, the terms of statutes often leave considerable choice in interpreting them. No analytical formula will solve the problem.

Two cases will serve to illustrate the type of situation in which the contract is intended primarily as an exercise of discretion rather than a limitation of it.[56] In *Stourcliffe Estates Co Ltd v Bournemouth Corporation*[57] the Corporation bought some land for a public park and covenanted to build on it only a band-stand or similar structure. On its face

[54] Intention is judged objectively.
[55] [1926] AC 355.
[56] See also *R v Hammersmith and Fulham LBC, ex p Beddowes* [1987] QB 1050.
[57] [1910] 2 Ch 12.

the contract was designed to acquire land for a park, which the council had power to do. When the council sought to exercise a statutory power to build public conveniences by putting them in the park, the claimant was awarded an injunction to restrain the building. The court rejected the argument that the covenant was a void fetter. In *Dowty Boulton Paul Ltd v Wolverhampton Corporation*[58] the Corporation conveyed to the plaintiff for ninety-nine years certain land for use as an aerodrome. Some years later, when use of the aerodrome had somewhat dropped off, the council sought to exercise a power to re-acquire the land for development on the ground that it was no longer required for use as an airfield. It was held that the company was entitled to keep the airfield and that the contract was not a void fetter.

The crucial difference between the contracts in these two cases and that in *Stringer*, for example, is that the contracts in the former two cases were made as part of a genuine exercise of a statutory power other than the one which the contract adversely affected. In *Stourcliffe* the council was validly exercising a power to acquire land; in *Dowty* the council was exercising a power to dispose of land. Each contract was an unexceptionable way of exercising the power in question. In both cases it was said that to hold the contract void would be to put an unreasonable restriction on the power of the authority to enter into contracts relating to land. It might have been different if the statutory power to build conveniences or to re-acquire had related only to the specific piece of land involved, because then it might have been said that the contract was a specific attempt to fetter that power. But since the powers related to land generally, to hold such contracts to be void fetters on the powers would be to put an excessive limitation on the contract-making power. When two powers impinge on each other in this way some compromise adjustment has to be found. Should the contract-making power prevail to the benefit of the citizen, or should the public interest in the exercise of the conflicting power be protected? In all these cases, at the end of the day, a balance has to be struck between the public and private interests involved that allows one to prevail over the other.

6.3.4 FETTERING BY UNDERTAKINGS, REPRESENTATIONS, AND PRACTICES

We have noted that in *Stringer*, Cooke J said that the important question was not whether the undertaking had contractual force but rather the

[58] [1971] 1 WLR 204.

effect it had on the administrator's deliberations. This implies both that an undertaking may not bind the administrator even if it is contractual and that an undertaking may, in principle at least, be binding even if it is non-contractual. The doctrine of 'legitimate expectation' has been used to justify giving legal effect to non-contractual undertakings and representations as to how powers will be exercised, despite their constraining effect on decision-making freedom.[59] In one case a local authority undertook that it would not increase the number of taxi licences until certain legislation was passed. The Court of Appeal held that the authority ought to have consulted the taxi-owners' association before going back on its assurance.[60] In another case, immigration authorities were held to have acted illegally in reneging on an explicit assurance that illegal immigrants would be given a hearing before being deported.[61] If the Inland Revenue gives a lawful undertaking[62] as to how a particular taxpayer will be treated, it may not be allowed to go back on its representation unless, for example, the taxpayer did not reveal all relevant information to the Revenue, or new relevant facts come to light subsequent to the giving of the undertaking,[63] or the undertaking is withdrawn before the taxpayer has relied on it.[64] There are also related cases in which public agencies have been held to have acted unfairly in not following relevant past practices adopted by the authority.[65] In such cases it may be said that by consistently following a particular practice,

[59] The representation or undertaking must have been made or given by someone with authority to do so: *South Bucks DC v Flanagan* [2002] 1 WLR 2601; *R (Bloggs 61) v Secretary of State for the Home Department* [2003] 1 WLR 2724.

[60] *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

[61] *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.

[62] It seems that unlawful representations, promises, and undertakings (ie that an agency will act in a way that it has no power to act) cannot give rise to a legitimate expectation. See eg *Rowland v Environment Agency* [2003] EWCA Civ 1885. In 6.3.1 we saw that there are two exceptions to the rule that unlawful decisions are not binding. It is not clear whether the principles on which these exceptions are based, or any other such principles, are relevant in this context. For an argument that unlawful representations, etc, should be capable of giving rise to legitimate expectations, see Schønberg, *Legitimate Expectations in Administrative Law* (n 20 above), 163–6.

[63] *R v Inland Revenue Commissioners, ex p Preston* [1985] AC 835; *R v Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545.

[64] *R v Inland Revenue Commissioners, ex p Matrix Securities Ltd* [1994] 1 WLR 334, 346–7 (Lord Griffiths).

[65] *R v Inland Revenue Commissioners, ex p Unilever Plc* (1996) 68 TC 205; *HTV v Price Commission* [1976] ICR 170; *Council of Civil Service Unions v Minister for the Civil Service (GCHQ case)* [1985] AC 374.

the agency impliedly represents that the practice will be followed in the future.

In general, a legitimate expectation will arise only if the conduct on which it is based clearly and unequivocally supports the citizen's interpretation of it.[66] A general statement of policy that makes no reference to individual circumstances will not normally be interpreted as giving rise to a legitimate expectation on the part of any particular individual of being treated in accordance with the policy regardless of their particular circumstances.[67] In some contexts, even a clear, express undertaking that a particular individual will be treated in accordance with the terms of an existing policy will not give rise to a legitimate expectation of being treated in that way rather than in accordance with a later and less advantageous policy.[68] More generally, a compelling public interest can prevent a legitimate expectation arising from undertakings, representations, and practices.[69] So, for instance, undertakings will not be enforced at the expense of unduly limiting the freedom of successive governments to depart from the policies of their predecessors.[70] Undertakings that belong 'in the realm of politics' (such as an undertaking to hold a referendum) cannot give rise to legally enforceable legitimate expectations.[71]

In *R v North and East Devon Health Authority, ex p Coughlan*[72] it was said that a legitimate expectation generated by conduct of a public administrator may be protected in one of three ways. First, the administrator may be required to give the expectation due weight as a relevant consideration in making its decision.[73] This obligation would not require the agency to act in any particular way, but only to take proper

[66] eg *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292; *R (Association of British Civilian Internees, Far East Region) v Secretary of State for Defence* [2003] QB 1397.

[67] *R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115; *R v Ministry of Defence, ex p Walker* [2000] 1 WLR 806. The result might be different if the statement was quite detailed or specific or, perhaps, limited in its operation to a relatively small class of people: *R (Abassi) v Secretary of State for the Foreign and Commonwealth Office* [2002] EWCA Civ 1598; [2002] All ER (D) 70.

[68] *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 All ER 397.

[69] *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] QB 353.

[70] *Laker Airways Ltd v Department of Trade* [1977] QB 643, 707, 708–9, 728. This is also true of contracts: *R v Hammersmith and Fulham LBC, ex p Beddowes* [1987] QB 1050, esp 1074–5 *per* Kerr LJ (dissenting).

[71] *R (Wheeler) v Prime Minister* [2008] EWHC 1409 (Admin).

[72] [2001] QB 213. What follows is an interpretation rather than description of what was said. The judgment is, unfortunately, unclear in various respects.

[73] See 6.5.1.

account of the expectation in deciding what action to take. Secondly, the authority may be required not only to take account of the expectation, but also to consult the beneficiary of the expectation[74] before reaching its decision in order to give the beneficiary an opportunity to persuade the agency that it should meet the expectation. Thirdly, the administrator may be required to meet the expectation by actually making a decision consistent with its promise, undertaking, representation, or previous practice.[75] In *Coughlan,* the difference between the second and third of these alternatives was put in terms of a distinction between 'procedural' and 'substantive' expectations. But this is a little misleading.

It may be helpful to distinguish between the content of expectations and modes of protecting expectations. The threefold classification in *Coughlan* relates to modes of protection of expectations, not to their content. Let us call the first the 'relevant-consideration' mode, the second the 'procedural' mode, and the third the 'substantive' mode of protection. So far as content is concerned, let us call an expectation (for instance) that an illegal immigrant will be given a hearing before being deported, a 'procedural expectation'; and an expectation (for instance), of having a 'home for life' in a local authority facility for the disabled, as in *Coughlan*, a 'substantive expectation'. It is obvious that a 'substantive' expectation could be protected either procedurally or substantively (as well as in the first 'relevant-consideration' mode). But it is also possible, in principle at least, to protect a procedural expectation either procedurally or substantively. Suppose that an agency has generated a legitimate expectation that a person will be given a full hearing before being treated in a particular way; and that the agency has changed its mind and wants to give a much less elaborate hearing instead.[76] The expectation could be protected substantively by requiring the agency to give the promised hearing, or procedurally by requiring it to consult the claimant before deciding whether to stand by its promise or whether, instead, to give a less elaborate hearing.

Unfortunately, the court gave relatively little guidance about how to decide the mode of protection appropriate to any particular expectation. *Coughlan* itself concerned a substantive expectation, and the issue was

[74] Or, more accurately, perhaps, give the beneficiary a hearing.

[75] A fourth possible form of protection would be compensation payable where a person relies to their detriment on a representation etc that generated a legitimate expectation which the court is unwilling to enforce: see Schønberg, *Legitimate Expectations in Administrative Law* (n 20 above), 234.

[76] eg *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292.

whether it deserved substantive protection. The court decided that it did. Normally, it said, substantive expectations will be protected substantively only in cases where one or a few people expect to be treated in the promised way, where the content of the promise is 'important', and where satisfying the expectation only needs the expenditure of money.[77] As the court recognized, protecting substantive expectations substantively is more problematic than protecting substantive expectations procedurally, and more problematic than protecting procedural expectations substantively, because of the relatively greater restriction it imposes on the agency's freedom of action, and because it involves the court telling the agency what decision to make rather than how to go about making a decision. It is for such reasons that courts in Australia and the US, for instance, have generally refused to protect substantive expectations substantively. It remains to be seen how the limits of substantive protection of substantive expectations will be defined.

It is clear from *Coughlan* that in deciding whether an expectation deserves substantive protection, the question to be asked is not whether failing to meet the expectation would be *unreasonable* but whether it would be *unfair*. What this means is that if an authority refuses to meet an expectation, it is ultimately for a court or tribunal to decide whether it has acted illegally by weighing for itself the factors for and against fulfilling the expectation. It is no answer for the authority to say to the court: even though you would have met the expectation if you had been in our shoes, nevertheless our failure to meet it was not unreasonable. The same approach also applies to deciding whether an expectation deserved procedural protection; but perhaps not to the relevant-consideration mode of protection which, in practice, only requires the agency to convince the court that its decision was consistent with having given some weight to the expectation.[78]

As we saw earlier, there is authority for the proposition that whether or not a person has relied to their detriment on a lawful decision is relevant to whether the decision-maker is free to revoke the decision. We have also seen that a soft-law rule may give rise to a legitimate expectation regardless of whether the citizen has detrimentally relied on the rule. What is the position in relation to undertakings, representations,

[77] The third of these criteria is, perhaps, the most difficult. In what sense was keeping the home open, rather than closing it and sending the claimant to a different institution, merely a financial matter? More importantly, expenditure of money on an activity that an agency has decided should be abandoned will inevitably have an impact on its capacity to fund other activities. In what sense is this merely a financial matter?

[78] See further 6.5.1.

and so on? There is a clear difference between saying that an authority should act in a particular way because a person has detrimentally relied on the agency's decision or policy or promise that it would so act, and saying that an authority should act in a particular way because it has decided, announced, or promised that it will act in that way (with the result that it is legitimate for a person to think that the authority will so act). Under the first approach, the authority's obligation is based on action by the claimant in response to conduct of the authority, whereas under the second approach the obligation rests directly on the conduct of the authority. It makes no sense to say that the legitimacy of an expectation depends on whether the conduct that gave rise to it has been relied upon.[79] If, as a result of an authority's conduct, a person legitimately expects that it will act in a particular way, and if 'legitimate expectation' is recognized as a ground of legal obligation, it is irrelevant to the existence of the obligation whether the claimant has or has not detrimentally relied on the authority's conduct. It follows that reliance is irrelevant to the doctrine of legitimate expectation. If it is relevant in relation to individualized decisions, this shows that some doctrine of detrimental reliance, and not the doctrine of legitimate expectation, underpins that area of the law. This is not to say, of course, that reliance may not strengthen the case for a remedy[80] but only that it cannot determine the existence of a legitimate expectation if that concept is to have independent content.

6.3.5 FETTERING BY POLITICAL COMMITMENTS

At the national level[81] the party system operates in such a way that it is perfectly acceptable for MPs to vote in accordance with the instructions of the party whips and to do so without the benefit of hearing or taking serious account of arguments against their party's position. By contrast, although local government is politicized more-or-less along the same party lines as national government,[82] the common law does not allow the

[79] The converse is not true, of course. If detrimental reliance is required, that reliance must be reasonable, which is another way of saying that it must be the product of a legitimate expectation that the agency would act in the way it said it would.

[80] *Oxfam v Her Majesty's Revenue and Customs* [2010] STC 686.

[81] In this context, this phrase covers the Westminster and Scottish Parliaments and, perhaps, the Welsh Assembly. The hesitation arises from the fact that the legal position of the Welsh Assembly is closer to that of a local government authority than of a national Parliament. The institutional structure of local government is in flux (see 2.1.5, n 16 and text); but the implications of such changes in this context remain to be explored.

[82] I Leigh, *Law, Politics and Local Democracy* (Oxford: Oxford University Press, 2000), 183–7.

party system to operate as rigidly at local government as at central government level.[83] Members of local authorities must not, by agreeing in advance to vote a particular way on an issue, effectively close their minds on the issue: party policy and the instructions of the whips are factors which councillors may take into account, but not to the exclusion of other relevant factors.[84] Except in extreme cases, however, it would in practice be very difficult to prove that a councillor had ignored every factor but party policy. Nor is it clear as a matter of political principle that the law should treat members of local authorities differently from MPs in this respect.

A related question is whether public agencies are free to put policies into operation solely because the policy was part of the governing party's election manifesto. Once again, the law differentiates between central and local government: at central level the election manifesto is accepted, in political terms, as an important source of legitimacy for government conduct. It is generally not a criticism of a government to say that it has given effect to its manifesto; and failure to fulfil manifesto promises may attract serious criticism. On the other hand, it would probably be thought constitutionally improper for a government to be formally bound by a manifesto, especially if members of the non-Parliamentary wing of the party had a hand in its formulation.[85] In legal terms, however, the doctrine of Parliamentary supremacy provides central government with a powerful weapon (namely, the enactment of its policies in a statute) for protecting its conduct from scrutiny in the courts whether on the ground that it failed, in formulating its legislative policy, to consider all relevant factors, or on any other ground.

At local government level the manifesto performs a similar political function as at central level. In legal terms, the extent to which local authorities are entitled to follow manifesto policies is somewhat unclear as a result of apparently conflicting dicta.[86]

[83] This is not to say that the courts take no account of the role of party politics in local government: eg *R v Greenwich LBC, ex p Lovelace* [1991] 1 WLR 506.

[84] *R v Waltham Forest LBC, ex p Baxter* [1988] QB 419. For discussion of the constitutional context of this case see Leigh, *Law, Politics and Local Democracy*, (n 82 above), 195–9.

[85] D Oliver, 'The Parties and Parliament: Representative or Intra-Party Democracy?' in J Jowell and D Oliver (eds), *The Changing Constitution*, 2nd edn (Oxford: Oxford University Press, 1989), 126–32.

[86] Ibid.

6.4 DISCRETION MUST NOT BE TRANSFERRED

6.4.1 ACTING UNDER DICTATION

In *R v Stepney Corporation*[87] a local authority had a statutory duty to pay a redundant clerk compensation for the loss of his part-time job. Instead of calculating the compensation itself taking into account the considerations laid down in the statute, it asked the Treasury how it calculated compensation for the loss of a part-time office and applied that formula. The authority was ordered to exercise its discretion to calculate the compensation, applying the statutory criteria. It is worth noting that under the statute the claimant was entitled to appeal to the Treasury if he was dissatisfied with the council's decision on compensation; but this did not mean that the council was not under an obligation to decide the matter in exercise of its own discretion first; an appeal is not a substitute for a first instance decision.

In *H Lavender & Son Ltd v Minister of Housing and Local Government*[88] the Minister refused the applicant permission to develop land as a quarry merely because the Ministry of Agriculture objected. Willis J said that it was acceptable for the Minister to hear the views of the Ministry of Agriculture and even to adopt the policy of always paying careful attention to those views. What he must not do was to allow the Ministry of Agriculture in effect to make the planning decision for him, by always and automatically yielding to its objections. It is worth noting that the refusal of planning permission was quashed even though the judge thought it unlikely that the applicant would be able to establish that the refusal was unreasonable as a matter of substance.

There are three strands of reasoning in these decisions: not only must the agency not allow itself to be dictated to in the exercise of its statutory discretions, but also it must not adopt rigid criteria for the exercise of its discretion; and it must not allow someone else to make its decision for it.

6.4.2 DELEGATION BY A DELEGATE

The rule against delegation (*delegatus non potest delegare*) is closely related to the rule against acting under dictation. They are both designed to ensure that when a specific person or body is given statutory discretion, the discretion is exercised by that person or body, and not by someone else. The rule does not impose an absolute prohibition on delegation. It usually operates as a principle of statutory interpretation: a

[87] [1902] 1 KB 317. [88] [1970] 1 WLR 1231.

statutory power will be delegable if the statute[89] so provides or the power to delegate is clearly implied. Power to delegate will, perhaps, more likely be implied in relation to individual decision-making than in relation to rule-making.

In *Barnard v National Dock Labour Board*[90] the Board had power to suspend workers who breached a disciplinary code. It passed a resolution that effectively gave the power to suspend to the London port manager. A worker suspended by the manager successfully challenged his suspension. It was held that not only had the Board no power to delegate the suspending function, but also that it had no power to ratify a suspension by the port manager since 'the effect of ratification is . . . equal to a prior command'. It would have been permissible for the Board to receive a recommendation from its subordinate and to decide, in exercise of its discretion, whether or not to accept the recommendation. It was not entitled simply to rubber-stamp what someone else had decided. This makes clear the link between this rule and that against acting under dictation.

In addition to conferring a power to delegate, a statute may also make provision about the persons to whom the power may be delegated, and about formalities to be observed in delegating the power. There are, therefore, three ways in which the non-delegation rule may be breached: an authority may purport to delegate a function which it has no statutory power to delegate; or a function may be delegated to an inappropriate person; or the delegator may fail to observe some formality required to be observed if a function is to be lawfully delegated. In any of these cases the decision of the delegate will be unlawful.

There is a qualification to the non-delegation rule that rests on the principle of ministerial responsibility. In *Carltona Ltd v Commissioner of Works*[91] a senior official in the Ministry of Works and Planning, in purported exercise of emergency powers, wrote a letter to Carltona requisitioning premises occupied by Carltona. Carltona challenged the requisitioning. The Court of Appeal held that independently of statute, delegation of functions by Ministers of State to officials within their department is both permissible and necessary because it would be physically impossible for the Minister to exercise personally all the powers vested in the Minister in his or her official capacity. The Minister is responsible to Parliament if things go wrong, or if a decision is delegated to an unsuitable official, or if a decision is delegated which

[89] Or some other statute, such as the Deregulation and Contracting Out Act 1994.
[90] [1983] 2 QB 18. [91] [1943] 2 All ER 560.

the Minister ought to have made personally. So it is unnecessary and inappropriate (so the reasoning goes) for the courts to enforce the principle of non-delegation in this case as they do in the case of public bodies that are not under the direct control of Ministers and so do not fall under the umbrella of Parliamentary accountability. It has been suggested that part of the reason for this decision was the traditional reluctance of the courts to review the exercise of emergency powers in wartime. But it is clear that the principle is not limited in its operation to emergency situations.[92]

The main difficulty with the *Carltona* decision is that it relies on an unrealistic view of the effectiveness of ministerial responsibility as a vehicle of political accountability. Moreover, it is not clear whether or how the *Carltona* principle applies to decisions made by civil servants employed in executive agencies as opposed to traditional ministerial departments.[93] On the other hand, unless it is anchored in the doctrine of ministerial responsibility, the scope of the principle becomes unclear. For instance, it has been held that it does not apply as between a commissioner of police and a superintendent because the former is not in the same position as a Minister so far as accountability to Parliament is concerned.[94] More recently, however, this reasoning was rejected in a case in which the principle was applied to delegation by a chief constable to officers on the basis that the former was *legally answerable* for decisions of the officers.[95] Interpreted in this way, the *Carltona* principle has the potential to swallow the rule against delegation.

Apparently related to the *Carltona* principle is the idea that the Crown, in the sense of central government, is a single indivisible entity.[96] In one case this idea was used to support a holding that a statutory decision, made by a government department which had no power to make it, could bind another department, which did have the

[92] *R v Skinner* [1968] 2 QB 700; *R v Secretary of State for the Home Department, ex p Oledahinde* [1991] 1 AC 254.

[93] M Freedland, 'The Rule Against Delegation and the *Carltona* Doctrine in an Agency Context' [1996] *PL* 19. However, in *R v Secretary of State for Social Security, ex p Sherwin* (1996) 32 BMLR 1 it was held that the principle applied to a civil servant in the Benefits Agency (now Jobcentre Plus).

[94] *Nelms v Roe* [1969] 3 All ER 1379.

[95] *R (Chief Constable of the West Midlands Police) v Birmingham Justices* [2002] EWHC 1087 (Admin).

[96] *Town Investments Ltd v Department of the Environment* [1978] AC 359; M Freedland, 'The Crown and the Changing Nature of Government' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

power to make it, because both departments were part of the Crown.[97] Conversely, in another case, Lord Rodger of Earlsferry appealed to the idea to justify striking down 'guidance' on employment practice in the NHS, issued by the Secretary of State for Health, on the ground that it disappointed legitimate expectations generated by the Immigration Rules, which were made by the Home Secretary.[98]

By contrast with central government, local authorities have only such powers of delegation as are expressly or impliedly conferred by statute. Section 101 of the Local Government Act 1972 allows local authorities to delegate the discharge of any of their functions to a committee, sub-committee, officer, or other local authority.

Delegation is a public-law notion. It is related to agency, which is basically a private-law concept; but the relationship between the two is rather obscure. Since the non-delegation principle is basically one of statutory interpretation, it is often said that the term 'delegation' only properly applies to transfers of power authorized expressly or impliedly by statute. For instance, it would seem that the notion relevant to analysing the exercise of common law contracting powers by employees and officers of central government is agency, not delegation. It is also possible to argue that the *Carltona* case is not concerned with delegation because the internal organization of departments of State is not regulated by statute but by non-statutory rules of law or merely by administrative practice. This would make the relationship between Minister and official more like that of principal and agent than of delegator and delegate.

Often a person is made an agent of another by a contract between them defining what the agent is empowered to do on behalf of the principal. The powers of an agent are not limited to those actually given by the contract. They may extend to powers which, as a result of conduct of the principal, the agent appears or can pretend to have (this is called 'apparent' and 'ostensible' authority). Whereas the limits of delegation are in theory defined by statute (ie by the legislature), the limits of agency and of the *Carltona* principle are defined ultimately by the common law (ie by the courts) which can extend the limits of the agency as defined in the contract between the parties and can determine

[97] *Robertson v Minister of Pensions* [1949] 1 KB 227, 232.

[98] *R (Bapio Action Ltd) v Secretary of State for the Home Department* [2008] 1 AC 1003. According to Lord Scott of Foscote, who dissented on this issue, the judgments of Lord Bingham of Cornhill and Lord Mance were also implicitly based on the idea of the unity of central government.

when the *Carltona* principle is applicable. The force of saying that matters of internal organization are not strictly matters of delegation is presumably that this gives the courts more power to say who can do what within government agencies.

This distinction between agency and delegation can be important. Suppose an official does an act (such as granting planning permission) the doing of which the employer has no power to delegate to the official, or has not properly delegated. Suppose, too, that the employer has acted in such a way that it appears the official has authority to do the act, for example by always rubber-stamping what the official does. According to the public-law principle of non-delegation, the act is illegal; but if the principles of agency were applied a court might hold the authority bound by what the official had done.[99]

6.5 CONSTRAINING DISCRETION

We turn now from legal norms designed to promote and protect discretion to norms that limit discretion. It is a basic tenet of the rule of law, as expounded by AV Dicey, that discretionary power should be controlled: uncontrolled (or, in Dicey's terminology, 'absolute') discretion is undesirable in most contexts.[100] This idea is central to administrative law. There are two main legal techniques[101] for limiting discretion. One is to impose *ex post facto* (or 'retrospective') checks in the form of complaints mechanisms, appeals, and judicial review; the other is to regulate the exercise of discretion in advance (or 'prospectively') by the use of rules.[102] However, the line between prospective and retrospective control is not clear-cut because the process of retrospective control may generate rules that can give prospective guidance to decision-makers. This is sometimes referred to as 'adjudicative rule-making'; and it is, of course, a basic feature of the common law technique of resolving disputes.

[99] See 6.3.1.1.1.

[100] Conversely, controlling discretion helps to legitimate its exercise: J Jowell, 'The Rule of Law Today' in J Jowell and D Oliver, *The Changing Constitution,* 6th edn (Oxford: Oxford University Press, 2007), ch 1.

[101] Law is only one of the many influences on the way discretionary powers are exercised, only one technique by which discretion is controlled, and only one factor in the legitimation of discretionary decisions. See generally K Hawkins (ed), *The Uses of Discretion* (n 1 above), esp chs 1 (Hawkins), 3 (Bell), 4 (Baumgartner), and 11 (Lacey); K Hawkins, *Law as Last Resort* (Oxford: Oxford University Press, 2002).

[102] See also 6.1. Achieving a suitable balance between prospective and retrospective controls may be a very complicated task: R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' [1984] *PL* 570.

An American jurist, KC Davis,[103] identified two types of prospective controls: confining and structuring discretion. Confining discretion involves setting the limits of discretion by the use of rules that define the area in which the decision-maker's choice is to operate.[104] However, rules need to be interpreted and applied by the decision-maker, and this involves an element of discretion. Also, rules often have unanticipated gaps that need to be filled. So the distinction between discretionary and rule-based decisions is not clear-cut. Rules can leave plenty of room for choice.

Structuring discretion involves controlling the way in which the choice is made by the administrator between alternative courses of action that lie within the confines of the discretion. This can be done in two ways: by flexible standards to guide the exercise of discretion[105] and by procedural rules that the administrator must observe in exercising the discretion. Discretion can be structured by flexible standards in a number of ways. For example, the standard may lay down a general purpose or policy at which the administrator is to aim in exercising the discretion; or it may list factors to be taken into account in exercising the discretion.[106] Discretion may also be structured by providing that it should be exercised 'reasonably'. This gives the decision-maker a degree of freedom because people may fairly disagree about what is reasonable, but it rules out certain results as unacceptable.

In theory, in English law, rules that confine discretion must be contained in legislation made either by Parliament or an official or agency exercising a statutory power to make such rules ('hard law'). On the other hand, standards and guidelines that flexibly structure the exercise of discretions in a way that nevertheless allows the circumstances of particular cases to be taken into account may be laid down in documents that do not have statutory force (soft law). As might be expected, the more flexible a rule, the more freedom it gives decision-makers in applying it to particular cases.

[103] *Discretionary Justice: A Preliminary Inquiry* (Urbana, Ill: University of Illinois Press, 1977). For a critical discussion of Davis's approach see R Baldwin, *Rules and Government* (n 7 above), 16–33.

[104] R Sainsbury, 'Administrative Justice: Discretion and Procedure in Social Security Decision-Making' in K Hawkins (ed), *The Uses of Discretion* (n 1 above).

[105] Rigidity and flexibility are matters of degree. They depend partly on the style in which a rule is drafted and partly on the perceived 'authoritativeness' of the rule.

[106] For a discussion of the use of guidelines by the Civil Aviation Authority see R Baldwin, *Regulating the Airlines* (Oxford: Clarendon Press, 1985), esp ch 11.

Flexible standards may be laid down 'legislatively' in advance of any decision being made or they may be developed by administrators incrementally in the course of exercising their powers—a sort of administrative common law. As we have seen, the law allows decision-makers to develop and apply flexible guidelines to structure discretion provided they are not used rigidly to exclude the essence of discretion, namely a readiness to deal with each case individually. The importance of soft law is difficult to overestimate because there is a common expectation, based on the values of predictability and consistency, that administrators will structure their discretionary powers. Also, no administrative agency of any size can operate efficiently without the exercise of management control through the use of soft law. Good management and the efficient pursuit of policy objectives require a mix of freedom for and control of front-line decision-makers.

In this section we are concerned with general principles of administrative law aimed at ensuring that public administrators give proper weight to rules that confine and structure their exercises of discretion.

6.5.1 RELEVANT AND IRRELEVANT CONSIDERATIONS

In making decisions and rules administrators must not take account of irrelevant considerations or ignore relevant ones, provided that if the relevant matter had been considered or the irrelevant one ignored, a different decision or rule might (but not necessarily would) have been made.[107] Under this principle, for example, decisions or rules that discriminate unfairly between people in similar situations or fail to take account of relevant differences between people may be illegal. This principle is closely related to certain other general principles of administrative law. For example, many errors of law and fact involve ignoring relevant matters or taking account of irrelevant ones. Again, when a body by its conduct creates a legitimate expectation that it will act in a particular way, it has an obligation (at least) to take that expectation into account in deciding what to do. Ignoring relevant considerations or taking account of irrelevant ones may make a decision or rule unreasonable or not in accordance with statutory policy,[108] and this may make the decision or rule illegal.

[107] *R v Secretary of State for Social Services, ex p Wellcome Foundation Ltd* [1987] 1 WLR 1166, 1175 (Sir John Donaldson MR). For an application to non-statutory rules see *R v North West Lancashire Health Authority, ex p A* [2000] 1 WLR 977.

[108] eg *R v Somerset CC, ex p Fewings* [1995] 1 WLR 1037.

Sometimes statutes that confer discretion list relevant considerations. Very often, however, the statute that confers discretion does not expressly or unambiguously state what considerations are relevant to its exercise. In extreme cases this may lead a court to hold that this head of review does not apply.[109] More often the court will attempt to lay down criteria of relevance by extracting what implied guidance it can from the statute or from other relevant documents, such as subordinate legislation or soft law. The search for criteria of relevance becomes even more elusive when the discretion in question is conferred by the common law or is a *de facto* power with no identifiable legal source other than the principle that everything is permitted which is not prohibited (see 3.2). However, all administrative discretion serves objectives and purposes, and it is those objectives and purposes that ultimately provide the criteria of relevance.

The number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule. For example, licensing authorities are normally required to consider not only the interests of the applicant and of any objectors but also of the wider public. By contrast, for example, decisions about individual applications for social security benefits are usually to be made solely on the basis of considerations personal to the applicant.[110] However, English courts have not traditionally engaged in 'hard-look' review (as it is called in the US).[111] Hard-look review requires administrators to show that they have considered all relevant available evidence and that the decision made is, in the light of that evidence, a rational way of achieving the objectives of the discretion. By contrast, English courts have traditionally done no more than decide whether the particular consideration(s) specified by the claimant ought or ought not to have been taken into account.[112] Thus applied, this principle only requires the administrator to show that specified considerations were or were not adverted to.[113] It does not require that comprehensive pre-decision inquiries be undertaken or that the exercise of discretion be

[109] *R v Barnet and Camden Rent Tribunal, ex p Frey Investments Ltd* [1972] 2 QB 342.

[110] D Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986), 188–95.

[111] Ibid, 314–20.

[112] *Cannock Chase DC v Kelly* [1978] 1 All ER 152.

[113] Strictly, the onus of proof is on the claimant. But in practice, the defendant will have to provide some evidence about what factors were or were not taken into account and how they affected the decision. A mere catalogue of factors ignored or considered may not be enough: *R v Lancashire CC, ex p Huddleston* [1986] 2 All ER 941.

justified in the light of the relevant and available material. Some people have argued that English courts should adopt something like the hard-look approach,[114] and it may be that English law is moving in that direction at least in the context of human rights law.[115]

The classic English example of a case where a decision was struck down for taking irrelevant considerations into account is *Roberts v Hopwood*.[116] A decision was made by the Poplar Borough Council (under a power to pay its employees such salaries and wages as it thought fit) to pay its employees uniform wage increases considerably greater than the rate of inflation, and unrelated to the sex of the employee and the nature of the work done. In a famous statement Lord Atkinson said that the Council had allowed itself 'to be guided by some eccentric principles of socialistic philanthropy or by a feminist ambition to secure equality of the sexes in the matter of wages in the world of labour', rather than by ascertainment of what was fair and reasonable remuneration for services rendered. This case is important not only as an illustration of reasoning in terms of irrelevant considerations. It also shows that the judgment of relevance is relative to changing political and social views. Discretionary powers can typically be used to achieve different ends favoured by groups with divergent political views. Very often the legislation does not rule out all but one of such ends, and so ultimately courts and tribunals must decide which ends are permissible and which are not. In this way they inevitably become involved in politics.

Roberts v Hopwood also rests on the narrower principle that since a local authority is dealing with funds contributed by local-tax payers, it owes them a 'fiduciary' duty to consider their interests as well as those of the intended beneficiaries of any spending programme before deciding how to spend the proceeds of local taxes.[117] The classic example of the fiduciary-duty reasoning is *Prescott v Birmingham Corporation*.[118] Birmingham Council had power to charge such fares for public transport as

[114] I Harden and N Lewis, *The Noble Lie* (London: Hutchinson, 1986), esp 272–8; criticized by PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990), 182–7.

[115] Convention rights are limits on discretion, not relevant considerations to be taken into account in exercising discretion (ie they confine rather than structure discretion). The question is whether administrative action infringes a Convention right, not whether the administrator took account of Convention rights: *R (Begum) v Headteacher and Governors of Denbigh School* [2007] 1 AC 100; *Belfast City Council v Misbehavin' Ltd* [2007] 1 WLR 1420.

[116] [1925] AC 578.

[117] Leigh, *Law Politics and Local Democracy* (n 82 above), 131–9; M Loughlin, *Legality and Locality: The Role of Law in Central-Local Relations* (Oxford: Clarendon Press, 1996), ch 4.

[118] [1955] 1 Ch 210.

it thought fit. It introduced a scheme of free travel for senior citizens, which was invalidated by the court on the ground that the council was in effect making a gift to one section of the public at the expense of local-tax payers. The effect of this decision was subsequently negated by statute, but the principle on which it rests remains: local authorities must take proper account of the interests of local-tax payers in making spending decisions.

The basis of the fiduciary-duty principle seems to be that whereas most central-tax payers can vote in central government elections, paying taxes to a local authority and being entitled to vote for it do not by any means always go together. A significant proportion of voters do not (directly) pay taxes to the authority for which they are entitled to vote. Moreover, many local-tax payers are commercial concerns that cannot vote. The individuals who comprise those concerns often live in a different local authority area, where they in turn pay local taxes and can vote. So commercial concerns often do not have a voice in local government elections, while spending decisions often affect them. This is not, however, a conclusive argument because it is also true that companies pay taxes to central government and yet have no vote as to how those taxes will be spent. On the other hand, those who own and run such companies do have a vote. The fiduciary duty principle is designed to make good the 'democratic deficit' which these facts are seen to produce.

By contrast, central government does not owe a fiduciary duty to the body of taxpayers. Political parties campaign at elections on the basis of certain policies and if elected into government they put those policies more-or-less into effect, raising and using taxes for that purpose. In modern political practice the idea of the electoral mandate is used to legitimate spending, subject of course to Parliamentary approval in the form of Finance and Appropriation Acts. It seems that the idea of the electoral mandate is not perceived as having the same legitimating force at the local level.[119] Local government election campaigns turn at least in part on schemes for local spending programmes. A notorious example—the Greater London Council's 'Fares Fair' scheme for reduced fares on London Transport[120]—was held unlawful even though

[119] Leigh, *Law, Politics and Local Democracy* (n 82 above), 71–4.

[120] See *Bromley LBC v Greater London Council* [1983] 1 AC 768; *R v London Transport Executive, ex p Greater London Council* [1983] QB 484. The former decision was extremely controversial: see JAG Griffith, *The Politics of the Judiciary*, 5th edn (London: Fontana, 1997), 126–33; *Judicial Politics Since 1920: A Chronicle* (Oxford: Blackwell, 1993), 154–7.

it had been a major issue in the elections which preceded the introduction of the scheme. Local authorities are required to pay continuing attention to the interests of local-tax payers in moulding their policies and may even be required, in fulfilment of their fiduciary duty, to give up some policy which they were apparently elected to put into effect. The fiduciary duty stacks the legal cards against the authority in any dispute about expenditure with local-tax payers even though local taxes represent only a small proportion of the income of local authorities, the bulk of which takes the form of grants by central government.

The fiduciary duty of local authorities to their taxpayers is reinforced by the rule of standing that local-tax payers as such have standing to challenge local authority spending decisions in court whereas central-tax payers apparently have no right to challenge central government spending decisions.

A particularly difficult general issue concerns the relevance of a public agency's available financial resources to decisions about provision of public welfare services. Much will depend on the precise wording of the relevant statutory provisions. It has, for instance, been held that in assessing the 'needs' of an elderly person for domestic assistance, a local authority is entitled to balance the degree of need and the cost of providing the needed services against available resources;[121] that a local authority may take resources into account in deciding whether to provide accommodation for a 'child in need';[122] that a road authority may take resources into account in considering the merits of a proposal to build a footpath;[123] and that a chief constable may take account of resources in deciding how many police to commit to a particular operation.[124] By contrast, it has been held that in deciding what would be a 'suitable education' for a disabled child, a local education authority may not take available resources into account.[125] Even if an agency may take resources into account in deciding whether criteria of entitlement to the service are met, once an agency has decided that a person meets the

[121] *R v Gloucestershire CC, ex p Barry* [1997] AC 584 (Chronically Sick and Disabled Persons Act 1970, s 2(1)).

[122] *R v Barnet LBC, ex p G(FC)* [2003] 3 WLR 1194 (Children Act 1989, s 17(1)).

[123] *R v Norfolk CC, ex p Thorpe* (1998) 96 LGR 597 (Highways Act 1980, s 66).

[124] *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418 (this case concerned the performance of the common law obligation to keep the peace).

[125] *R v East Sussex CC, ex p Tandy* [1998] AC 714 (Education Act 1993, s 298); applied in *R v Birmingham CC, ex p Mohammed* [1999] 1 WLR 33 (Housing Grants, Construction and Regeneration Act 1996).

criteria, it cannot rely on lack of resources as an excuse for not providing the service.[126]

The key to understanding these cases appears to lie in the distinction between duties and discretionary powers.[127] If a statute is interpreted as imposing on an agency a duty to provide a particular service (such as 'suitable education'),[128] the agency will not be allowed to take resources into account in deciding what service to provide (ie what would be a suitable education in the circumstances of the particular case). By contrast, if the statute is interpreted as conferring on an agency a discretion about the particular services to be provided in the circumstances of the case (eg to meet a person's domestic 'needs'), the agency is allowed to take resources into account in deciding what service(s) to provide (ie what the person's 'needs' are). In reviewing the exercise of such discretion, the relevant principle is that the court should not second-guess decisions about the allocation of scarce resources.[129] Only if such a decision is 'unreasonable'[130] (or, presumably, illegal on some other ground) will it be invalid.[131] Although this distinction is dressed up as depending on legislative intent, its practical effect in many instances will be to allow courts to decide when to set spending priorities for service-providers and when to leave them relatively free to decide how to allocate available resources between competing demands.

6.5.2 IMPROPER PURPOSES

The issue of whether a decision-maker or a rule-maker has ignored a relevant consideration or taken account of an irrelevant one does not raise any question about the decision-maker's intention or motive in choosing the basis for the decision. The subjective purpose or motive of the decision-maker or rule-maker may provide grounds for challenging the decision if the agency consciously pursued an improper purpose.[132] The word 'improper' does not necessarily imply dishonesty or corruption,

[126] *R v Sefton MBC, ex p Help the Aged* [1997] 4 All ER 532.

[127] *R v Barnet LBC, ex p G(FC)* [2003] 3 WLR 1194 at [10]–[15] (Lord Nicholls).

[128] The fact that a statute refers to a function as a 'duty' is not conclusive because some so-called 'duties' ('target duties') leave the functionary with considerable discretion: see 3.2.

[129] *R v Cambridge HA, ex p B* [1995] 1 WLR 898; *R v North West Lancashire Health Authority, ex p A* [2000] 1 WLR 977.

[130] See 7.3.1.

[131] *See R v East Sussex CC, ex p Tandy* [1998] AC 714, 749 (Lord Browne-Wilkinson).

[132] Of course, these two heads of review overlap: deliberate pursuit of an improper purpose involves taking an irrelevant consideration into account—but more as well. In theory, at least, a power can be conferred in such wide terms that it could be used for *any* lawful purpose, with the result that this head of review would not apply.

although actual dishonesty or fraud can, of course, invalidate a decision or rule.[133] The word indicates that the decision-maker or rule-maker consciously pursued a purpose identifiably different from the purpose for which the power to decide or to make rules was conferred. For example, Leicester City Council was held to have acted improperly when it banned Leicester Football Club from using a recreation ground owned by the council as a punishment for the club's failure to oppose participation by some of its players in a tour to South Africa.[134] As this case demonstrates, like the judgment as to what considerations are irrelevant, the judgment about what ends are impermissible may raise delicate and controversial political issues.

An area in which questions of improper purposes frequently arise is that of government contracting: government bodies may wish to use their economic power to award contracts for the provision of goods and services with a view to achieving ends over and above simply acquiring the goods or services in question (see further 9.1).

An authority may have more than one purpose in mind when it acts. In *R v Brixton Prison Governor, ex p Soblen*[135] an order for the deportation of Soblen to the US was not invalidated even though it would deliver Soblen into the hands of the US government, which sought his extradition for a non-extraditable offence. The court was satisfied that the Minister's prime motive was deportation of an unwelcome alien. The fact that the Minister was happy thereby to be able to help the US government did not render the order illegal. The proper question is, what was the dominant motive or purpose? Because motives are often (if not usually) multiple and mixed, the vague concept of dominance makes the application of this ground of illegality in particular cases very difficult to predict.

[133] *Porter v Magill* [2002] 2 AC 357, [19]–[21] (Lord Bingham).
[134] *Wheeler v Leicester City Council* [1985] AC 1054.
[135] [1963] 2 QB 302.

7

Substance

So far we have discussed general principles of administrative law that regulate administrative procedures and the reasoning processes leading to administrative decision-making and rule-making. We now turn to legal norms that regulate the content or substance of administrative decisions and rules. Important here are the distinctions between issues of law, issues of fact, and matters of policy. As we have seen (see 3.3), these distinctions are by no means clear-cut; but this chapter is concerned with the significance of the various distinctions rather than with their analytical clarity. The norms that regulate administrative decision-making and rule-making differ according to whether the issue being decided is one of law, fact, or policy. Non-compliance with such norms may make a decision or rule 'illegal'—ie contrary to 'law'. In this last sentence, 'law' is being used in a different sense than previously in this paragraph: it is not being contrasted with 'fact' and 'policy'. Rather, whether a decision or rule is contrary to law is being contrasted with whether it is (adopting an Australian phrase) 'the correct or preferable' decision or rule. In this sense, the 'legality' of a decision is often contrasted with its 'merits'; and certain errors of fact and policy mistakes may be described as errors of 'law' in this sense because they bring illegality in their wake.[1] However, not all errors of fact are errors of law in this sense, although an error of fact that is not an error of law in this sense may justify describing a decision or rule based on the error as 'not the correct or preferable one'. As we will see in 14.2.1, such a decision or rule may be liable to be set aside by a tribunal even though it is not 'illegal'.

[1] Non-compliance with the norms discussed in Chapters 4 and 5 also brings illegality in its wake.

7.1 LAW

In exercising their legal powers and performing their legal duties, public administrators must act consistently with any and every applicable legal rule, whether statutory or common law. Applicable legal rules include not only those that confer and define the power being exercised or the duty being performed but other relevant rules, such as rules of EU law and human rights law. To act inconsistently with applicable law is to commit an error of law.

In one respect, this definition of error of law is too narrow because an administrative decision may be illegal because it is inconsistent with rules that are not binding rules of *law* in a strict sense of having been made in exercise of legal power to make rules.[2] However, in another respect, this definition of error of law is too broad because the legal status of some rules made in exercise of legal rule-making power, such as the Immigration Rules[3] or the *Social Fund Guide*,[4] is sufficiently unclear to make it uncertain in particular cases whether acting inconsistently with the rules would be illegal. For most purposes, however, the statement, that to make an error of law is to act inconsistently with some applicable legal rule, is accurate enough.

In English law, questions of law are deemed to have a single right answer. The ultimate authority on issues of law is the Supreme Court, the highest court in the system. The obligation of public administrators is to answer questions of law correctly; and in the final analysis, this means the way the Supreme Court would answer the question. In practice, however, administrators must resolve most of the issues of law with which they are confronted in exercising their powers and performing their duties without knowing how the Supreme Court would resolve the issue. It follows that an administrator should approach the task of answering questions of law in the same way as a court would. Resolving issues of law typically involves interpreting primary or secondary legislation (or soft law); and so administrators should follow the principles of interpretation that courts use.

There are probably two main reasons why questions of law are treated as having only one right answer. First, as a matter of constitutional

[2] *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815; P Cane, 'Self-Regulation and Judicial Review' [1987] *CJQ* 324, 331–3, 343–4.

[3] S Legomsky, *Immigration and the Judiciary* (Oxford: Clarendon Press, 1987), 50–67.

[4] R Drabble and T Lynes, 'Decision-Making in Social Security: The Social Fund—Discretion or Control? [1989] *PL* 297, 305–9.

principle, the ultimate responsibility for deciding what the law is rests with the judicial branch of government, not the executive; and the judicial branch is organized in such a way as to generate a single authoritative answer to questions of law. Secondly, when various administrators have the power to decide the same issue of law at different times and without reference to the way other administrators have decided the issue, it is desirable, in the interests of certainty and predictability, that there be some government institution with the power to resolve conflicts that may arise about how the issue is to be decided.

7.2 FACT

In making decisions and rules administrators must not take account of an established but irrelevant fact or ignore an established relevant fact (6.5.1). However, this obligation extends only to facts that the administrator is required by law to take into account or ignore. Even if the law does not provide that a particular established fact is relevant (or irrelevant), an administrator may make an error of fact by ignoring it (or taking it into account). Administrators may also make mistakes in the process of establishing facts by finding facts for which there is insufficient evidence or failing to find facts for which there is adequate evidence—in other words, by giving relevant available evidence too much or too little weight or by failing to realize that there was relevant available evidence. In general, the law requires administrators to answer questions of fact consistently with relevant available evidence.

However, in English law it is not assumed that every question of fact has a single right answer. It is accepted that some questions of fact may admit of more than one reasonable answer. The significance of this feature of the law arises from the distinction between judicial review and appeal limited to points of law on the one hand, and appeal not limited to points of law (which we may call a general appeal) on the other (see further 11.2 and 14.2.1). Consider, first, judicial review and appeals on a point of law. Traditionally, bodies exercising judicial review jurisdiction or hearing an appeal on a point of law have been reluctant to hold decisions and rules illegal on the basis of factual errors. In other words, they have given administrators more freedom in deciding issues of fact than in deciding issues of law. One reason for this is that constitutional principle does not allocate the ultimate responsibility for answering questions of law to the judicial branch. This is probably because findings of fact typically lack the wide or general significance of questions of law so that certainty and predictability are not as important in relation to fact-finding as in relation

to deciding what the law is. By comparison with law, facts tend to be particular and specific rather than general and abstract.

A second reason for reluctance to overturn findings of fact is that gathering and analysing the evidence relevant to finding facts can be very time-consuming and resource-intensive. In order to ration and preserve scarce judicial resources, courts typically review fact-finding with a light touch whether the fact-finder was an administrator, a tribunal, or a lower court. The evidence-gathering process is not re-run, and new evidence is only exceptionally admitted. Courts are particularly unwilling to depart from findings of fact based on evidence given orally by witnesses. In such cases, it is said, a court that does not see the evidence being given is at a significant disadvantage is assessing its value.

Thirdly, it is recognized that finding facts often involves not just the collection and processing of raw factual data but also the interpretation of that data in the light of policy considerations. This is probably one reason why the House of Lords in *R v Hillingdon LBC, ex p Puhlhofer*[5] held that it was for local authorities to decide whether the factual preconditions for the allocation of public housing were satisfied and that a court should only very rarely interfere with such decisions. *R v Secretary of State for the Home Department, ex p Bugdaycay*[6] involved two separate decisions made by immigration authorities: one was that certain asylum-seekers ought not to be given leave to enter Britain; and the other was, in effect, that a certain immigrant would not be in physical danger if he was deported. The House of Lords held that decisions as to whether particular immigrants were refugees should only be interfered with in extreme cases, partly because such decisions often raise difficult issues of foreign policy and diplomacy which courts are not suited to resolve.[7] The second decision turned on whether the Home Office had given sufficient weight to a letter indicating that the immigrant might be maltreated if he was returned to his country of origin. The House of Lords decided that sufficient weight had not been given to this letter. This decision could be reached without delving into delicate political questions.[8]

[5] [1986] AC 484. Because decisions about allocation of public housing involve significant discretion, they do not affect 'civil rights' for the purposes of Art 6 of the ECHR: *Tomlinson v Birmingham City Council* [2010] 2 WLR 471.

[6] [1987] AC 514.

[7] See also *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153.

[8] See also *R v Secretary of State for the Home Department, ex p Turgut* [2001] 1 All ER 719. The CA pointed out that this approach is required by Art 3 of the ECHR.

This traditional reluctance to overturn findings of fact by public administrators in judicial review proceedings and on appeal limited to points of law has somewhat abated. In *E v Secretary of State for the Home Department*,[9] the Court of Appeal held that a mistake in finding facts may make a decision illegal if (1) an administrator (or an administrative tribunal) makes a mistake about the existence or non-existence of a fact, including a mistake about the availability of evidence to support a finding of fact; (2) the fact, or the evidence, is 'uncontentious and objectively verifiable'; (3) neither the citizen nor his advisors were responsible for the mistake; and (4) the mistake played a material (but not necessarily decisive) part in the reasoning leading to the making of the decision or rule.

The second condition seems to rule out overturning a decision when there is reasonable dispute about whether a finding of fact is sufficiently supported by evidence. In that sort of case, it seems, a decision will be illegal only if the contested finding of fact on which it is based is held to be unreasonable. The court in *E* did not explore the relationship between this approach and that taken in earlier cases. For instance, in *Zamir v Home Secretary*[10] the question of fact at issue was whether an immigrant's entry certificate had been obtained by fraud. In the first instance, this question had to be answered by an immigration officer at the point of entry into Britain. Lord Wilberforce said that in some cases 'the exercise of power . . . depends on the precedent establishment of an objective fact. In such a case it is for the court to decide whether that precedent requirement has been satisfied'. In other cases, however, of which this was an example, all the High Court can do is 'to see whether there was evidence on which the immigration officer, acting reasonably, could decide as he did'.[11]

The actual application of this principle in *Zamir* was later said to have been wrong. In *R v Secretary of State for the Home Department, ex p Khawaja*[12] it was held that where, as in *Zamir,* the claimant for judicial review is challenging an order that he or she be personally detained, the court must decide for itself the factual issues on which the validity of the order depends. Personal liberty is too important an issue to be left to the decision of immigration officers, subject only to the requirement

[9] [2004] 2 WLR 1351. [10] [1980] AC 930.

[11] An unreasonable decision is one that is either literally, or to all intents and purposes, wholly unsupported by the evidence. See the judgments of Lord Denning MR in *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320 and *Coleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 WLR 433.

[12] [1984] AC 74.

of reasonableness. Similarly (as we have seen), in *R v Secretary of State for the Home Department, ex p Bugdaycay*[13] it was said that a decision whether to accord refugee status should be interfered with only if it was unreasonable, whereas the court would interfere with a decision as to whether an immigrant was in danger of life or limb if it (the court) was of the opinion that the decision-maker had, for example, given too much (or too little) weight to some piece of available evidence.[14]

Under this older approach, the issue of whether a decision will be illegal if the court disagrees with the administrator's factual findings or only if it considers those findings to be unreasonable depends on a judgment by the court of the importance of the issues at stake. By contrast, the approach in *E* apparently distinguishes between findings of fact on the basis of whether or not they are contested. The rationale for the latter approach is, perhaps, less clear than the justification for the older approach. Probably more significant than *E* is the decision of the Supreme Court in *Manchester City Council v Pinnock*,[15] in which it was held that whenever a court (or tribunal) exercising 'traditional' (or 'normal') judicial review powers has to decide whether there has been a breach of a Convention right, its powers 'should be expanded' so as to enable it 'to make its own assessment of any relevant facts which are in dispute'.[16] It remains to be seen what, if any, impact this decision will have outside the human rights context.

The discussion so far in this section has concerned control of administrative fact-finding by way of judicial review and appeal on a point of law. Where a decision is subject to a general appeal not limited to points of law the issue in relation to findings of fact is not whether the decision is illegal but whether the appeal body (typically a tribunal) thinks that the decision based on the findings is the correct or preferable one. In practice, administrative decisions are much more commonly the subject of a general appeal than of judicial review, and this point is fundamental to understanding legal control of administrative fact-finding.

7.3 POLICY

Policy in this context means the purposes for which a power to make decisions or rules was conferred. If a decision or rule is based on

[13] [1987] AC 514.
[14] See also *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1047 (Lord Wilberforce).
[15] [2010] 3 WLR 1441. [16] Ibid, [73].

irrelevant considerations (see 6.5.1) or is made for an 'improper purpose' (see 6.5.2) it will be illegal. The question to be considered here is whether a decision or rule can be illegal not because of the purposes it promotes but because of the way it promotes them.

7.3.1 *WEDNESBURY* UNREASONABLENESS

In the *GCHQ* case Lord Diplock said (somewhat imprecisely) that there were three basic grounds on which administrative decisions could be unlawful: illegality, procedural impropriety, and irrationality.[17] 'Irrationality' is more often referred to as 'unreasonableness'. What is the criterion or standard of unreasonableness? The classic answer to this question is that of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*:[18] the challenged decision must be 'so unreasonable that no reasonable authority could ever have come to it'. In *GCHQ* Lord Diplock said that an irrational decision is one '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'. Applied literally, these definitions are so stringent that unreasonable administrative acts in this sense are likely to be a rare[19] occurrence in real life.

Not all definitions of *Wednesbury* 'unreasonableness' are so uncompromising, however. For example, Lord Donaldson MR once said that an unreasonable decision is one of which it can be said, 'my goodness, that is certainly wrong'.[20] It has also been said that a decision can be held unreasonable even though there are arguments in its favour, if the court thinks that the arguments against the decision are 'over-whelming'.[21] Even when a decision is set aside because it is '*Wednesbury* unreasonable', a lesser standard of unreasonableness may be applied than that specified by Lord Greene.[22]

Whether a decision is unreasonable may depend on its subject matter and the context in which it was made. According to Sir Thomas

[17] [1985] AC 374, 410–11.

[18] [1948] KB 223. For a more recent statement see *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 757 (Lord Ackner).

[19] But not non-existent. See eg *R (Rogers) v Swindon NHS Primary Care Trust* [2006] 1 WLR 2649; *R (Limbu) v Secretary of State for the Home Department* [2008] EWHC 2261 (Admin); *Re Duffy* [2008] UKHL 4.

[20] *R v Devon CC, ex p G* [1989] AC 573, 583H.

[21] *West Glamorgan CC v Rafferty* [1987] 1 WLR 457, 477 (Ralph Gibson LJ).

[22] eg *R v Cornwall CC, ex p Cornwall and Isles of Scilly Guardians ad Litem and Reporting Officers Panel* [1992] 2 All ER 471.

Bingham MR, '[t]he greater the policy content of a decision, and the more remote the subject matter of the decision from ordinary judicial experience,[23] the more hesitant the court must necessarily be in holding a decision to be irrational'.[24] Indeed, it has been held that decisions made in exercise of powers to formulate and implement 'national economic policy' or which concern 'the appropriate level of public expenditure and public taxation' are matters of 'political opinion', and that there are no 'objective criteria' by which they can be judged. Such decisions cannot be struck down as *Wednesbury* unreasonable, at least if they have been debated and approved by Parliament; but they may be illegal on other grounds.[25]

Statutory rules are rarely challenged for unreasonableness, and a general rule is quite unlikely to be found irrational in the strong sense.[26] In this context, the degree of control exercised may vary according to the identity of the rule-maker.[27] If it is a commercial or unelected body the court, it has been said, should 'jealously watch' the exercise of its rule-making powers to 'guard against their unnecessary or unreasonable exercise to the public disadvantage'.[28] By contrast, if the rules were made by a public representative body, such as a local authority, the court would be slow to condemn the legislation as unreasonable unless it was 'partial or unequal in [its] operation as between different classes . . . [or] manifestly unjust . . . [or] disclosed bad faith . . . [or] involved such oppressive or gratuitous interference with the rights of those subject to [it] as could find no justification in the minds of reasonable men'.[29] Even so, it is not clear that all of the items in this list satisfy Lord Greene's narrow criterion. Furthermore, it seems that the reasonableness of soft law depends on a loose purpose-based test: does the particular rule further the permitted policy goals of the rule-maker?[30]

[23] For instance, if it is 'policy-laden, esoteric or security-based'.

[24] *R v Ministry of Defence, ex p Smith* [1996] QB 517.

[25] *R v Secretary of State for the Environment, ex p Hammersmith and Fulham LBC* [1991] 1 AC 521, 595–7.

[26] *R (Ahmad) v Newham LBC* [2009] 3 All ER 755.

[27] Concerning Acts of the Scottish Parliament see *Petition of Axa General Insurance Ltd for Judicial Review of the Damages (Asbestos-related Conditions) (Scotland) Act 2009* [2010] ScotCS CSOH 02.

[28] *Kruse v Johnson* [1898] 2 QB 91, 99.

[29] Ibid.

[30] See eg *R v Inspector of Taxes, Reading, ex p Fulford-Dobson* [1987] QB 978, esp 988D; P Cane, 'Self-Regulation and Judicial Review' [1987] *CJQ* 324, 343–4.

While there is no doubt that unreasonable administrative decisions and rules can, in principle, be illegal because they are unreasonable, the precise role of the concept of unreasonableness is harder to discern. In the *Wednesbury* case Lord Greene MR seems to have seen it as a last resort which might invalidate a decision that could not be said to fall foul of any other ground of illegality such as taking account of an irrelevant consideration.[31] As an independent criterion of illegality, unreasonableness means something like extreme inconsistency or incompatibility with the objectives or purposes of the power being exercised. Viewed in this way, unreasonableness is unlikely to play a significant role because if a decision or rule can be described as unreasonable in an extreme sense it will typically be illegal for some other reason. On the other hand, the fact that a decision or rule could not be described as illegal on any other basis might not prevent it being illegal if it could be described as unreasonable in the *Wednesbury* sense.[32]

Instead of viewing unreasonableness as an independent criterion of illegality, it might be interpreted as a standard of review. The idea here would be, for instance, that a decision or rule could be held illegal on the ground of taking an irrelevant consideration into account only if that failure could be described as unreasonable in the extreme *Wednesbury* sense.[33] Understood in this way, the concept of unreasonableness gives effect to a more general principle of 'judicial restraint' or 'deference' to the policy choices of the decision/rule-maker.

Even if the distinction between the two different understandings of *Wednesbury* unreasonableness is clear in principle, it is of little practical significance. This is because even under the second, standard-of-review approach, it is clear that unreasonableness is not the appropriate standard of review for procedural unfairness[34] or questions of law: on the contrary, it is for the court to decide what the law is or what fairness requires. So under both approaches to the *Wednesbury* test, the fundamental issue is when a highly deferential standard of review is appropriate and when, instead, the court should adopt a less deferential and more intrusive attitude to the control of public decision-making.

[31] This also seems to have been the view of the House of Lords in *R v Secretary of State for the Environment, ex p Hammersmith and Fulham LBC* [1991] 1 AC 521, 597.

[32] eg *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855.

[33] There is an inconclusive discussion of this point in *Pickwell v Camden LBC* [1983] QB 962. But it seems to be the approach adopted in *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 in relation to the first mode of protection of legitimate expectations: see 6.3.4.

[34] *Booth v Parole Board* [2010] EWCA Civ 1409.

7.3.2 UNREASONABLENESS IN A BROAD SENSE

Matters are made even more confusing[35] by the fact that the term 'unreasonable' is sometimes used in relation to statutes that confer discretionary powers, for example, on a Minister to act if he 'has reason to believe' or 'is satisfied' that, or if 'in his opinion', something is the case; or to take such steps as he thinks 'fit'. In this sense, a decision or rule may be unreasonable if it fails to further the purposes of the power in exercise of which it was made, or if it conflicts with some other superior rule of law, even though it is not unreasonable in the *Wednesbury* sense.[36]

Phrases such as those listed above immediately raise the question whether the challenged action is to be judged according to the authority's own sense of reasonable belief (or satisfaction or fitness) or by some more objective standard. We might think that the notion of unreasonableness could only be applied objectively and that there is hardly any point in applying a subjective test because very rarely will an authority act in a way which it does not honestly (if mistakenly) believe to be reasonable. However, in a few cases a subjective approach has been adopted. The most famous is *Liversidge v Anderson*[37] which was an action for false imprisonment. The Home Secretary had power to detain any person whom he had reasonable cause to believe to be of hostile origins or associations. A majority of the House of Lords held that the Home Secretary's action in detaining the complainant would be justified provided he had acted in the honest belief that there was reason to think that the detainee was hostile. A somewhat similar case is *McEldowney v Forde*,[38] which involved a challenge to a regulation (which proscribed republican clubs and like organizations in Northern Ireland) made under a power 'to make regulations . . . for the preservation of peace and the maintenance of order'. A majority of the House of Lords held that the power gave the Minister a very wide discretion which would only be interfered with if it could be shown that the Minister had not acted honestly, or if the regulation bore no relation to the purposes for which the power had been given. These cases are exceptional and are

[35] As was recognized by Lord Bridge in *R v Secretary of State for the Environment, ex p Hammersmith and Fulham LBC* [1991] 1 AC 521, 597.

[36] e.g. *R v Barnet LBC, ex p Johnson* (1990) 89 LGR 581 (conditions condemned as *Wednesbury* unreasonable even though they were simply beyond the statutory power in question).

[37] [1942] AC 206. [38] [1971] AC 632.

probably to be explained by the fact that both concerned the preservation of peace and security.

The leading authority for the proposition that even subjective statutory language ought to be given an objective interpretation is *Padfield v Minister of Agriculture, Fisheries, and Food*.[39] In that case the Minister had power to refer, to an investigation committee, complaints about decisions of the Milk Marketing Board fixing milk prices. It was held that the Minister was under a duty to give proper consideration to the question whether to refer the complaint, and that any such decision had to be based on good reasons. Moreover, if the Minister gave no reason for a refusal to refer, the court would consider for itself whether there were good reasons.[40] Another important case is *Secretary of State for Education and Science v Tameside MBC*.[41] The Minister had power to give directions to a local authority as to the performance of its statutory functions if he was satisfied that the local authority was acting or was proposing to act unreasonably.[42] The issue at stake was the highly contentious one of the 'comprehensivization' of schools: a Conservative local authority decided to reverse a scheme, worked out by its Labour predecessor and approved by the Secretary of State, for the abolition of selective schools in its area. It was made clear in this case that the test to be applied in judging the Minister's satisfaction was objective, not subjective: was the opinion which the Minister had formed about what the local authority had done, or was about to do, one which a reasonable person could entertain? In this case much turned on evidence concerning the amount of disruption to the school system which the proposed reversion to the selective entry criteria would cause.

7.3.3 PROPORTIONALITY

In the *GCHQ* case,[43] Lord Diplock contemplated the possibility that English law might at some time adopt the concept of 'proportionality'. This term is slightly misleading because what it refers to are cases in which

[39] [1968] AC 997.

[40] But failure to give reasons where there is no obligation to do so raises no presumption that the decision-maker had no good reason for the decision: *R v Secretary of State for Trade and Industry, ex p Lonrho Plc* [1989] 1 WLR 525.

[41] [1977] AC 1014.

[42] Which was held the mean '*Wednesbury*-unreasonably'. This holding has been criticized on the ground that the restraint embodied in the *Wednesbury* test is designed to regulate the relationship between the courts and the executive, not that between one governmental body and another.

[43] See n 17 above.

a decision or rule is a *dis*proportionate response to a particular problem or a *dis*proportionate way of giving effect to a legitimate policy objective.

As in the case of *Wednesbury* unreasonableness, there are two different ways of understanding this concept. As a criterion of illegality, proportionality expresses the idea that a sledgehammer is not needed to crack a nut. So understood, it is sometimes said that the concept of proportionality is more structured than that of *Wednesbury* unreasonableness[44] because the former requires identification of an end and of means to that end, and assessment of the relationship between the means and the end; whereas the latter is framed in terms of vague notions such as 'irrationality'.[45] In the late 1980s the British government banned broadcasts of voices of members of proscribed terrrorist organizations. In the *Brind* case, the ban was challenged on the ground (amongst others) that it was disproportionate to the object of the empowering legislation. The House of Lords held that the ban would be unlawful only if it was unreasonable in the *Wednesbury* sense (which it was held not to be).[46] This does not mean that a measure that was disproportionate to the end to be achieved could not be unlawful, but only that it would not be unlawful for that reason unless it was so disproportionate that no reasonable authority could have thought it an appropriate response.

Another understanding of the concept of proportionality treats it not (merely) as a criterion of illegality but (also) as a competitor to *Wednesbury* unreasonableness as a standard of review. In this sense, a decision or rule could be unlawful, even if it was not *Wednesbury* unreasonable, provided that it was lacked 'proportionality'. As a standard of review, proportionality would not necessarily be limited in operation to proportionality as a criterion of illegality. In *Brind*, the House of Lords rejected this use of proportionality on the basis that it would license excessive judicial interference with public decision/rule-making by allowing judges to pronounce on the 'merits' (as opposed to the 'legality') of decisions and rules. Given that *Wednesbury* unreasonableness, as much as proportionality, is concerned with the substance or content of decisions and rules, this objection amounts to no more than saying that the latter would license too much judicial interference with the substance of decisions.

[44] eg *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, [27] (Lord Steyn). For an example of a structured inquiry conducted in the language of unreasonableness see *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292. See generally P Daly, '*Wednesbury's* Reason and Structure' [2011] *PL* 238.

[45] A decision or rule could be irrational, illogical, or immoral without being disproportionate.

[46] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.

It is difficult to say whether or to what extent the principle of proportionality, understood as a standard of review, licenses the degree of judicial interference that the House of Lords feared, not least because the difference between lack of proportionality and *Wednesbury* unreasonableness is impossible to quantify in the abstract and independently of particular circumstances. We have also seen that *Wednesbury* unreasonableness is a flexible concept that can be used to justify various degrees of judicial interference; and the same is true of proportionality.[47] In fact, both concepts are typically used simply to provide justificatory frameworks for judgments about whether or not particular decisions are illegal. English courts always have and always will decide whether or not a decision or rule is invalid on policy grounds in a flexible and fact-sensitive way regardless of the conceptual framework in which the issue is considered.[48]

Assuming that proportionality is not merely a criterion of illegality but also an independent standard of review in English law,[49] it is unlikely that courts will interpret it as requiring a strongly evidence-based cost–benefit analysis, as opposed to a somewhat impressionistic and normative assessment of the relationship between the challenged decision or rule and its objective. It also seems certain that a proportionality standard would be applied selectively and only in cases where it was thought appropriate or necessary for courts to exercise a more intrusive style of scrutiny of public decisions and rules than could convincingly be justified by the concept of 'unreasonableness'.

7.4 RIGHTS

The concepts of law, fact, and policy were well established before the rights revolution that has overtaken English administrative law in the past twenty-five years. Britain was one of the original signatories to the ECHR (1950), and it accepted the right of individuals to petition the ECtHR in 1966. However, it was not until the late 1980s that pressure mounted to give the ECHR force in UK law. The first reaction

[47] S Boyron, 'Proportionality in English Administrative Law: A Faulty Translation' (1992) 12 *OJLS* 237.

[48] For instance, courts will be highly deferential to decisions on defence or macroeconomic policy regardless of whether the standard of review adopted is *Wednesbury* unreasonableness or proportionality.

[49] *R (Association of British Civilian Internees, Far East Region) v Secretary of State for Defence* [2003] QB 1397, [32]–[37]; *Quila v Secretary of State for the Home Department* [2010] EWCA Civ 1482.

of English courts was to explore the resources available in the common law for the protection of individual rights. It was in this context in particular that the stringency of the test of *Wednesbury* unreasonableness was relaxed and the concept of proportionality was mooted. Courts, it was said, would apply 'anxious scrutiny' to decisions and rules that implemented and promoted public policies at the expense of individual interests that enjoyed the status of fundamental common law rights.[50] It also came increasingly to be said that although the ECHR was not part of English law, nevertheless the common law independently and effectively protected various Convention rights such as freedom of speech and the right of access to an independent court.[51]

The Human Rights Act 1998 (HRA), which gives the ECHR force in UK law, came into effect in 2001. Until that time, the only court with jurisdiction to remedy alleged infringements in the UK of rights protected by the ECHR (Convention rights) was the ECtHR. The HRA places on any and every official and agency that has power to implement and apply English law an obligation to interpret that law, as far as possible, compatibly with the ECHR. It renders unlawful any act of a public authority (including courts and tribunals) that is incompatible with a Convention right; and it transfers the prime responsibility for enforcing Convention rights to UK courts and tribunals.

The requirements of the obligation to act compatibly with Convention rights depend, to some extent, on whether the right in question is qualified or unqualified. Unqualified Convention rights include the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Art 3), the right to liberty (Art 5), and the right to a fair trial (Art 6). Qualified rights include the right to respect for private and family life, the right to freedom of expression, and the right to a public trial. Abridgment of qualified rights will not be incompatible with the right (and, so, not unlawful under the HRA) provided the abridgment can be justified as necessary in a democratic society to meet a 'pressing social need' and proportionate to that aim.[52] In general terms,

[50] eg *R v Ministry of Defence, ex p Smith* [1996] QB 517. Not all common law rights are fundamental in this sense—contractual rights, for instance, are not. Such scrutiny may not be sufficient to satisfy the requirement of proportionality under the ECHR: *Smith and Grady v UK* (1999) 29 EHRR 493.

[51] J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *PL* 671.

[52] *Smith and Grady v UK* (1999) 29 EHRR 493, [138]; eg *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434. However, questions of proportionality may arise in defining the content of unqualified rights: *Austin v Metropolitan Police Commissioner*

deciding whether a decision or rule is proportional involves balancing the interests of society against those of affected individuals and groups by asking whether the administrative objective is sufficiently important to justify limiting the right, and whether the decision or rule is rationally connected to the objective and limits the right no more than is necessary to achieve the objective.[53]

The issue of compatibility under the ECHR/HRA is an issue of law: it has only one right answer, and ultimately that is the answer the Supreme Court would give.[54] This means, for instance, that failing to take account of Convention rights in making a decision or rule is not an independent ground of unlawfulness: if the act is unlawful, taking account of Convention rights will not save it; and if it is lawful, failing to take account of Convention rights will not render it unlawful.[55] The most that can be said is that an act is less likely to be held incompatible if the administrator has taken careful account of the issue of compatibility in the reasoning supporting the act, especially if the court considers that the administrator was better equipped to assess that issue because of its experience, expertise, or local knowledge.[56]

7.5 UNCERTAINTY

Under English administrative law a provision of subordinate legislation[57] may be illegal if it is so vague or uncertain that 'it can be given no

[2009] 1 AC 564. Proportionality is also a general principle of EU law: R Gordon, *EC Law in Judicial Review* (Oxford: Oxford University Press, 2007), ch 11.

[53] *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, [19].

[54] English courts are required to take account of decisions of the ECtHR but are not bound by them. In case of conflict between a decision of the Supreme Court and a decision of the ECtHR, English courts are bound by the former, not the latter. Because courts (including the Supreme Court) are public authorities for the purposes of the HRA, they act unlawfully if they decide a case incompatibly with the Convention. In the case of the Supreme Court, such a decision could only be challenged by making a claim against the UK government in the ECtHR. The ECtHR is not an appeal court, and even if it decides that the Supreme Court has acted incompatibly with a Convention right, the Supreme Court's decision will stand unless and until the UK government takes action to overturn the decision.

[55] *R (Begum) v Headteacher and Governors of Denbigh School* [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420.

[56] *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, [91] (Lord Neuberger of Abbotsbury).

[57] It is unclear whether this head of illegality could apply to soft law, which is not expected to be as carefully drafted as legislation and which does not determine rights and obligations. On the other hand, soft law can only give rise to legitimate expectations if it is sufficiently clear and unequivocal (see 6.2.2).

sensible or ascertainable meaning'[58] or if it does not give those subject to it adequate guidance as to what their legal rights and obligations are,[59] or if it is impossible to say whether the provision is properly related to the purposes for which the law-making power was conferred.[60] Under the ECHR, one aspect of the requirement that abridgments of qualified rights must be 'prescribed by law' is that the law must be sufficiently clear and precise to enable citizens to act in conformity with it.[61]

[58] *Fawcett Properties Ltd v Buckinghamshire County Council* [1961] 1 AC 636, 677–8 (Lord Denning). See also *Percy v Hall* [1997] QB 924.

[59] *Staden v Tarjani* (1980) 78 LGR 614, 623 (Lord Lane CJ); *Tabernacle v Secretary of State for Defence* [2008] EWHC 416 (Admin), [13]–[16].

[60] *McEldowney v Forde* [1971] AC 632. Whether this is an 'independent' ground of illegality or an aspect of unreasonableness is unclear and perhaps not very important. See R Moules, 'Uncertainty as a Ground for Judicial Review' [2007] *JR* 104.

[61] *Gaweda v Poland* (2002) 12 EHRR 486.

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Section B

Private-Law Norms

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8

Tort

8.1 STARTING POINTS

So far in this Part we have been concerned with rules of 'public law'. In this Section we will consider the place of rules of the private law of tort, contract, and restitution in the normative framework of public administration and, in particular, the way in which these rules are modified in their application to public administration.

There is a strong tradition in English law of understanding private-law rules as the paradigm governing not only relations between citizens but also relations between citizens and the government. According to the nineteenth-century constitutional lawyer, AV Dicey, the 'rule of law' requires that the conduct of public administrators should be regulated by law to the same extent and according to the same rules as the conduct of private individuals. This approach (sometimes called 'the equality principle') is (and was in Dicey's day) inadequate as a complete account of the legal framework of public administration if for no other reason than that there are public-law norms that have no application to the conduct of private individuals. But the equality principle gets closer to the mark if we understand it as being primarily concerned with the application to the activities of public administrators of private-law norms.

By the time Dicey was writing, it was well established that many public agencies were bound by the private law of negligence.[1] However, the Crown[2] enjoyed immunity from liability in tort, which was not

[1] *Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93; *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430. Although these cases concerned liability for negligence, they are applications of a more general principle. They were actions against non-governmental statutory corporations, but they are now treated as having established a general rule governing the exercise of statutory functions by governmental as well as non-governmental bodies.

[2] For discussion of the meaning of this term and its significance see 15.4.

removed until the enactment in 1947 of s 2 of the Crown Proceedings Act, providing (subject to a number of exceptions and qualifications[3]) that the Crown shall be liable in tort to the same extent 'as if it were a private person of full age and capacity' in respect of vicarious liability, employers' liability, and occupiers' liability. The Crown's immunity never applied to individual servants and agents of the Crown[4] and today, the general principle is that the law of tort applies to all public officials and agencies.[5]

That is not to say, however, that tort law applies to public agencies in precisely the same way and to precisely the same extent as it applies to citizens. In some instances, legitimate public interest may require that bodies exercising public functions be subject to lesser or fewer or different obligations than private individuals who have no responsibilities to the public generally. However, there is another side to the 'public interest' coin. For instance, when making contracts, the government wields such economic and political power that ordinary citizens dealing with the government may need greater protection from the effects of inequality of bargaining power than they do when they are dealing with each other. This might imply that in some cases the government should be subject to greater restrictions and obligations than private citizens, not lesser.[6]

This chapter explores the application of the private law of tort to the performance of public functions, whether by governmental or non-governmental[7] entities.

[3] For instance, the Crown is not liable in respect of the exercise of judicial functions (Crown Proceedings Act 1947, s 2(5)); nor are the judges themselves: P Cane, *Tort Law and Economic Interests,* 2nd edn (Oxford: Oxford University Press, 1996), 228–33.

[4] *M v Home Office* [1994] 1 AC 377.

[5] US law starts from the opposite position. 'The United States is immune from suit except so far as it has waived its sovereign immunity': HM Goldberg, 'Tort Liability for Federal Government Actions in the United States: An Overview' in D Fairgrieve, M Andenas, and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (London: BIICL, 2002).

[6] An application of this idea in a slightly different context is the rule that government bodies (*Derbyshire CC v Times Newspapers Ltd* [1993] AC 534) and political parties (*Goldsmith v Bhoyrul* [1998] QB 459) cannot sue for defamation in respect of their public activities.

[7] eg *Watson v British Boxing Board of Control Ltd* [2001] QB 1134.

8.2 NEGLIGENCE AND THE OBLIGATION TO TAKE CARE

The law's starting point is that care must be taken in the performance of public functions in the same way as citizens are required to take care in conducting their private affairs. There are at least two significant difficulties in applying this general principle. The first concerns the relationship between liability in tort and the public-law concept of illegality. To say that someone has committed a tort is to make a statement of private law. To say that a public administrator has acted illegally is to make a statement of public law, not private law. In theory at least, it is possible that an administrator might commit the tort of negligence (or some other tort) without acting illegally in the public-law sense; and so the question arises: could the administration be liable in tort even though its tortious conduct was not illegal in the public-law sense? Is public-law illegality a precondition of holding a public administrator liable in tort?

The second difficulty is caused by the fact that public law allows administrators considerable freedom in finding facts and implementing policy. Such freedom is most clearly articulated in the concept of unreasonableness in the strong *Wednesbury* sense of a decision or action 'so unreasonable that no reasonable authority could have made or done it' (see 7.3.1). In tort law, by contrast, 'unreasonableness', which is central to the legal concept of negligence, is understood in terms of what, all things considered, a reasonable person would (or would not) have done. This raises the question of whether the obligation of public administrators to take care should be defined in terms of the public-law concept of *Wednesbury* unreasonableness or in terms of the private-law concept of unreasonableness.

Courts have been grappling with these difficulties for forty years,[8] but we can start with the 1995 case of *X v Bedfordshire CC*[9] in which Lord Browne-Wilkinson offered general guidance about the requirements of negligence law in relation to the performance of statutory functions.[10] First, there will be an obligation to take care in performing a statutory

[8] Important early decisions were *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004; *Anns v Merton LBC* [1978] AC 728.

[9] [1995] 2 AC 633.

[10] The discussion that follows focuses on statutory functions. However, the obligation to take care may also apply to the performance of common law functions. See, for instance, the

function only where the private-law conditions for the existence of a duty of care are satisfied. These (as laid down in *Caparo Industries Plc v Dickman*[11]) are that the official or agency performing the function (the 'defendant') ought to have foreseen that the citizen (the 'claimant') might suffer injury or damage if the function was performed negligently; that there was a sufficient relationship of proximity between the claimant and the defendant; and that it would be just and reasonable to impose a duty of care on the defendant. The concept of proximity has been used as the basis for refusing to impose a duty of care in several cases where it was alleged that by negligence in performing its functions, a regulatory or law-enforcement agency failed to prevent the claimant suffering loss or damage as a result of conduct of a third party:[12] the agency's function, it was said, was to protect the public as a whole, not specific individuals.[13] It is generally conceded that the concept of proximity is simply a cover for giving effect to value-judgments about the desirable scope of tort liability. Two principles relevant in many actions against public agencies are, first, that the law of tort in general and the tort of negligence in particular are mainly concerned with personal injury and property damage, and only marginally and exceptionally with economic loss; and secondly that tort law only exceptionally imposes obligations to prevent harm as opposed to an obligation not to cause harm.[14]

discussion of cases dealing with investigation of crime in the text around n 31 below. For present purposes, it can be assumed that statutory functions are public functions.

[11] [1990] 2 AC 605.

[12] See esp *Yuen Ku Yeu v Attorney-General of Hong Kong* [1988] AC 175; *Hill v Chief Constable of West Yorkshire* [1989] AC 53. Contrast *Watson v British Boxing Board of Control Ltd* [2001] QB 1134; see further J George, *'Watson v British Boxing Board of Control:* Negligent Rule-Making in the Court of Appeal' (2002) 65 *MLR* 106.

[13] However, if the authority had dealings with the claimant in particular, this might forge a sufficient relationship of proximity: eg *T v Surrey CC* [1994] 4 All ER 577; *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692; *Swinney & Swinney v Chief Constable of Northumbria* [1997] QB 464, (1999) 11 Admin LR 811; *Costello v Chief Constable of Northumbria* [1999] ICR 752.

[14] eg *Mitchell v Glasgow City Council* [2009] 1 AC 874. Failure by a highway authority to remove a danger created by someone else is much less likely to attract liability than a failure by the authority to remove a danger it has created: *Kane v New Forest DC* [2002] 1 WLR 312. Emergency services owe no duty to take care to respond to calls for help; and if they do respond, their only duty is to take care not to make matters worse: *Capital and Counties Plc v Hampshire CC* [1997] QB 1004; *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 297. But for these purposes, the ambulance service is not an emergency service. It has a duty of care to respond, and in responding, to calls: *Kent v Griffiths* [2001] QB 36 (Lord Woolf's rationalization of this distinction between various services is unlikely to convince everyone).

In relation to the exercise of statutory functions, *X v Bedfordshire CC* seemed to establish that the third condition ('justice and reasonableness') has three elements. The first is that a duty of care will be imposed only if it would be compatible with the provisions and purposes of the statute in question.[15] This element is relevant whether or not the statutory function in question is 'discretionary'. It appears that in this context, 'discretion' does not simply mean 'power' or 'choice'. For instance, in *X v Bedfordshire CC* Lord Browne-Wilkinson said that 'the decision to close a school . . . necessarily involves the exercise of a discretion' whereas 'the actual running of a school' does not.[16] However, it is obvious that even running a school confronts those responsible with a multitude of choices. Rather, the distinction between discretionary and non-discretionary decisions seems to parallel a distinction drawn in the earlier case *of Anns v Merton LBC*[17] between 'policy' (or 'planning') and 'operational' decisions.

Under the *Anns* scheme, policy decisions were accorded special deference and an allegedly negligent policy decision could be tortious only if the decision-maker had acted illegally in reaching the decision. On the other hand, negligence in making an operational decision could, in itself, be tortious (provided other conditions of liability were satisfied).[18] In other words, *Anns* established a 'policy defence' to an action in negligence which, if successful, would immunize the defendant from liability for lawful policy decisions. As a result of *Anns,* in cases of 'negligence at the policy level' a finding of illegality was a precondition of liability for negligence in the exercise of a statutory function. The principles laid down by Lord Browne-Wilkinson in *X v Bedfordshire CC*

[15] An analogous requirement applies to non-statutory functions: eg police owe no duty to potential victims of crime to investigate with care: *Hill v Chief Constable of West Yorkshire* [1989] AC 53; soldiers owe no duty of care to fellow soldiers when engaging the enemy in battle, nor is the army under a duty to provide a safe system of work on the battlefield: *Mulcahy v Ministry of Defence* [1996] QB 737. A similar issue may also arise where the question is not whether there is a duty to take care in performing a statutory function but whether the way a statutory function is performed may constitute negligent performance of an accepted duty of care, such as the employer's duty to employees: *Connor v Surrey County Council* [2010] 3 All ER 905.

[16] [1995] 2 AC 633, 735.

[17] [1978] AC 728.

[18] There are many common types of case in which the ordinary principles of negligence apply to performance of public functions. For instance, gaolers owe a duty to take care for the health and safety of prisoners (eg *Butchart v Home Office* [2006] 1 WLR 1155); officials driving government vehicles on government business owe the same duty of care to other road users as ordinary citizens; public authorities may owe a duty not to cause financial loss to citizens by making negligent misrepresentations; government owes the same obligations as citizens in its capacity as occupier of land and employer.

concerning liability for negligent exercise of statutory *discretion* apparently relate to what, under the *Anns* scheme, were called 'policy decisions'. So we can rephrase the third sentence of the previous paragraph as follows: the compatibility condition has to be satisfied whether or not the negligence claim is in respect of a policy or an operational decision.[19]

However, *X v Bedfordshire CC* also established that the compatibility condition has to be satisfied whether the function in question was a 'power' or a 'duty'. Here, 'power' is used synonymously with 'discretion' in the sense of 'choice' rather than in the narrower sense just explained. In *Stovin v Wise*[20] Lord Hoffmann said that the compatibility condition is less likely to be satisfied in relation to powers than in relation to duties. He also interpreted the condition more strongly than Lord Browne-Wilkinson by saying that only in exceptional cases would a statute be interpreted as being compatible with the imposition of liability for negligent exercise (or, even more, non-exercise) of a statutory duty or power.

Lord Browne-Wilkinson's judgment in *X v Bedfordshire CC* further indicated that in relation to the exercise of statutory discretions—in the sense of 'policy decisions'—the 'justice and reasonableness' requirement has two elements in addition to compatibility with the statutory scheme. First, a duty of care would arise only if the discretion had been exercised unreasonably in the *Wednesbury* sense.[21] Secondly, a duty of care would not be imposed if, in order to decide whether it had been breached, the court would have to consider 'non-justiciable issues'. Putting these three elements together, the resulting principle is that a public authority would owe a duty of care in respect of the exercise of a statutory discretion (ie a policy decision) only if (1) the imposition of such a duty would be compatible with the statute; (2) the discretion was exercised unreasonably in the *Wednesbury* sense; and (3) determining whether the duty had been breached would not require consideration of

[19] See also *Stovin v Wise* [1996] AC 923, 951–2 (Lord Hoffmann).

[20] [1996] AC 923.

[21] See also *Stovin v Wise* [1996] AC 923. Lord Hoffmann was critical of the policy–operational distinction, and his judgment can be read as meaning that the 'unreasonableness' condition applies to any and every exercise of (or failure to exercise) a statutory power regardless of whether it raises issues of 'policy'. On the other hand, *Stovin v Wise* is often treated as establishing the unreasonableness condition only in relation to failure to exercise a statutory power or, in other words, failure to prevent harm occurring (as opposed to causing harm). For an argument that all exercises of public power should be immune from negligence liability see B Feldthusen, 'Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity' [1997] *Tort L Rev* 17.

non-justiciable issues. Let us examine each of these three elements in a little more detail.

8.2.1 COMPATIBILITY

The compatibility requirement is that the imposition of a duty of care must be consistent with the general scheme and particular provisions of the relevant statute. For instance, in *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*[22] it was held that the powers of local authorities under public health legislation to inspect buildings in the course of construction were designed to protect the health and safety of occupants; so a developer could not recover from a local authority the cost of replacing faulty drains (even if they constituted a danger to the health of prospective occupants). Similarly, in *Yuen Kun Yeu v Attorney-General of Hong Kong*[23] it was held to be no part of the statutory functions of the Commissioner of Deposit-Taking Companies to monitor the day-to-day activities of registered companies to ensure that they continued to be financially sound. It has also been held that the purpose of the Prison Act 1952, and of the Prison Rules made under it, is to regulate the internal affairs of prisons, and that breach of provisions of the Act or the Rules would not be actionable in tort.[24]

In *X v Bedfordshire CC* local authorities were sued in respect of the way their social services departments had handled allegations of child abuse. The House of Lords held that no duty of care arose because such a duty 'would cut across the whole statutory system set up for the protection of children at risk'; that civil litigation would be likely to have a detrimental effect on the relationship between social worker and client; and that the statute provided full procedures for the investigation of grievances.[25] In the same case, local education authorities were sued

[22] [1985] AC 210. The decision in this case must be read in the light of *Murphy v Brentwood DC* [1991] 1 AC 398. See also *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648; *Harris v Evans* [1998] 1 WLR 1285.

[23] [1988] AC 175.

[24] *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58. Of course, statutes may contain express provisions relevant to the availability of actions in tort, but typically they do not.

[25] [1995] 2 AC 633, 749, 750, and 752 respectively. This is no longer the law. An educational psychologist employed by a local authority owes a duty of care to a child in making decisions about its education (*Phelps v Hillingdon LBC* [2001] 2 AC 619); social workers and health-care professionals employed by local authorities owe a duty of care to the child (but not to the child's parents) in investigating allegations of child abuse (*JD v East Berkshire Community Health NHS Trust* [2005] 2 AC 373). The principle underlying the decision in *JD* that no duty was owed to the parents is that such a duty would conflict with the authority's prime responsibility to protect the child. A similar 'conflict of interest' principle

in respect of provision for children alleged to have special educational needs. Once again, the House held that no duty of care arose because the parents of the children were involved in the statutory process of deciding what provision to make for their children; there was a statutory appeals mechanism; and imposition of a duty of care would have an inhibiting effect on the performance of the statutory functions.[26] By contrast, the House held that an education authority that provided a psychological advisory service to parents could owe a duty of care in respect of the conduct of that service.[27]

The reference to the statutory appeals mechanism raises the issue of the relevance of availability of alternatives to tort law for obtaining redress. It is sometimes said that a tort claim is a last resort that should not be allowed if a suitable alternative remedy is available. For example, the existence of a 'statutory default power' (effectively, a right of appeal to a Minister) may preclude an action in tort for damages for failure by a public administrator to perform a statutory duty.[28] In *Jones v Department of Employment*[29] it was held that a negligence action could not be brought in respect of loss suffered as a result of refusal of unemployment benefit because there was a statutory appeal mechanism.[30] One of

underlies a decision that a nursing home regulator owed no duty of care to the owner of the nursing home in deciding to close it down—the regulator's prime responsibility was to the residents: *Trent Strategic Health Authority v Jain* [2009] 2 WLR 248.

[26] [1995] 2 AC 633, 760–2.

[27] Whether a public agency owes a duty of care (or, as it is sometimes put, whether the agency is 'directly liable') can be distinguished from the issue of whether the agency is vicariously liable for the negligence of its employees. See *Phelps v Hillingdon LBC* [2001] 2 AC 619. In theory, an agency may be vicariously liable for the negligence of an employee who owes a duty of care to a third party but owe no duty of care itself to that third party. Conversely, an agency may owe a duty of care even though its employees do not. Commonly, however, considerations that weigh against imposing a duty directly on the agency will similarly weigh against imposing a duty on employees; and conversely, considerations that weigh in favour of imposing a duty on servants or agents will also weigh similarly in favour of imposing a duty on the employing agency. As a general rule, there is no vicarious liability for the negligence of independent contractors. This is particularly important in relation to contracting-out of the provision of public services to private-sector providers.

[28] eg *Watt v Kesteven CC* [1955] 1 QB 408; *Cumings v Birkenhead Corporation* [1972] Ch 12; *Pasmore v Oswaldtwistle UDC* [1898] AC 387.

[29] [1989] QB 1.

[30] This aspect of the decision is problematic because the court treated the tort action as being an alternative to an appeal against refusal of unemployment benefit. Since the claimant had successfully appealed against the refusal, it is not surprising, viewed in this way, that his tort action failed. In fact, however, what the claimant sought to recover in the tort action (damages representing the cost of the appeal and for mental distress) could not be secured by appealing. In *Rowley v Secretary of State for Work and Pensions* [2007] 1 WLR 2861, which concerned child support, the problem was recognized but the same result was reached as in

the reasons why the House of Lords in *Hill v Chief Constable of West Yorkshire*[31] held that the police owe no duty of care to potential victims when investigating crime is that victims may be able to recover compensation from the Criminal Injuries Compensation Board. In *Cullen v Chief Constable of the Royal Ulster Constabulary*[32] one of the reasons why the House of Lords refused to allow an action for breach of a statutory duty in failing to give an accused access to a lawyer was that judicial review provided a better remedy.

The fear expressed by Lord Browne-Wilkinson that tort liability might detrimentally affect the relationship between social worker and client echoes what Lord Keith in *Rowling v Takaro Properties Ltd*[33] called 'the danger of overkill'. The idea is that the fear of being sued might cause public agencies to take 'unnecessary' action, or to refrain unnecessarily from taking action, merely in order to minimize the risk of being sued and not because this was in the best interests of the public in general or of affected individuals in particular. For example, in *Calveley v Chief Constable of Merseyside*[34] one reason why the House of Lords held that police officers owed no duty to take care in conducting an internal disciplinary inquiry was that to do so might inhibit free and fearless conduct of the investigation. Appeal to the risk of overkill is rarely based on (reliable) empirical evidence about the effect of potential tort liability.[35] In the absence of such evidence, an equally plausible speculation is that the risk of incurring liability might beneficially improve standards of administration.

Furthermore, the force of the overkill argument as a reason not to impose a common law duty of care is weakened in cases where the

Jones on the ground that although not complete, the statutory remedy in that case was adequate.

[31] [1989] AC 53. The *Hill* no-duty principle has been applied to a case in which the police behaved badly towards victim and witness of a crime (*Brooks v Metropolitan Police Commissioner* [2005] 1 WLR 1495) and to a case in which police failed to take steps to protect an indentified individual against a risk of attack of which they had been notified (*Chief Constable of Hertfordshire Police v Van Colle* [2009] 1 AC 225).

[32] [2003] 1 WLR 1763.

[33] [1988] AC 473.

[34] [1989] AC 1228. See also *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335. A related argument, prominent in the cases discussed in n 31 above, is that having to defend claims for negligence would divert valuable resources away from the agency's main tasks.

[35] P Cane, 'Consequences in Judicial Reasoning' in J Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (Oxford: Oxford University Press, 2000). For a contrary point of view see R Bagshaw, 'The Duties of Care of Emergency Service Providers' [1999] *LMCLQ* 71, 90–1.

allegedly tortious conduct may also constitute a breach of a Convention right for which a monetary remedy may be available, at least if it is assumed that the risk of incurring tort liability would be likely to have no significant 'chilling' effect over and above that produced by the risk of incurring liability for breach of the Convention right.[36]

8.2.2 UNREASONABLENESS

As noted above, under the *Anns* scheme, negligence liability could arise out of the exercise of discretion at the policy level only if the discretion was exercised illegally. There was no discussion in *Anns* of whether any and every ground of illegality could attract negligence liability or whether only some could. In *X v Bedfordshire CC* Lord Browne-Wilkinson expressly stated that the only head of illegality that could attract tort liability for negligence was *Wednesbury* unreasonableness.[37] In other words, the only way of challenging the exercise of a statutory discretion in a negligence action is to attack its substance; the decision-making process is not open to attack in a negligence action.[38] An important result of this surprising limitation is that the required standard of care in the exercise of a statutory discretion is defined in terms of the concept of *Wednesbury* unreasonableness: unless the defendant acted in a way so unreasonable that no reasonable authority could have so acted, it will not have acted negligently. On the other hand, if the defendant acted unreasonably in the *Wednesbury* sense, the conduct will automatically satisfy the weaker test of unreasonableness used in the tort of negligence, namely whether the defendant acted in a way a reasonable authority would not have acted.[39] At this point, however, it is important to refer back to the discussion of the concept of *Wednesbury* unreasonableness in 7.3.1. There we saw that its inherent vagueness and flexibility softens the contrast between it and the weaker sense of unreasonableness.[40]

[36] *J D v East Berkshire Community Health NHS Trust* [2004] QB 558, [79]–[85].

[37] [1995] 2 AC 633, 736–7.

[38] Contrast *Rowling v Takaro Properties Ltd* [1988] AC 473 in which it was alleged that a policy decision had been reached by a negligent procedure. The Privy Council held that the procedure had not been negligent, but did not say that procedural defects could not form the basis of a negligence action.

[39] Doubt has been cast on whether this requirement is actually part of the law: *Carty v Croydon LBC* [2005] 1 WLR 2312, [28]–[32] (Dyson LJ).

[40] It has been suggested that the EU law concept of 'serious breach' (see 13.4.4) would provide a better basis for liability (both in negligence and for breach of statutory duty) than *Wednesbury* unreasonableness: P Craig, 'The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?' in J Beatson and T Tridimas (eds),

8.2.3 NON-JUSTICIABILITY

Assuming that the imposition of a duty of care would not be incompatible with the relevant statute and that the defendant acted unreasonably in the *Wednesbury* sense, still (according to *X v Bedfordshire CC*) a duty of care would not be imposed if assessment of the defendant's conduct (at the policy level) required consideration of non-justiciable issues. In *X v Bedfordshire CC* Lord Browne-Wilkinson explained the concept of non-justiciability in several ways. He spoke of 'matters of social policy', 'the determination of general policy', 'the weighing of policy factors', and decisions about the 'allocation of finite resources between different calls made upon them or... the balance between pursuing desirable social aims against the risk to the public inherent in so doing'[41] as being non-justiciable. From this it would seem that the term 'non-justiciable' bears a different meaning in this context from that given to it in the *GCHQ* case.[42] In the *GCHQ* sense, a non-justiciable decision is one that cannot be challenged in a court either by way of judicial review or by way of an action for damages. By contrast, in Lord Browne-Wilkinson's sense, a non-justiciable decision is one which is not actionable in tort or, at least, in negligence. This difference of meaning is important because a decision which is not actionable in negligence by reason of being non-justiciable may, nevertheless, be challengeable by way of a claim for judicial review. For example, 'decisions about the allocation of finite resources' are not, as such, immune from judicial review.[43] The judicial review cases indicate that whether a decision about how to use finite resources may be illegal depends on the substance of the decision itself. For instance, a decision about whether a patient should be treated in a particular way or what resources the police should commit to a particular operation is very unlikely to be held illegal; but a decision of a local authority not to provide basic care for a disabled person may be. The central issue is not the fact that the decision has resource implications, but whether the court should second-guess the original decision-maker in respect of the subject matter of the decision.

New Directions in European Public Law (Oxford: Hart Publishing, 1998), 83–9; but see J Allison, 'Transplantation and Cross-Fertilisation' in ibid, 176–82.

[41] [1995] 2 AC 633, 737, 748, 749, and 757 respectively.

[42] See 12.1.2.

[43] See 6.5.1.

It may be that such an approach is what Lord Browne-Wilkinson had in mind in *X v Bedfordshire CC*. If so, it is unclear what types of decision he would consider non-actionable in negligence on the ground that they raise non-justiciable issues about the allocation of scarce resources (for instance). However, there are certain types of decision which we can confidently assert would be 'non-justiciable in negligence', namely decisions about national economic and defence policy. This is because it has been held that such decisions are not illegal merely by reason of being *Wednesbury* unreasonable.[44] *A fortiori*, such a decision would be non-justiciable in tort.

8.3 BREACH OF STATUTORY DUTY

Although the *Bedfordshire* case was concerned primarily with the tort of negligence, the principles it establishes could apply to any tort. For instance, a tort claim for damages (or an injunction) for breach of statutory duty[45] will lie only if the statute can be interpreted as giving individual rights of action to people in the claimant's position and in respect of the sort of injury or damage suffered by the claimant.[46] This requirement is indistinguishable from the principle of compatibility. Indeed, in *X v Bedfordshire CC* the reasons that led the court to conclude that a duty of care would not be compatible with the relevant statutes were very similar to the reasons why it also held that no action would lie for breach of the defendants' duties under those statutes. If failure by an administrator to perform a statutory duty to do (or to refrain from doing) X would not be actionable in tort, it is highly unlikely that the agency would have a common law duty to take care to do (or not to do) X unless, for instance, the agency had undertaken to do (or not to do) X or the duty related to the provision of professional services.[47]

[44] See 7.3.1 (n 25).

[45] As opposed to a negligence action for breach of a common law duty of care arising out of breach of a statutory duty.

[46] eg *Wentworth v Wiltshire CC* [1993] QB 654; *O'Rourke v Camden* LBC [1998] AC 188 (criticized by R Carnwath, 'The *Thornton* Heresy Exposed: Financial Remedies for Breach of Public Duties' [1998] *PL* 407); *Kirvek Management and Consulting Services Ltd v Attorney-General of Trinidad and Tobago* [2002] 1 WLR 2792. A tort action for breach of statutory duty will lie only where the claimant has suffered some pecuniary or non-pecuniary harm. Breach of statutory duty is not actionable *per se*: *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763.

[47] *Gorringe v Calderdale MBC* [2004] 1 WLR 1057, esp [20]–[40] (Lord Hoffmann); D Nolan, 'Liability of Public Authorities for Failing to Confer Benefits' (2011) 127 *LQR* 260.

The principle that an exercise of discretion will only be actionable if it was *Wednesbury* unreasonable can also apply to a claim for breach of statutory duty. For example, in *Meade v Haringey LBC*[48] the question was whether the council had breached its statutory duty to provide sufficient schools by closing schools in its area during a cleaners' strike. This duty is open-textured and leaves considerable discretion to local authorities.[49] The court held, in effect, that it was up to the council to decide how to handle strikes provided only that any action it took was not illegal. In other words, the decision how to handle a strike could be challenged in a tort action for breach of statutory duty only if it was illegal.

8.4 NUISANCE

Private nuisance is an unreasonable interference with a person's use and enjoyment of their land. One defence to an action for nuisance is that the nuisance was authorized by statute. If a statute authorizes (or requires) the doing of a specific act, and the doing of that act necessarily or inevitably creates a nuisance no matter how carefully it is done, then the nuisance is authorized and cannot form the subject of a successful tort action. But if the nuisance is the result of negligence in doing the authorized act, an action in nuisance may lie because the nuisance will not be inevitable. If (as will usually be the case) a statute authorizes a class of acts and leaves it up to the authority to decide which of those acts it will perform (in other words, if the statute gives the authority a choice), and if the choice could have been exercised in such a way as not to create a nuisance, an action for damages (or an injunction) may lie if a nuisance is created by the chosen course of action.[50] It is not clear what the phrase 'could have been exercised in such a way as not to create a nuisance' means. It has the effect, at least, that if the nuisance is the result of negligent exercise of a statutory power a plea of statutory authorization will fail.

There is no reason why the *Bedfordshire* principles should not apply here: where a defendant pleads statutory authorization, if the nuisance-creating action was at the operational level the defendant would have to prove that it acted without negligence. If the action was at the policy

[48] [1979] 1 WLR 624.
[49] See 3.2.
[50] *Managers of Metropolitan Asylum District v Hill* (1881) 6 App Cas 193; *Allen v Gulf Oil Ltd* [1981] AC 1001.

level, then provided it was not *Wednesbury*-unreasonable, the defence would succeed. If it was *Wednesbury* unreasonable the defence would fail because a *Wednesbury* unreasonable action would, *ex hypothesi*, also be unreasonable in the private-law sense.

Even if a defence of statutory authorization is not available, a common law action for nuisance resulting from the performance of statutory functions will lie only if such an action would be compatible with the statutory scheme. In *Marcic v Thames Water Utilities Ltd*[51] it was held that an action for nuisance would not lie in respect of repeated flooding caused by overloading of a sewerage system because the statute created a regulatory mechanism more suitable than litigation for dealing with the complex issues of public interest involved in deciding how best to solve the problem.

8.5 TRESPASS

In the old case *of Cooper v Wandsworth Board of Works*[52] the claimant successfully sued the defendant in tort for trespass to land when it demolished part of a house in pursuance of an invalid demolition order. If the order had been lawful the action would not have succeeded; but since the defendant had failed to comply with the rules of procedural fairness in making the order the defendant had no legal authority for the demolition of the house. This case illustrates the role of illegality in tort actions in respect of the exercise of policy-based discretions.[53] It is possible to conceive of cases of 'operational trespass' in which the ordinary principles of trespass law would apply regardless of whether or not the impugned action was illegal: for example, if peripatetic workers employed by a public authority mistakenly and without authority or permission set up camp on private land rather than on land owned by the authority.

The tort of trespass to the person (assault, wrongful detention, and wrongful imprisonment), which protects fundamental common law rights to liberty, freedom of movement, and personal security, plays a very important role in regulating the activities of police and other law-enforcement agencies. In *Ashley v Chief Constable of Sussex Police*[54] it

[51] [2004] 2 AC 42.
[52] (1863) 14 CBNS 180.
[53] However, doubt may be cast on the result in *Cooper* by Lord Browne-Wilkinson's statement in *X v Bedfordshire* that breach of procedural fairness 'ha[s] no relevance to the question of negligence': [1995] 2 AC 633, 736.
[54] [2008] 1 AC 62.

was held (although only by a bare majority) that a citizen is entitled to bring a tort claim for assault and battery in order to vindicate rights even if the citizen has been fully compensated for all harm caused by the trespass. In *Holgate-Mohammed v Duke*[55] the House of Lords held that the police will be liable for false imprisonment for arresting a person suspected of having committed an arrestable offence only if they exercised their powers unlawfully in the public-law sense. Once again, however, it is easy to imagine cases of assault and battery by public officials (in prisons, for instance) in which no issue of public-law illegality would arise. (See Addendum 1, p. vi.)

8.6 CRITICISMS OF THE POLICY–OPERATIONAL DISTINCTION

The use of the distinction between policy and operational (or discretionary and non-discretionary) functions and decisions as a basis for limiting the tort liability of public authorities has been criticized on three main grounds. In the first place it is said that there is no non-circular way of classifying decisions as policy or operational: a policy decision is simply one which can lead to liability in negligence only if it is also *Wednesbury* unreasonable, whereas an operational decision is one to which this condition does not apply, and it is ultimately up to the court, according to its own willingness to award a tort remedy, to decide into which category to place any particular decision.[56]

At first sight, this criticism might seem exaggerated. In some cases the policy–operational distinction seems intuitively attractive and relatively easy to apply. For example, in the *Dorset Yacht Co* case[57] a distinction could be drawn between, on the one hand, a decision to have a system of low-security penal institutions for young offenders which raised important issues of policy; and, on the other, an

[55] [1984] AC 437.

[56] Note that the distinction between policy and operational decisions is not a distinction between the making of decisions and the execution of decisions. For example, a decision to establish a system of low-security prisons for the sake of rehabilitation might be held to be a policy decision. If a prisoner escaped as a result of the execution of that decision (by setting up a low-security prison), an allegation that the execution of the decision was an unreasonable course of action would raise exactly the same policy issues as an allegation that the decision was unreasonable. Conversely, if executing a particular decision is an operational matter, so is the decision itself. The distinction between policy and operations turns on whether the claimant's allegations of tortious conduct raise issues that are inappropriate to be judged according to the ordinary private law of tort.

[57] [1970] AC 1004.

'operational' decision by guards to relax security procedures for their own convenience for which no policy justification could be found. Again, in a case like *Anns v Merton LBC*[58] a distinction could plausibly be drawn between, on the one hand, a (policy) decision on financial grounds only to inspect every third building site; and, on the other, an (operational) decision by an inspector to have only a cursory glance at a particular site because he or she trusted the builder. It is also easy to see a decision about how to handle a strike[59] as a policy decision; and the issuing of an inaccurate certificate by a land registry clerk,[60] or failure to provide a safe system of work for employees,[61] or failure by the police to protect a prisoner from suicide,[62] or nuisance consisting of failure to remove tree roots,[63] as operational lapses.

However, other cases are much more difficult. For example, in *Bird v Pearce*[64] road markings that indicated traffic priorities at an intersection were obliterated when the road was resurfaced. The markings were not repainted immediately and the council had decided 'as a matter of policy' not to erect temporary priority signs at intersections in such circumstances. The council was held liable on ordinary negligence principles for creating a danger of physical injury and damage and not taking reasonable steps to remove it. Similarly, in *Reffell v Surrey CC*[65] a child was injured when her hand went through a glass swing-door which she was trying to control. It was held that the school authority was in breach of its statutory duty to ensure that school premises are safe. This duty is rather open-textured and could be interpreted so as to leave to school authorities a considerable degree of discretion to decide how much to spend on safety and the level of safety to be aimed at. It was held, however, that the duty was 'absolute' in the sense that it was for the authority to secure the safety of pupils, and that the test of breach was objective in the sense that it was for the court, not the authority, to decide what 'reasonable safety' meant. There was no evidence in the case as to whether the council which, according to the judge, appreciated the risk presented by such doors (found in a number of older schools), had

[58] [1978] AC 728.
[59] As in *Meade v Haringey LBC* [1979] 1 WLR 624.
[60] As in *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223.
[61] eg *Walker v Northumberland CC* [1995] ICR 702; *Waters v Metropolitan Police Commissioner* [2000] 1 WLR 1607.
[62] eg *Orange v Chief Constable of West Yorkshire Police* [2002] QB 347.
[63] eg *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321.
[64] [1979] RTR 369.
[65] [1964] 1 WLR 358.

consciously decided for reasons of economy or otherwise not to replace such doors or modify them to render them safe. The judge surmised that the council simply waited for a major refurbishment of old schools or for a breakage before replacing such doors. Such an approach may have been illegal, but the clear implication of the judgment is that even if the council had genuinely decided not to replace all such doors immediately, an action for breach of statutory duty would still have lain because the authority's duty was to secure safety, not to make a valid decision whether or not to secure it.

These cases show that it is ultimately for the court to decide whether an impugned decision raises policy issues which it is prepared to leave to the defendant authority to decide subject only to the requirement that the decision not be illegal.[66]

The problematic nature of the policy–operational distinction is also illustrated by *Rigby v Chief Constable of Northamptonshire*[67] in which a decision not to acquire a particular type of CS-gas canister (the use of which did not create a fire risk) was held to be a policy decision, whereas a decision on a particular occasion to use a canister of a type which did create a fire risk, even though a fire-engine was not present, was an operational decision. It could be argued that decisions about how to deal with particular situations should be left to the police[68] to at least the same extent as a decision to purchase one type of canister rather than another.

It has been said[69] that decisions about the allocation of scarce resources (eg a decision on financial grounds to reduce policing levels at a protest site) or decisions deliberately to take risks (eg by establishing low-security penal institutions for the sake of rehabilitation) are policy decisions. However, the cases we have just considered suggest that there are certain interests (such as the safety of persons or property) which the courts may not allow governmental bodies to jeopardize for the sake of economy; and the *Rigby* case suggests that the law will not always allow public bodies to take risks that endanger persons or property. Whether financial stringency or the benefits of risk-taking will protect a defendant from tort liability depends on how much weight is given to the interests thereby put in jeopardy relative to the interests served by the

[66] See also *Vicar of Writtle v Essex CC* (1979) 77 LGR 656.

[67] [1985] 1 WLR 1242.

[68] See also *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63 (Lord Keith); *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418.

[69] eg by Lord Browne-Wilkinson in *X v Bedfordshire CC*.

decision being challenged. The more the weight given to the interests served by the decision the more likely it is to be classified as a policy decision.

The second ground on which the use of the policy–operational distinction has been criticized is that it is illogical. According to *Anns,* a policy decision could form the basis of a negligence action if it was illegal. The purpose of the illegality requirement was to ensure that courts would not interfere unduly with the discretion of public authorities by making judgments about the propriety, from a policy point of view, of their decisions. On the other hand, once the illegality condition was met, it appeared to be open to a court to decide that the decision was negligent or, in other words, that in making it the authority had not struck a reasonable balance between the interest of the claimant in being free from injury or damage and the public interest in what the authority had decided to do. But surely in doing this the court was doing exactly what the legislature had intended the authority to do, namely to balance the interests of private individuals against the public interest. The difficulty with the *Anns* formula was that it made illegality a precondition of liability but not the ground of liability. It may have been with this criticism in mind that Lord Browne-Wilkinson held in the *Bedfordshire* case that the exercise of a statutory discretion could be actionable in negligence only if it was *Wednesbury* unreasonable*:* the effect of this requirement is that *Wednesbury* unreasonableness is both a precondition of liability for negligence in the exercise of a statutory discretion and also the definition of negligence in the exercise of a statutory discretion. Once the court has decided that discretion was exercised unreasonably in the *Wednesbury* sense it has also decided that it was exercised negligently. Whether intentionally or not, Lord Browne-Wilkinson seems to have met this second criticism of the *Anns* scheme by imposing as a precondition of actionability in negligence a ground of public-law illegality that implies negligence.

The third criticism which has been directed at the *Anns* scheme is that the policy–operational distinction is unnecessary because it adds nothing to the basic concepts of the tort of negligence. The test for negligent conduct (that is, basically, unreasonableness) is, according to this view, flexible enough to overcome the difficulties with which the distinction was designed to deal: in deciding whether a public authority has acted reasonably the court can take account of its responsibilities to the public interest.[70] A good illustration of this point is provided by a nuisance

[70] SH Bowman and MJ Bailey, 'The Policy/Operational Dichotomy—A Cuckoo in the Nest' [1986] *CLJ* 430; 'Public Authority Negligence Revisited' [2000] *CLJ* 85.

case, *Page Motors Ltd v Epsom & Ewell BC.*[71] A group of gypsies had camped in a field owned by the council beside which ran a road that gave access to the claimant's automotive garage. The claimant's business suffered because the behaviour of the gypsies discouraged customers from using the access road. The council obtained an eviction order against the gypsies, but delayed for five years in enforcing it because of political pressure from the county council and from Westminster to await a wider-ranging solution to the gyspy 'problem'. It was apparently argued on behalf of the council, in effect, that its decision not to enforce the eviction order was a policy decision which should only be actionable if it was illegal. The Court of Appeal rejected this argument and held that the liability of the council as occupier had to be judged according to the ordinary principles of the tort of nuisance: had its actions interfered unreasonably with the use and enjoyment of the claimant's land? However, the court then proceeded to hold that because the council was a public body, it was reasonable for it to go through the 'democratic process of consultation' before deciding when and how to abate the nuisance; and so the council was justified in delaying longer before acting than a private landowner would have been (although not five years). Another relevant way in which the concept of unreasonable conduct in the tort of negligence is helpfully flexible is that it is sometimes (notably in actions against doctors) given a meaning very similar to *Wednesbury* unreasonableness. So it is not necessary to introduce the policy–operational distinction in order to import the idea of *Wednesbury* unreasonableness into the tort of negligence.

The thrust of this third criticism is not that the law of tort should apply to public bodies in exactly the same way as it applies to private individuals. It allows that there might be some policy decisions of public bodies for which there ought not to be liability in tort. Rather it argues that the policy–operational distinction is an unnecessarily inflexible way of providing the desirable level of non-liability

There seems little doubt that understood as a sharp dichotomy, or as a basis for creating areas of complete immunity from tort liability, the policy–operational distinction is open to serious objection. On the other hand, the basic idea that the distinction captures is of continuing normative attraction. This is the judgment that in certain areas courts should exercise restraint in holding public functionaries liable to pay tort damages. Attempts (most notably in *X v Bedfordshire CC*) to lay

[71] (1982) 80 LGR 337.

down abstract principles to give effect to this judgment have been largely unsuccessful. Under the influence of the ECtHR, the House of Lords has adopted a more fact-sensitive approach which perhaps meets the major criticisms of the policy–operational distinction (see 8.8.1). The result may be that in order to understand the tort liability of public functionaries we need to focus on the way the law of tort applies to particular functions rather than on general principles of tort liability. This may be an area in which the 'general-principles' approach to administrative law (see 1.5) has little to teach us.

8.7 MISFEASANCE IN A PUBLIC OFFICE

All the torts we have considered so far have their origin in and derive their basic characteristics from private law. There is one tort that can be called a public-law tort because it applies only to performance of public functions. This tort is called 'misfeasance in a public office'. There has been considerable academic discussion of its origins and status and of technical matters such as the meaning of the term 'public office'.[72] Only two points need to be made here. The first is that the tort is only committed if either (1) a public power is exercised with the intention of injuring the claimant; or (2) the official knew that the conduct complained of was illegal and would probably injure the claimant[73] or, at least, cause an injury of the type the claimant suffered.[74] As a result, the tort is of quite limited value and importance as a means of controlling the ordinary run of inadvertent governmental illegality. Secondly, the tort is committed only if the misfeasance causes the claimant 'material damage'.[75] It does not provide a remedy for interference with rights as such. Material damage includes loss of liberty.[76]

In *R v Secretary of State for Transport, ex p Factortame Ltd (No 4)*[77] the ECJ decided that the government could be held liable to pay damages to individuals for loss suffered as a result of serious breaches of EC law. The court also held that any requirement of fault (such as that

[72] For recent judicial discussion of this concept see *Stockwell v Society of Lloyd's* [2008] 1 WLR 2255.

[73] *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1.

[74] *Akenzua v Secretary of State for the Home Department* [2003] 1 WLR 741.

[75] *Watkins v Home Office* [2006] 2 AC 395.

[76] *Karagozlu v Commissioner of Police of the Metropolis* [2007] 1 WLR 1881.

[77] [1996] QB 404. Breach of EU law that gives rise to a right to claim damages against the government is treated as breach of statutory duty and as a cause of action in tort: *Phonographic Performance Ltd v Department of Trade and Industry* [2004] 1 WLR 2893, [12]–[13].

for misfeasance in a public office) over and above the requirement of a serious breach of EC law was inconsistent with EC law. It remains to be seen whether this decision will have any impact on the rules of governmental damages liability in purely domestic cases. Past experience suggests that pressure will sooner or later build up to bring domestic law into line with EC law.

It should also be noted in this context that one of the few situations in which exemplary damages may be awarded in a tort action is where a body or official has been guilty of 'oppressive, arbitrary or unconstitutional action'[78] in exercise of a governmental (or 'public') function.[79] For example, exemplary damages are sometimes awarded against the police in actions for false imprisonment or malicious prosecution; and they can be awarded in a suitable case of misfeasance in a public office.[80]

8.8 TORT LAW AND THE ECHR

The HRA and the ECHR have affected English tort law in various different ways, several of which will be discussed in this section.

8.8.1 DUTY AND BREACH IN THE TORT OF NEGLIGENCE

The conceptual scheme set up by Lord Browne-Wilkinson in *X v Bedfordshire CC* to limit the negligence liability of public administrators focused on the duty-of-care element of the tort of negligence: it involved immunizing public functionaries from negligence liability by providing that a duty of care would not arise unless certain conditions, additional to those applicable to ordinary private-law tort claims, were satisfied. In *Osman v UK*[81] the ECtHR held that this approach was incompatible with the right to a fair hearing under Art 6 of the ECHR. The basic idea underlying the *Osman* decision was that the duty-of-care technique did not allow litigants to address the facts of individual cases in the way that consideration of the issues of breach and causation inevitably would if a duty of care were held to arise. The decision in *Osman* apparently influenced the outcome of *Barrett v Enfield LBC*,[82] in which the House

[78] *Rookes v Barnard* [1964] AC 1129.
[79] *Bradford City MC v Arora* [1991] 2 QB 507.
[80] *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122.
[81] (2000) 29 EHRR 245.
[82] [2001] 2 AC 550.

of Lords refused to accept a local authority's argument that it owed no duty of care in respect of the way it looked after children in its care.[83]

The main impact of the *Barrett* approach appears to be that the issues of compatibility, unreasonableness, and justiciability are (in some cases, at least) to be decided in the context of considering whether the defendant has breached the duty of care rather than in the context of deciding whether a duty of care was owed.[84] *Barrett* does not mean that these issues are no longer relevant to the negligence liability of public administrators but only that they may, and in some cases should, be considered in the context of the detailed facts of individual cases, and not at the more abstract level and in the less fact-specific way suggested by the approach in *X v Bedfordshire*. If the court thinks that negligence liability would be incompatible with the relevant statutory scheme, or that the defendant should not be held liable because it did not act unreasonably in the strong, *Wednesbury* sense, or that the claim raises non-justiciable issues, the claim will fail. The way this result is rationalized—ie whether in terms of duty of care, breach of duty,[85] or causation—is of secondary importance.[86]

No sooner had the House of Lords modified its approach to the negligence liability of public administrators to accommodate the reasoning in *Osman*, than the ECtHR changed its mind about the incompatibility of the duty-of-care technique with Art 6.[87] This is not to say, however, that the shift of approach was unnecessary because the ECtHR also held that although the duty-of-care technique is not incompatible with Art 6, it is incompatible with Art 13 of the ECHR, which requires an 'effective remedy before a national authority' for

[83] In *X v Bedfordshire* it had been held that no duty of care was owed in respect of decisions whether or not to take children into care. Instead of overruling that decision, the House in *Barrett* drew a distinction between deciding whether or not to take a child into care (in relation to which no duty of care was owed) and decisions about the welfare of a child already in care (in respect of which a duty could be owed). In *JD v East Berks Community Health NHS Trust* [2004] QB 558 the Court of Appeal rejected this unattractive distinction (obiter) and held that in dealing with child-abuse allegations and deciding whether to institute care proceedings, local authorities owe a duty of care to the child but not to the parents. The decision was affirmed by the House of Lords ([2005] 2 AC 373) but the court did not advert to the distinction.

[84] *W v Essex CC* [2002] 2 AC 592.

[85] Concerning the relevance of resources to the standard of care in medical negligence cases against the NHS see C Witting, 'National Health Service Rationing: Implications for the Standard of Care in Negligence' (2001) 21 *OJLS* 443.

[86] This is also true of the foreseeability and proximity elements of the *Caparo* test (n 11 above).

[87] *TP and KM v UK* (2002) 34 EHRR 42; *Z v UK* (2002) 34 EHRR 97; *DP and JC v UK* (2003) 36 EHRR 183.

breaches of the Convention.[88] Where a claimant makes an 'arguable' case of infringement of a right protected by the ECHR, other than that protected by Art 13, the right to an effective remedy requires that the claimant's allegations be properly investigated. To the extent that such an investigation is precluded by a holding that no duty of care was owed to the claimant, it is incompatible with Art 13, and the claimant is entitled to an award of just satisfaction[89] on account of the infringement of Art 13. It seems likely that the modified, fact-sensitive approach in *Barrett* satisfies the requirements of Art 13.

8.8.2 TORTS AND BREACHES OF THE ECHR

There are many types of conduct that may infringe Convention rights but which could not be tortious. On the other hand, various types of conduct that could, in principle, be tortious might also infringe a Convention right. For instance, failure to care for a sick prisoner could infringe the right not to be subjected to inhuman or degrading treatment (Art 3);[90] detention or imprisonment could infringe the right to liberty (Art 5);[91] searching property[92] and polluting the environment[93] could infringe the right to respect for the home (Art 8); failure by the police to protect citizens from fatal violence could infringe the right to life (Art 2);[94] as could failure by gaolers or hospitals to protect inmates or patients from self-inflicted harm;[95] and so on. But suppose that in a particular case, conduct that infringes a Convention right and could in principle be tortious does not, in the particular circumstances, constitute a tort. Because s 8 of the HRA provides remedies for infringement of Convention rights, the fact that English tort law provides no remedy would not constitute a breach of Art 13 of the ECHR. However, because (as we will see in 8.8.3) the HRA rules about remedies differ in various ways from tort rules, there may be pressure for English courts to develop tort law to bring it into line with the ECHR in areas where they overlap.

[88] Art 13 is not given effect by the HRA partly because it is drafted from a supra-national point of view.

[89] In accordance with Art 41.

[90] *McGlinchey v UK* (2003) 37 EHRR 41.

[91] *Austin v Metropolitan Police Commissioner* [2009] 1 AC 564.

[92] *Funke v France* (1993) 16 EHRR 297.

[93] *Dobson v Thames Water Utilities Ltd* [2009] 3 All ER 319.

[94] *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225. See also *Mitchell v Glasgow City Council* [2009] 1 AC 874.

[95] *Savage v South Essex Partnership NHS Foundation* [2009] AC 681.

Judicial views vary about whether English tort law should be developed to reduce or eliminate differences between it and human rights law,[96] and there may be no single answer applicable to all torts or all situations. In general, however, the clear trend is in favour of treating tort law and human rights law as parallel rather than converging streams. For instance, it has been said that negligence law and human rights law rest on quite different conceptual foundations. The former imposes obligations to take care, breach of which must be established by the injured person; the latter confers rights, interference with which must be justified by the State.[97]

8.8.3 MONETARY REMEDIES

The typical remedy for a tort is damages, although an injunction may be available in suitable cases. Article 41 of the ECHR provides that if the internal law of a state which is a party to the Convention 'allows only partial reparation' for a violation of the Convention, the ECtHR 'shall, if necessary, afford just satisfaction to the injured party'. Under s 8 of the HRA, damages may be awarded for breaches of s 6 of the HRA (ie conduct by a public authority unlawful by reason of incompatibility with a Convention right); but no award of damages is to be made unless 'the court is satisfied that the award is necessary to afford just satisfaction'. In deciding whether to award damages, and the amount of any such award, the court must take into account principles applied by the ECtHR under Art 41. The concept of just satisfaction is significantly different from the English concept of damages. For instance, a finding that a Convention right has been infringed may itself constitute just satisfaction; and the power to award just satisfaction is discretionary. In English law, by contrast, a claimant who has suffered legally recognized harm as the result of a tort is automatically entitled to compensation. The requirement that account be taken of ECtHR Art 41 case law could be interpreted to allow damages under s 8 to be calculated according to rules of English tort law to the extent that these are at least as generous as the principles of just satisfaction.[98] However, the House of Lords has held

[96] See eg *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225, [58] (Lord Bingham of Cornhill); [81]–[82] (Lord Hope of Craighead); [136]–[139] (Lord Brown of Eaton-under-Heywood) and *Watkins v Home Office* [2006] 2 AC 395, [26] (Lord Bingham); [32] (Lord Hope); [64] (Lord Rodger of Earlsferry); [73(4)] (Lord Walker of Gestingthorpe). See also *Trent Strategic Health Authority v Jain* [2009] 2 WLR 248.

[97] *Lawrence v Pembrokeshire County Council* [2007] 1 WLR 2991.

[98] As they may be: eg *Marcic v Thames Water Utilities Ltd* [2002] QB 929 (reversed by HL on other grounds: [2004] 2 AC 42); *Dobson v Thames Water Utilities Ltd* [2009] 3 All ER 319.

that principles of tort law should not be used in assessing damages under s 8.[99] This approach, coupled with that noted in the previous subsection, establishes a clear demarcation line between tort law and human rights law.

The basic rule of English law is that damages may not be awarded for harms caused by a breach of public law as such but only if the breach also constitutes a private-law wrong such as a tort or breach of contract (see 13.4.1). The possibility of obtaining monetary just satisfaction for infringements of Convention rights provides a way around this rule. For instance, damages under s 8 of the HRA may be available for infringement of the right to a fair trial under Art 6 of the ECHR; or for 'maladministration' in failing to provide welfare benefits.[100]

8.9 CONCLUSION

Because of the basic rule of English law that public-law illegality as such is not a ground for awarding monetary remedies, the private law of tort is a vital component of the legal framework of public administration and the legal accountability of bureaucrats. To the extent that monetary remedies are available for infringements of Convention rights, these may be viewed as a species of tort. As we will see in 13.4.4, breaches of EU law by organs of the State may also attract monetary remedies. The prime focus of monetary remedies is on the past—on correcting wrongs, compensating for and repairing harm. By contrast, public-law remedies (as we will see) are more future-looking, more concerned with making sure that administrators get things right. Prevention is better than cure, of course; but cleaning up messes after things go wrong is also important; and this is why tort law and other principles that provide a basis for the award of monetary remedies play a central role in regulating public administration.

[99] *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673. See also *Anufrijeva v Southwark LBC* [2004] QB 1124. For criticism see J Varuhas, 'A Tort-Based Approach to Damages under the Human Rights Act 1998' (2009) 72 *MLR* 750. It has been argued that certain aspects of the approach of English courts to s 8 may be incompatible with Art 13 of the ECHR: R Clayton, 'Damage Limitation: the Courts and Human Rights Act Damages' [2005] *PL* 429, 436.

[100] *Anufrijeva v Southwark LBC* [2004] QB 1124.

9

Contract

In order to understand the role of the legal concept of contract and the law of contract in the legal framework of public administration, it is helpful to distinguish between contract as a medium of exchange and contract as a technique of governance or regulation. We have already discussed the impact of contractual techniques of governance and regulation on the institutional structure of public administration (2.1.4) and later we will examine the implications for accountability of contracting-out of provision of public services (19.3). In this chapter we will focus on contract as a medium of exchange. The main topics to be discussed are the acquisition of goods and services by government (called 'public procurement') and the rules governing the liability of public agencies for breach of contract.

The basic principle discussed in Chapter 8—that the private law of tort regulates the conduct of public officials and agencies as well as that of private citizens—has its counterpart here. Unlike French law, for instance, English law recognizes no category of 'public contracts' subject to a regime of public law and distinct from contracts between private individuals and corporations. The starting point of English law is that the 'ordinary' law of contract regulates public contracting (ie contracting between public agencies and between public agencies and citizens) and private contracting alike.

9.1 PROCUREMENT

'Procurement' refers to the acquisition of goods and services[1] by government for its own consumption. It can be distinguished from acquisition by government of services for provision to citizens, commonly called contracting-out. Public procurement is big business. The UK public sector spends more than £150 billion a year on acquiring goods

[1] Other than the services of its own employees, as to which see 9.2.

and services. The main objectives of public procurement policy are efficiency and value-for-money through competition. Because contract is the legal form of procurement activity, these goals have to be pursued within the framework of contract law, as well as EU public procurement law. This section is concerned with that framework.

9.1.1 PRE-CONTRACTUAL NEGOTIATIONS AND THE MAKING OF CONTRACTS

As already noted, the equality principle that government is subject to the ordinary law of the land lies at the heart of the way the law regulates contracting by public agencies generally and central government (the Crown) in particular. The traditional attitude of the English common law to the making of contracts is embodied in the phrase 'freedom of contract': parties are entitled, subject to any relevant legal limitations, to make what contracts they like with whomever they choose, or not to contract at all. This principle applies to public agencies as well as to private citizens; and it applies to the statutory contracting powers of public agencies as well as to the common law contracting power of central government, which it has by virtue of being treated as a person or corporation (3.2).

This permissive approach of the common law has had some very important consequences. The first is that in general, the common law contracting power of the Crown has not been subject to judicial review. This traditional lack of judicial control over central government contracting is matched by a lack of Parliamentary control. Government contracting is also beyond the jurisdiction of the central government ombudsman although, with certain exceptions, it falls within the remit of the local government ombudsman. However, we will see that the government's common law 'prerogative' powers are now subject to judicial review (12.1.3), and this raises the question of the effect this will have on the reviewability of the common law contracting power of central government.[2] The underlying issue concerns whether, and the extent to which, government contracting should be regulated by administrative law norms enforced through judicial review in addition to the norms of private contract law, which are informed by the ideology of the free market.[3] The answer will probably depend on issues such as the

[2] S Arrowsmith, 'Judicial Review and the Contractual Powers of Public Authorities' (1990) 106 *LQR* 275; D Oliver, 'Judicial Review and the Shorthand Writers' [1993] *PL* 214.

[3] For judicial reflection on this issue see *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776.

subject matter of the contract, the identity of the other contracting party, and the administrative context in which the power is being exercised. It is clear, for instance, that central government procurement processes can be judicially reviewed for compliance with EU procurement rules;[4] but not all procurement is subject to these rules.

A second important consequence of the freedom-of-contract approach is that the contracting powers of public agencies may be used for any purpose not prohibited by law (including the rule that discretionary powers must not be fettered, which was discussed earlier (see 6.3.3) and is discussed further later in this chapter). Indeed, it has been said that 'whatever the Crown may lawfully do it may do by means of contract'.[5] Particularly in the case of central government, the constitutional implications of freedom of contract are considerable. Contracting may provide a viable alternative to legislation in various situations as a means of achieving government policy objectives; indeed, this possibility underpins the use of contract as a technique of governance. In the extreme case, the use of contractual rather than legislative techniques may enable the government (for a time at least) to evade the effects of the rule that Parliament cannot bind its successors.[6]

One aspect of this freedom to use contracts to achieve any lawful purpose is the possibility of pursuing ('collateral' or 'secondary') goals other than procuring required goods or services of a particular quality at the best possible price through what are called 'procurement linkages'.[7] This may be done by means of express contractual terms; for example, from 1891 until 1983 resolutions of the House of Commons (the so-called 'Fair Wages Resolutions') required the insertion into government contracts of terms requiring the payment of minimum wages; and current policy requires all government contracts to contain a 'prompt payment clause' requiring contractors to pay sub-contractors within thirty days of invoice. It may be done in other ways, too. For instance, governments may wish to award contracts with a view to easing unemployment in selected areas, or to favour British manufacturers over

[4] eg *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] 1 CMLR 19.

[5] C Turpin, *Government Procurement and Contracts* (London: Longman, 1989), 84.

[6] See 6.3.3.

[7] ACL Davies, *The Public Law of Government Contracts* (Oxford: Oxford University Press, 2008), ch 9; C McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford: Oxford University Press, 2007).

foreign, or small firms over large.[8] Another technique is to 'blacklist' potential contractors who do not, for example, employ a certain proportion of handicapped people or people from ethnic minorities. A much-publicized example of blacklisting occurred in 1978 when the Labour government sought by this means to enforce its policy of limiting maximum pay increases.[9] The use of contracting powers in this way is commonly considered objectionable when it is done (as it can be) without legislative support or even without Parliamentary approval, especially if the policy being pursued is controversial.[10]

In the 1980s and 1990s, increased emphasis was put on efficiency and value-for-money in public procurement at the expense of the pursuit of collateral goals. This development was given legal force by EU Directives that require public contracts[11] of a certain value to be awarded on narrow financial criteria—lowest price or most economically advantageous tender.[12] The main aims of these Directives are to prevent discrimination in the award of public contracts by contracting entities in one Member State against nationals of other Member States, and to ensure publicity, transparency, and the application of objective criteria in the process of inviting tenders and awarding contracts. The Directives significantly limit the potential of procurement as a means of promoting collateral social purposes.[13]

The contracting powers of government agencies other than the Crown (notably, local authorities) are statutory, and although such powers are often drafted in extremely wide terms, thus preserving a great deal of freedom of action, contracts that do not fall within the limits of those powers will be illegal and unenforceable.[14] Moreover, the

[8] Such policies may have anti-competitive effects: T Sharpe, 'Unfair Competition by Public Support of Private Enterprises' (1979) 95 *LQR* 205.

[9] G Ganz, 'Comment' [1978] *PL* 333.

[10] T Daintith, 'Regulation by Contract: The New Prerogative' [1979] *CLP* 41. For some interesting (and relatively uncontroversial) uses of contractual techniques *in lieu* of law reform see R Lewis, 'Insurer's Agreements not to Enforce Strict Legal Rights: Bargaining with Government and in the Shadow of the Law' (1985) 48 *MLR* 275.

[11] The scope of the directives is defined institutionally. Concerning the impact of privatization see ER Manunza, 'Privatised Services and the Concept of "Bodies Governed by Public Law" in EC Directives on Public Procurement' (2003) 28 *European LR* 273.

[12] The current Directives are implemented by the Public Contracts Regulations 2006 (SI 2006/5), and the Utilities Contracts Regulations 2006 (SI 2006/6).

[13] Davies, *The Public Law of Government Contracts* (n 7 above), 275–83.

[14] eg *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1; *Credit Suisse v Allerdale BC* [1997] QB 306. But see the Local Government (Contracts) Act 1997, which selectively modifies this rule. For more detailed discussion see I Leigh, *Law, Politics and Local Democracy* (Oxford: Oxford University Press, 2000), 38–62, 283–4, 298–9.

exercise of statutory contracting powers may be illegal in cases where the power is exceeded or abused, or where a contract is made for purposes other than those envisaged by the empowering statute.[15] The awarding of contracts may also be attacked on the basis that the tendering process was 'unfair' or 'arbitrary' or 'discriminatory'.[16] Another way of making these points it to say that contracting is not, as such, a function of local authorities and other government agencies, but rather a technique for performing statutory functions. The contracting power must be exercised consistently with, and so as to promote the performance of, those functions.

The freedom of local authorities to pursue collateral policy objectives through contracting has been greatly curtailed by statute. Part II of the Local Government Act 1986[17] prohibits the publication by local authorities of material that appears to be designed to affect public support for a political party.[18] More directly, s 17 of the Local Government Act 1988 prohibits local authorities (and various other bodies) from exercising contracting powers (such as inviting tenders, awarding contracts, approving sub-contractors, and terminating contracts) on 'non-commercial' grounds.[19] However, express provision is made in s 18 to enable local authorities to comply with their statutory obligation to promote good race relations. Section 20 imposes on authorities a duty, if asked, to give reasons for decisions made in exercise of contracting powers, and it makes provision for remedies. The EU Directives mentioned above also apply to local authorities.

[15] *R v Lewisham LBC, ex p Shell UK Ltd* [1988] 1 All ER 938. In practice, one of the most important contexts in which this issue arises is land-use planning. Planning authorities have power to make contracts with developers, and such contracts are often used to obtain public amenities, such as parks, child-care facilities, and road works, at the developer's expense. The power is very wide and creates the danger that planning authorities may engage in a form of extortion. It enables authorities to achieve outcomes that could not be secured by the imposition of conditions on the grant of planning permission. Even so, such contracts must bear some relationship to planning objectives and it may be possible to challenge particular contract terms or the exercise of powers under existing contracts on the ground of illegality. See further T Cornford, 'Planning Gains and the Government's New Proposals on Planning Obligations' [2002] *JPL* 796; Turpin, *Government Procurement and Contracts* (n 5 above), 290–2.

[16] eg *Law Society of England and Wales v Legal Services Commission* [2010] EWHC 2550 (Admin).

[17] As amended by s 27 of the Local Government Act 1988.

[18] HF Rawlings and CJC Willmore, 'The Local Government Act 1986' (1987) 50 *MLR* 52; Leigh, *Law, Politics and Local Democracy* (n 14 above), 74–8.

[19] M Radford, 'Competition Rules: The Local Government Act 1988' (1988) 51 *MLR* 747. See also Local Government Act 1999, s 19.

A third important consequence of freedom of contract is that the common law has never developed any general principle allowing parties to a contract to obtain relief from what may be seen as unfair consequences of inequality of bargaining power. Government has very considerable bargaining power both by reason of its constitutional and economic strength[20] and because government contracts are often valuable and long-term. This power may enable it to secure more favourable terms and conditions than any private contractor could obtain (although, of course, large private corporations can also wield great bargaining power).

In practice, most government contracts are made in standard form.[21] There are two main sets of standard contract terms, one for construction contracts and the other for supply contracts. Contracts of central government typically contain various special terms (which may be seen as being designed to protect the public interest): for example, terms giving the government more control over performance than is usual in contracts between private parties, and giving the government certain powers of unilateral variation and termination. There are some statutory provisions that constrain government bodies in exercising their bargaining strength to the full. The provisions of the Unfair Contract Terms Act 1977 apply to public authorities (including central government) by virtue of the definition of 'business' in s 14.[22] The Act renders ineffective certain contractual terms which purport to exclude or restrict liability for negligence or breach of contract. Public authorities (including central government) are bound in their contracting activities[23] to comply with the provisions of legislation which prohibit discrimination on grounds of sex or race.

However, the balance of contracting power is not always in favour of the government. For instance, cost overruns are a significant problem in some contexts.[24] There are also mechanisms by which government seeks to recover what are called 'excess profits' made by a contractor.[25] This type of arrangement may be needed to protect the government in areas,

[20] For instance, the Ministry of Defence is the single largest customer of British industry: Turpin, *Government Procurement and Contracts* (n 5 above), 10.

[21] Turpin, *Government Procurement and Contracts* (n 5 above), 105–11.

[22] The government is also bound by the EC-derived Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159).

[23] But not in legislating (*R v Entry Clearance Officer, Bombay, ex p Amin* [1983] 2 AC 818) unless the legislation conflicts with EU law or is incompatible with a Convention right.

[24] Davies, *The Public Law of Government Contracts* (n 7 above), 198–204.

[25] Ibid, 204–8.

such as defence procurement, where there may be very little choice of contractor and where, because of the highly advanced and innovatory nature of the work being done, it may be difficult to assess tenders or monitor performance. In practice, mechanisms for preventing and detecting fraud and excess profits have often proved to be ineffectual. Skill on the part of purchasing officers and sound management within purchasing units is crucial for ensuring that public funds are adequately protected. Also important is the willingness of individuals (especially employees of contractors) to notify government of fraud, waste, and mismanagement on the part of contractors.[26]

Despite the basically permissive approach of the common law, administrative law imposes some constraints on the exercise of public contracting power. First, we will see that licensing activities of monopolistic private contractual bodies have been subjected to judicial review for the sake, for example, of enforcing compliance with the rules of procedural fairness.[27] Since the effect of granting a licence in such cases would be to create a contractual relationship between the body and the licensee, such judicial control places a constraint on pre-contractual activity.

Secondly, courts have taken some notice of the fact that the pre-contractual conduct of public agencies is extensively regulated by soft law.[28] In the case of central government, the Office of Government Commerce (within the Treasury) plays a key role in formulating soft law. Consultation with organizations representing contractors is common.[29] Most local authorities adopt uniform standing orders published by central government that contain provisions on tendering and contracting.[30] In addition, central government may issue circulars to local authorities recommending the adoption of particular contract terms. In *R v Hereford Corporation, ex p Harrower*[31] a local authority was ordered to comply with its own standing orders regulating the process by which tenders for contracts were to be invited. Failure to comply with a published tendering procedure may constitute a breach of contract;[32] and the Parliamentary Ombudsman may recommend that compensation be paid when a government body withdraws from contractual

[26] Legal protection for 'whistleblowers' is briefly discussed in 5.3.
[27] See 12.1.2.
[28] Davies, *The Public Law of Government Contracts* (n 7 above), 33–41.
[29] Turpin, *Government Procurement and Contracts* (n 5 above), 61–6.
[30] See Local Government Act 1972, s 135.
[31] [1970] 1 WLR 1424.
[32] *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 3 All ER 25.

negotiations.[33] More generally (as we have seen), various norms regulate the substance, application, and interpretation of soft law, and there is no apparent reason to think that such norms do not apply to soft law dealing with contracting by public agencies.

9.1.2 FUNDING OF CENTRAL GOVERNMENT CONTRACTS

In 1865 in *Churchward v R*,[34] it was held that unless, at the time a contract was made on behalf of the Crown, sufficient funds had been voted by Parliament to meet the government's obligations under the contract, no valid contract came into existence. In other words, the existence of a valid contract was contingent upon the availability of funds for its performance. It followed that if funds had not been allocated, the government could not be sued or held liable for breach of contract if it did not perform its contractual obligations. Although there is no modern English authority on the point, it seems likely that English courts would accept the theory laid down in an Australian case[35] that the availability of funds is relevant to the performance of the contract and to the enforcement of any judgment for damages for breach, but that lack of funds does not prevent a valid contract being made.[36]

9.1.3 THE LAW OF AGENCY

Contracts with public entities are often made by an officer or agent acting on behalf of the entity. Indeed, the Crown can only contract through some natural or legal person acting on its behalf: the term 'the Crown' refers collectively to the executive branch of central government. However, when a duly authorized officer or agent of the Crown makes a contract on behalf of the Crown, that contract is made with the Crown.[37] The importance of this is that the contract attracts the privileges and immunities of the Crown (see 15.4).

In the ordinary law of agency the principal is bound by a contract made by the agent provided the latter actually had authority to enter the contract ('actual authority') or if the principal 'held out' (that is, represented by words or conduct) that the agent had authority which he or

[33] P Brown, 'The Ombudsman: Remedies for Misinformation' in G Richardson and H Genn, *Administrative Law and Government Action* (Oxford: Clarendon Press, 1994), 325–6.
[34] (1865) LR 1 QB 173.
[35] *New South Wales v Bardolph* (1943) 52 CLR 455.
[36] See generally Turpin, *Government Procurement and Contracts* (n 5 above), 91–4.
[37] *Town Investments Ltd v Department of Environment* [1978] AC 359.

she did not actually have ('ostensible' or 'apparent' authority)[38] or, perhaps, if entering such a contract would usually be within the authority of someone in the agent's position ('usual' authority).[39] If the agent did not possess authority of any of these kinds, the principal is not bound but the agent can be sued for 'breach of (an implied) warranty of authority', that is, for holding out that he or she had authority. These rules apply to public entities with one exception, namely that a Crown agent cannot be sued for breach of (an implied) warranty of authority[40]

9.2 GOVERNMENT EMPLOYMENT

The relationship between many government agencies and their employees is an ordinary employment relationship. However, the position of Crown employees ('civil servants') is peculiar. It is not clear that the relationship between the Crown and its employees is contractual;[41] and the basic common law rule is that Crown employees can be dismissed at will,[42] although this rule has been considerably modified by statute.[43] As we will see (11.3.5), uncertainty about the status of civil servants has generated much litigation about the availability of judicial review. While the legal position of civil servants may, in some respects, be precarious, in practice government jobs are relatively secure; although the appointment of senior civil servants (such as chief executives of agencies) for fixed terms is now common.

Like private individuals and corporations, public agencies are free (subject to legal limitations such as those contained in sex and race discrimination legislation) to employ or to refuse to employ whom they will. An allegation sometimes made, especially about central government, is that although public employees who advise politicians are meant to be politically neutral and not to allow their own political views to colour the advice they give, the political views of applicants for

[38] The 'holding out' must be by the principal and not by the agent: *Attorney-General for Ceylon v Silva* [1953] AC 461.

[39] GH Treitel, 'Crown Proceedings: Some Recent Developments' [1957] *PL* 321, 336–7.

[40] *Dunn v Macdonald* [1897] 1 QB 401 and 555. Concerning the tort liability of an unauthorized agent see *Kavanagh v Continental Shelf Company (No 46) Ltd* [1993] 2 NZLR 648.

[41] For certain purposes it is deemed to be: Employment Act 1988, s 30(i)(a). See generally S Fredman and G Morris, 'Civil Servants: A Contract of Employment?' [1988] *PL* 58; 'Judicial Review and Civil Servants: Contracts of Employment Declared to Exist' [1991] *PL* 485.

[42] *Dunn v R* [1896] 1 QB 116; *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482.

[43] Employment Rights Act 1996, Part X and ss 191–3.

politically sensitive posts are taken into account in recruiting. The implication is that the government appoints people with views congenial to its own in the hope of receiving acceptable advice. In the very nature of the case, such allegations are almost impossible to substantiate; but it is, perhaps, worth noting that there are private vetting agencies that maintain lists of persons with certain political views which they make available to employers, and that the activities of such agencies have been investigated by the Employment Committee of the House of Commons.[44] Moreover, one of the major areas of investigation by the Nolan Committee on Standards in Public Life was appointment by the government to membership of executive non-departmental public bodies and NHS bodies. There was much concern about the criteria of appointment, and the Nolan Committee recommended that the overriding principle should be merit.[45] EU law prohibits discrimination against nationals of other Member States in recruitment to most civil service jobs.[46]

9.3 LIABILITY FOR BREACH OF CONTRACT

Prior to 1947 the *fiat* (or leave) of the Attorney-General had to be obtained by a citizen who wanted to sue the Crown for breach of contract; but this procedural protection was removed by s 1 of the Crown Proceedings Act 1947. Section 17 of the Act overcomes technical obstacles to suit that may arise if the department of central government the claimant wishes to sue is not strictly a legal person (ie if it is not incorporated). The 1947 Act has, therefore, removed procedural obstacles to suing central government for breach of contract.

9.3.1 THE BASIC POSITION

It is extremely rare for disputes arising out of the performance of government contracts to be the subject of litigation. Such disputes are usually resolved by informal negotiation between the government and the contractor or, if this does not succeed, by arbitration.[47] An important reason for this is that the relationship between government and its

[44] Second Report: Recruitment Practices (1990–1).

[45] Cm 2850–1 (1995). See also House of Commons Public Administration Select Committee, 'Government by Appointment: Opening Up the Patronage State', Fourth Report (HC 165, 2002/3).

[46] GS Morris, 'Employment in Public Services: The Case for Special Treatment' (2000) 20 *OJLS* 167, 176–7.

[47] Turpin, *Government Procurement and Contracts* (n 5 above), 221–6.

contractors is often more in the nature of a long-term cooperative venture for mutual advantage than a one-off commercial deal. Within such a relationship, recourse to courts to settle disagreements will often seem inappropriate and possibly counter-productive. On the other hand, when contractual disputes are settled without recourse to a third-party adjudicator, there is a danger that any inequalities of bargaining power between the parties may distort the outcome.[48]

In general, the law governing the liability of public functionaries for breach of contract is the same as that governing the liability of private individuals and corporations. But a qualification must be added to this general position which is easy to state but not so easy to apply. Because public agencies have to consider the wider public interest in fulfilling their obligations under contracts, there may be circumstances in which the demands of public policy provide good grounds for a public agency to refuse to perform its obligations to the other contracting party. In such cases the interests and rights of the individual contractor are subordinated to the demands of public policy. In other words, the law recognizes what might be called a public policy defence or immunity which public agencies can sometimes plead in actions against them for breach of contract. The difficulty is to define the scope of this defence or immunity.

The other side of the same coin (as we have seen: 6.3.3) is that it is illegal for a public functionary to fetter its statutory discretion by contract or undertaking. It is important to note that the principle against fettering refers to both contracts and (non-contractual) undertakings. Here we are concerned with contracts, but undertakings that are not contractually binding should not be ignored because failure to perform such undertakings can be illegal.

As we have already seen, application of the rule against fettering requires a value-judgment to be made about the relative claims of the individual contractor and the demands of public policy which the discretion is designed to serve, and in the light of this value-judgment a decision about whether the contract or undertaking is an illegal fetter on the proper exercise of the discretionary power. This issue is not essentially different from that presented by a plea of public policy made in defence to a claim of breach of contract. The only difference lies in the way the question is typically raised in practice. The fettering principle is usually relevant when a party seeks to force the public

[48] Ibid, 236–9.

agency to exercise its discretion, or seeks to challenge the exercise of a discretion that has been exercised in accordance with, or contrary to, the demands of a contract or undertaking. The issue of public policy typically arises in cases in which the contractor seeks to enforce the contract or to recover damages for breach of contract. It is important to note that the same basic issue ties the two areas together because this shows that any sharp division between the so-called public-law obligation not to fetter the exercise of discretion and the private-law contractual obligations of public bodies is unwarranted. The law of government contracts is basically an application of public-law principles to the ordinary law of contract leading to certain modifications of private-law principles in their application to public functions.

Most of the cases relevant to this topic have already been discussed (in 6.3.3). Brief mention need be made of only two cases. In *The Amphitrite*[49] the owners of a foreign ship unsuccessfully sued the government for failure to honour a promise to release the ship from British waters after it had discharged its cargo. The government pleaded that the exigencies of war justified its refusal to release the ship. The decision has always been the source of much difficulty. In the first place, Rowlatt J seems to have thought that the public policy defence only applied to 'non-commercial contracts'; but this limitation would make it irrelevant to most cases. Secondly, the decision might be taken to support the extreme proposition that a defence of public policy can be established merely on the public body's word that the demands of public policy justify non-performance of its undertakings. In some areas, such as the conduct of war, courts will no doubt exercise their power in a very restrained way and will usually accept official certificates as to the demands of public policy on the ground that the exercise of the power to wage war is unreviewable in the courts (this explains *The Amphitrite*). However, there is no general rule that pleas of public policy cannot be questioned and evaluated by a court. This emerges quite clearly from *Commissioners of Crown Lands v Page*[50] in which it was held that the requisitioning of premises in 1945 could not be held to be in breach of the implied covenant of quiet enjoyment in the lease. Devlin LJ was not prepared to allow decisions about the demands of the conduct of the war to become the subject of judicial inquiry, but denied that this created a general privilege to escape from any contract, which a public body happened to find disadvantageous, by pleading the public interest.

[49] [1921] 3 KB 500.
[50] [1960] 2 QB 274.

The court will scrutinize the plea and if it feels competent to do so, will judge its merits. In one sense there is always a legitimate public interest in public functionaries not being bound to disadvantageous contracts, but against that interest must be weighed the contractual rights of the contractor. A contract is a technique by which parties can restrict their freedom of action in the future, and a party to a contract cannot be free to ignore that restriction as it wishes. In this context, it should also be noted that the ability of local authorities to terminate contracts for 'non-commercial' reasons has been severely curtailed by statute.[51]

Whatever its importance in principle, the public policy defence will frequently be of little relevance in practice because of express provisions conferring on the government a right to withdraw from the contract that would entitle it to give effect to the legitimate demands of public policy.[52] In French law there are several doctrines dealing with the termination and variation of public contracts, and it is sometimes suggested that English law would do well to adopt something like them.[53]

9.3.2 ILLEGALITY AND BREACH OF CONTRACT

What is the relationship between public-law illegality and breach of contract? In answering this question it should first be noted that the rule that public administrators must not fetter the exercise of their discretionary powers by contract implies a legal limitation on the contracting powers of a public agency that does not attach to the contracting powers of private individuals or corporations. Secondly, it should be recalled that if the contracting powers of the agency in question derive from statute, the statute might impose limitations on those powers, and failure to observe those restrictions may mean that the body has exercised its contract-making power illegally. Illegal contractual provisions are, as a matter of contract law, void and unenforceable. However, the contract as a whole may not be void if it would, without the illegal provision(s), be one which a reasonable person would have entered into.[54] Moreover, money or property transferred under an illegal contract may be recoverable.[55]

[51] Local Government Act 1988, s 17(4)(c)(ii); see also s 19(7)(b).

[52] Turpin, *Government Procurement and Contracts* (n 5 above), 243–6.

[53] LN Brown and J Bell, *French Administrative Law*, 5th edn (Oxford: Clarendon Press, 1998), 206–10.

[54] *In re Staines Urban District Council's Agreement* [1969] 1 Ch 11.

[55] *Westdeutsche Landesbank Girozentral v Islington LBC* [1994] 1 WLR 938. See also *Westdeutcshe Landesbank Girozentral v Islington LBC* [1996] AC 669. Compensation may be

More difficult to disentangle is the relationship between illegality and a plea of public interest in answer to a claim of breach of contract. It might be thought that as a matter of general principle, a public agency could not be held liable in contract in respect of the exercise by it of its public powers unless that exercise of power was illegal. Clearly, if a breach of contract consists of the illegal exercise of a discretionary power, the public body would not be allowed to argue that its breach was justified by the public interest. But in many contract cases the exact problem is that there is a conflict between two valid exercises of different discretionary powers, namely the contract-making power and some other power. Only if the contract is declared to be a void (and thus illegal) fetter on the other discretionary power will the conflict be avoided. In such cases, it seems, the question to be asked in the face of a plea of public interest, is whether the public interest pleaded is of sufficient importance that it should be held to outweigh the interests of the private contractor. For example, in *The Amphitrite*[56] and *Commissioners of Crown Lands v Page*[57] the defendant's plea involved an appeal to the exigencies of war, and it is a well-established principle that the exercise of the power of waging war is unreviewable. By contrast, in *Dowty Boulton Paul Ltd v Wolverhampton Corporation*[58] and in the *Birkdale Electric Supply Company* case,[59] the court seems to have decided that the public interest pleaded was not sufficient to justify treating the public body differently from a private contracting party by allowing the interests of the private contractor to be overridden.

It is clear, therefore, especially from the *Dowty Boulton Paul* case (in which the decision of the local authority was directly challenged and held to be valid,[60] but was also held to amount to a breach of contract)[61] that exercise of a discretion may involve a breach of contract even though the exercise was not illegal. Contractual rights may be protected even against lawful exercises of power if the public interest thereby served is insufficiently important to justify infringing the strong principle that contracts ought to be performed.

recoverable if the unenforceability of the contract infringes a Convention right: *Stretch v United Kingdom* (2004) 38 EHRR 12.

[56] [1921] 3 KB 500.
[57] [1960] 2 QB 274.
[58] [1971] 1 WLR 204.
[59] [1926] AC 355. See 6.3.3 for further discussion of these cases.
[60] *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)* [1976] Ch 13.
[61] [1971] 1 WLR 204.

9.3.3 THE EFFECT OF A PLEA OF PUBLIC POLICY

Perhaps the most contentious issue in this area is the effect of a plea of public policy. It is possible to approach this question in a technical fashion by seeking private-law analogies. For example, it is possible to treat at least some cases (involving, for example, declaration of war after the contract was made) in terms of the doctrine of frustration. If this analogy is used, a re-adjustment of the affairs of the parties along the lines provided for in the Law Reform (Frustrated Contracts) Act 1943 would be justified: that is, restitution of benefits given and received subject to a claim for expenses incurred. If a contract is treated as containing an implied term entitling the public agency to refuse to perform if public policy so demands (as in *Commissioners of Crown Lands v Page*), the technically correct result may be to leave the losses where they fall.

Perhaps a better approach than searching for private-law analogies would be one which, while recognizing that there may be good grounds of public policy which justify releasing public bodies from contractual obligations, dealt with the questions of monetary compensation for the disappointed contractor more flexibly. Restitution of benefits conferred on the public body by the other party would be fair and reasonable to the extent that this is possible. It may be, too, that if a contracting party has incurred irrecoverable expenses in performance of the contract, that party should be entitled to compensation for such reliance losses. Should the contractor ever be entitled to damages for profits which were expected from performance of the contract? There might be an argument for saying that although a contractor should never be expected to bear actual losses for the sake of the public interest, the contractor should not be allowed to make a profit at its expense. The most flexible of all approaches would be to leave the question of the availability and amount of monetary compensation to be decided in the light of the circumstances of each individual case and of the interests of both the public and the private contractor. However, courts are unlikely to be prepared to get involved in the fine discriminations and policy judgments that such an approach requires. It would probably be better if the legislature laid down some general principles.

10

Unjust Enrichment

This very brief chapter deals with the application of the law of unjust enrichment to public administration.[1] The law of unjust enrichment deals with situations in which a person has acquired some benefit at the expense of another that can be said to have been unjustly obtained. Suppose a public agency charges a citizen for a service which it is under a duty to provide free of charge, or for some lesser amount than it actually charges. If the agency successfully threatened to withhold the service if the charge was not paid, the charge would have been unjustly extracted and the citizen would be entitled to 'restitution' of the payment.[2] Similarly, if a public agency made an unlawful monetary demand and extracted the payment by applying unlawful pressure to the citizens, any payment might be recoverable.[3]

But what if the agency makes no threat or applies no pressure? Suppose that it wrongly believes that as a matter of law, it is entitled to make the charge and the citizen does not realize that it need not be paid. Or suppose that the Inland Revenue makes a wrongful tax demand thinking that the tax is legally due, and that the taxpayer pays it on the same basis. As a matter of public law, the tax or charge will be illegal[4] and recoverable by virtue of the constitutional principle of 'no taxation without Parliamentary approval'.[5] Whereas illegal conduct on the part

[1] A Burrows, *The Law of Restitution,* 2nd edn (London: Butterworths, 2002), ch 13; R Williams, *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EU* (Oxford: Hart Publishing, 2010).

[2] See *Congreve v Home Office* [1976] QB 629.

[3] It might also be liable for for misfeasance in a public office (see 8.7).

[4] *R v Inland Revenue Commissioners, ex p Woolwich Equitable Building Society* [1990] 1 WLR 1400; *R v Richmond upon Thames LBC, ex p McCarthy & Stone (Developments) Ltd* [1992] 2 AC 48.

[5] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70. Conversely, a public authority that makes an illegal payment can recover it by virtue of the constitutional principle of no public spending without Parliamentary authorization: Burrows, *The Law of Restitution* (n 1 above), 420–3.

of a public agency will not as such give rise to a claim for damages,[6] it may give rise to a restitution claim. In some cases there may be a statutory provision for refund of an illegal tax or charge. If such a provision does not impose a duty to make a refund but only confers a power to do so, that discretion must be exercised reasonably and on the basis that a refund should only be refused if there is some good reason for refusal, such as the conduct of the person claiming the refund.[7]

The question of restitution of payments made to public bodies can also arise in 'private-law' contexts, for example if a public landlord makes an improper claim for rent. In such a case the principle that illegal taxes and charges can be recovered would probably be inapplicable and the ordinary 'private' law of unjust enrichment would apply. The mere fact that the public body had made a wrongful demand would not give rise to a claim for restitution. Such a claim would arise only if some other ground of restitution (such as duress or mistake of fact) could be found. A (private-law) claim to restitution may also arise if a citizen makes a payment to a public agency by mistake even in the absence of any demand, whether wrongful or not, by the agency. Public-law and private-law grounds for restitution can exist concurrently.[8] Statutory and common law claims can also exist concurrently provided the common law claim is not inconsistent with the statute.[9]

Sometimes illegality of a demand for payment which was unlawful and unjust will have very wide effects, as similar payments may have been made by many citizens.[10] If an authority is required to repay a large number of small payments, the total impact on its finances might be very great. Is this a good reason to refuse restitution?[11] It does not seem a good reason to refuse to overturn unlawful decisions of the Inland Revenue that the impact on the public purse will be significant. The same should be true of wrongful demands for payment for a public service. Courts should not be sympathetic to an argument that to declare the demand invalid would damage public finances. The legislature can deal as it sees fit with any adverse impact on the public purse of judicial decisions awarding restitution.

[6] See 13.4.1.
[7] *R v Tower Hamlets LBC, ex p Chetnik Developments Ltd* [1988] AC 858.
[8] *Deutsche Morgan Grenfell Group Plc v Inland Reveue Commissioners* [2007] 1 AC 558.
[9] *Monro v Commissioners for HM Revenue and Customs* [2009] Ch 69.
[10] eg *Daymond v South West Water Authority* [1976] AC 609.
[11] See *Air Canada v British Columbia* (1989) 59 DLR (4th) 161; J Beatson, 'Restitution of Overpaid Tax, Discretion and Passing-On' (1995) 111 *LQR* 375.

Unjust enrichment claims may also arise in contexts other than wrongful demands for payment. For example, suppose a contract made by a public authority is held to be illegal and unenforceable, but only after it has been performed (in whole or in part) by one or both of the parties. In private law the basic rule is that benefits transferred under an illegal contract are irrecoverable, although there are exceptions to this rule, most of which are designed to prevent a guilty party taking advantage of a party innocent of the illegality. By contrast, although an illegal contract made by a statutory authority will be void and unenforceable, money or property transferred to the authority by the other party under the terms of the contract may be recoverable (subject to an allowance for any benefits transferred by the authority to the other party). However, this does not apply in the case of a contract of loan because it is said that to allow a creditor to recover money transferred to a statutory authority under such a contract would be tantamount to enforcing the void contract.[12]

[12] *Westdeutsche Landesbank Girozentral v Islington LBC* [1994] 1 WLR 938. See further S Arrowsmith, 'Ineffective Transactions, Unjust Enrichment and Problems of Policy' (1989) 9 *LS* 307; A Burrows, 'Public Authorities, Ultra Vires and Restitution' in A Burrows (ed), *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991); M Loughlin, 'Innovative Financing in Local Government: The Limits of Legal Instrumentalism—Part II' [1991] *PL* 568, 574–82.

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Part III

Accountability and Administrative Justice

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Section A

Courts and Tribunals

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11

Judicial Review: Institutions, Nature, and Mechanics

Having surveyed the normative framework of public administration, in this Part we examine institutions and mechanisms for policing this framework and for holding administrators accountable for failure to comply with legal norms. The discussion begins with judicial review.

11.1 INSTITUTIONS

Judicial review was developed by the Court of Queen's Bench in the seventeenth century. Its early use was mainly to regulate the activities of inferior courts, including Justices of the Peace, who performed many public functions at local level. With the rapid growth of central government departments, local authorities, and administrative tribunals in the nineteenth and twentieth centuries, judicial review came to be used mainly to regulate the administrative activities of public agencies other than courts. Since 2000, the High Court's judicial review (or 'supervisory') jurisdiction has been mostly exercised by the Administrative Court, which is a component of the Queen's Bench Division of the High Court. Because it was developed by the Court of Queen's Bench, the supervisory jurisdiction is 'inherent'; and, of course, the High Court itself is not 'amenable' (or 'subject') to judicial review.

Until very recently, the only body with original judicial review jurisdiction was the High Court.[1] Now, the Upper Tribunal (UT) also has statutory judicial review jurisdiction; but because this jurisdiction is

[1] However (for instance), under s 120(4) of the Enterprise Act 2002 the Competition Appeal Tribunal is required to 'apply the same principles as would be applied by a court on an application for judicial review'. Until 2009, judicial review applications could be made only in London. Now many types of judicial review claim can be heard in some regional centres: S Nason, 'Regionalisation of the Administrative Court and the Tribunalisation of Judicial Review' [2009] *PL* 440.

conferred rather than inherent, the UT is itself amenable to judicial review even though it is a 'superior court of record'.[2] Unlike the High Court, the UT has limited, not unlimited, jurisdiction.

11.2 NATURE

Supervisory jurisdiction is contrasted with 'appellate' jurisdiction. The distinction between judicial review and appeal is central to understanding the mechanisms and procedures by which the legal framework of public administration is policed and administrative law norms are enforced. The courts never developed mechanisms for appeals as we understand them today, and all appellate powers are statutory in origin.

In the administrative law context, there are two main differences between judicial review and appeal. The first relates to the remedial powers of the court or tribunal: in appeal proceedings the court or tribunal may vary the decision under appeal or make a substitute decision ('remake' the decision). In judicial review proceedings, on the other hand, the court or tribunal's basic power is to set aside (or 'quash') the challenged decision. If any of the matters in issue have to be decided again, this will be done by the original decision-maker and not by the reviewer. If the original decision-maker was under a duty to make a decision, this duty will revive when the decision is quashed, and it will then be for the agency to make a fresh decision. In appropriate cases, an order may be made requiring the agency to re-run the decision-making process.

However, this clear distinction between judicial review and appeal is blurred by the fact that when a decision is set aside in judicial review proceedings before the Administrative Court, (i) the matter may be remitted to the decision-maker with a direction to reconsider it and reach a decision in accordance with the findings of the Administrative Court or (ii) the Administrative Court may substitute its own decision for the decision under review.[3] The power to make a substitute decision may be exercised only if the decision set aside was made by a court or tribunal; it was set aside on the ground of error of law; and without the error there would have been only one decision which the court or tribunal could have reached.[4] It is not clear what 'error of law' means: does

[2] *R (Cart) v Upper Tribunal* [2011] QB 120.
[3] CPR 54.19(2); Senior Courts Act 1981, s 31(5).
[4] Senior Courts Act 1981, s 31(5A).

it mean an error of law as opposed to an error of fact or policy, or does it mean an error that brings illegality in its wake?[5] The significance of this question is reduced by the third condition because many grounds of illegality leave open the correctness of the decision. The power to remit is not limited in the same way. This means that decisions may be remitted to administrators as well as to courts and tribunals, and in cases where the directions do not determine what the substance of the new decision will be. For instance, the court could give directions concerning procedure.

The clear distinction between appeal and review is also blurred in relation to appeals on points of law. For instance, under s 12 of the TCE Act, when the UT allows an appeal on a point of law from the FtT it must either remake the decision or remit it to the FtT for reconsideration. Remittal for reconsideration might be appropriate where the basis on which the appeal was allowed does not determine what the new decision will be.

The second main distinction between appeal and review relates to the substantive basis on which the remedial powers of the court or tribunal may be exercised. An application for judicial review will be successful only if the decision under review is 'illegal' or 'unlawful'. The same is true of appeals limited to points of law,[6] which are effectively equivalent in this respect to claims for judicial review. By contrast, an appeal not so limited (which we may call a 'general appeal') may succeed provided the decision under appeal is 'wrong' or, to adopt an Australian phrase, 'not the correct or preferable decision', even if it is not illegal. Only illegal decisions can be successfully challenged by judicial review or an appeal on a point of law. Illegal decisions can also be successfully challenged by a general appeal; but so may decisions that are 'wrong' but not illegal.

11.3 MECHANICS

Until 2008, the only institution with supervisory jurisdiction was the High Court. The High Court is a single court of unlimited jurisdiction. It operates in Divisions: Queen's Bench, Chancery, Family, and Admiralty. The Administrative Court is a specialist component of the Queen's Bench Division. Because the High Court is a single court, technically

[5] On this distinction see the first paragraph of Chapter 7 above.

[6] For instance, to the county court under s 204 of the Housing Act 1996: *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306; cited with approval in *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430, [7] (Lord Bingham of Cornhill), [98] (Lord Millett).

any Division can exercise the jurisdiction of any other Division; and any component within a Division can exercise all the jurisdiction of that Division. Being a court of unlimited jurisdiction, the High Court can hear both private-law and public-law claims.

Underlying the issues discussed in this chapter are two important questions. First, to what extent should judicial review claims that are made in the High Court be channelled into the Administrative Court and dealt with by a distinct public-law procedure? Secondly, to what extent should courts or tribunals other than the High Court be given supervisory jurisdiction?

11.3.1 THE CLAIM FOR JUDICIAL REVIEW AND THE JUDICIAL REVIEW PROCEDURE

The procedure for seeking judicial review (called 'the judicial review procedure' (JRP)) is contained in Part 8 of the Civil Procedure Rules (CPR) as modified by CPR Part 54. These rules lay down a procedure for what are called claims for judicial review (CJRs). A CJR is 'a claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function' (CPR 54.1 (2)(a)). JRP *must* be used for making a CJR in which a quashing, prohibiting, or mandatory order is sought (whether or not any other remedy is sought in addition or in the alternative).[7] For making a CJR in which the only remedy sought is a declaration or an injunction, JRP *may* be used. A CJR made by JRP 'may include a claim for damages or restitution . . . but may not seek such a remedy alone' (CPR 54.3(2)).[8] For making a CJR that does not have to be made by JRP, the claimant can choose between the procedure laid down in CPR Part 8 (unmodified by Part 54) (which the CPR calls 'the alternative procedure' for making claims) and that laid down in CPR Part 7 (which, for convenience, will be referred to in this section as 'the basic procedure').

This complicated two-track procedural regime was first introduced in 1978 by amendments to the predecessor of CPR Part 54, Order 53 of the Rules of the Supreme Court (RSC). The basic aim of these amendments was to establish RSC Order 53 as the procedure for making applications for judicial review (as they were then called) regardless of the remedy sought by the applicant (as the claimant was then called). Up until then, the appropriate procedure for seeking judicial review depended on the

[7] See Chapter 13 for details of the various remedies.
[8] See also Senior Courts Act 1981, s 31(4).

remedy sought: the equivalent of CPR Parts 7 and 8 for claiming a declaration or injunction and RSC Order 53 for claiming the equivalents of quashing, prohibiting, and mandatory orders. Under the new regime, declarations and injunctions could be sought under Order 53 in cases where a quashing, prohibiting, or mandatory order could be sought instead. This rule was also enacted in s 31(2) of the Senior Courts Act 1981; and although Order 53 has now been replaced by CPR Part 54, s 31(2) is still in force and is expressly referred to in CPR 54.3 as setting out the circumstances in which the court may grant a declaration or injunction in a CJR—namely, circumstances in which a quashing, prohibiting, or mandatory order could be sought instead.

CPR Part 54 has further complicated this picture by defining a CJR not in terms of the remedy sought but in terms of the subject matter of the claim: the lawfulness of an enactment, or a decision or action (or failure to act) related to the performance of a public function. CPR Part 54 therefore contains two different criteria for determining the applicability of JRP, one remedial (is a quashing, prohibiting, or mandatory order being sought either alone or in conjunction with some other remedy?) and the other substantive (is the lawfulness of an enactment or a public decision or action being challenged?). How do these two criteria fit together?

Before addressing that question, it is necessary to outline the chief differences between the basic/alternative procedure and JRP.

11.3.2 THE BASIC/ALTERNATIVE PROCEDURE AND JRP CONTRASTED

11.3.2.1 Permission to proceed

The first important difference is that under Part 54 the claimant must first seek 'permission to proceed' with a CJR. JRP, therefore, has two stages: the 'permission stage' and the 'hearing stage'. At the permission stage the court decides whether the claim should proceed, and at the hearing stage it decides whether it should succeed. In theory, any matter relevant to whether the claimant should succeed at the hearing stage is also relevant to whether, at the permission stage, the claim should be allowed to proceed. Permission to proceed can be refused on any ground on which a remedy could be refused at the hearing stage. Conversely, the fact that a claimant is given permission to proceed does not (in principle, at least) prevent the court at the hearing stage deciding, for example, that the claim should fail because of undue delay, even if the issue of delay was argued and expressly decided in the claimant's favour at the

permission stage.[9] The permission requirement gives the court control over the proceedings from the very start, and because the defendant does not have to take part in a permission hearing, it may be relieved of the need to take any steps to secure refusal of permission to proceed with a weak claim. By contrast, in claims brought under the basic or alternative procedures, the defendant has to take positive steps to have the claim struck out.

A practice direction supplementing CPR Part 54 (PD 54A, 8.4) says that the court will generally, in the first instance, consider the question of permission without a hearing. Even when there is a hearing in order to clarify issues, permission proceedings are meant to be brief. The basic idea is that the court should give only cursory consideration to the claimant's case at the permission stage, and that permission proceedings should not be used as a surrogate for a full hearing in order to test the strengths and weaknesses of the parties' respective cases as an aid to settlement out of court.[10]

It has been said that the function of the permission requirement is to weed out cases that are prima facie unarguable and have no real chance of success; or that might be called 'frivolous' or 'vexatious' or 'an abuse of court process' in the sense of being brought, not out of a genuine interest in the outcome, but for some ulterior motive such as to make things difficult for the defendant.[11] The proposition that 'frivolous or

[9] *R v Lichfield DC and Williams, ex p Lichfield Securities* [2001] EWCA Civ 304.

[10] Indeed, it has been said that a court may be justified in refusing permission to proceed in order to provide an incentive for the resolution of the dispute, without recourse to litigation, by some form of 'alternative dispute resolution' (ADR): *R (Cowl) v Plymouth City Council* [2002] 1 WLR 803. Assumptions about the benefits of mediation that underlie this approach are challenged by empirical evidence: V Bondy and L Mulcahy, *Mediation and Judicial Review: An Empirical Research Study* (London: Public Law Project, 2009); see also M Supperstone, D Stilitz, and C Sheldon, 'ADR and Public Law' [2006] *PL* 299; G Richardson and H Genn, 'Tribunals in Transition: Resolution of Adjudication?' [2007] *PL* 116, 133–40. More than half of cases in which an intention to commence CJR proceedings is communicated to the defendant are settled or withdrawn without permission being sought, and it is estimated that a majority of these are settled favourably to the applicant. Most of the remainder are settled or withdrawn before hearing: V Bondy and M Sunkin, 'Settlement in Judicial Review Proceedings' [2009] *PL* 237. This is not surprising; but whether or not it gives cause for concern depends in part on views about the function of judicial review: M Sunkin, 'Withdrawing: A Problem of Judicial Review?' in P Leyland and T Woods, *Administrative Law Facing the Future: Old Constraints and New Horizons* (London: Blackstone Press, 1997), 221–41.

[11] *R v Inland Revenue Commissioners, ex p Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. Concerning permission in human rights cases see R Clayton and H Tomlinson, *Law of Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009), 22.114–22.115. Abuse of court process may be a tort: T Cross, 'The Tort of Abuse of Process and Judicial Review: A Disincentive for the Rival Challenge? [2009] *JR* 256.

vexatious' claims should not be allowed to proceed needs to be treated carefully. Legal proceedings are often brought for various reasons: not just to obtain a favourable outcome but also in order, for example, to obtain publicity, or to force a reconsideration of a contentious decision or policy, or as a bargaining tactic. The general approach is that only in very extreme cases would it be appropriate to refuse permission or relief on the basis of the claimant's motives.[12] However, in the context of decisions of agencies exercising powers to regulate company takeovers, it has been said that a remedy would not normally be given until after the takeover process is complete; and that such an agency should 'ignore any application for leave[13] . . . since to do otherwise would enable such applications to be used as a mere ploy in takeover battles'.[14] Underlying this approach is a fear that judicial review will be used for tactical purposes to cause delay and ultimately defeat the takeover bid.

If the basic function of the permission requirement is to weed out unarguable or vexatious cases it might be expected that only a small proportion of cases would fail at this stage. However, permission is refused in more than half of all CJRs which reach that stage.[15] This low success rate may reflect the fact that most CJRs settle before the permission stage, and those that get that far may, on the whole, be significantly weaker than those that do not.

11.3.2.2 Time-limit

The second noteworthy feature of JRP is that CPR 54.5 imposes a very short time-limit in which a CJR must be made: 'promptly[16] and in any event not later three months after the grounds to make the claim first arose'. This time-limit does not apply when another enactment specifies a shorter time-limit for the claim in question. The court has discretion

[12] *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 1 WLR 763, 773–4 (Lord Donaldson MR); *R (Mount Cook Land Ltd) v Westminster City Council* [2004] 2 P&CR 22, [45]–[46]; *R (Feakins) v Secretary of State for Environment, Food and Rural Affairs* [2004] 1 WLR 1761; *R (Edwards) v Environment Agency* [2004] 3 All ER 21.

[13] As permission was called at this time.

[14] *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815, 840.

[15] V Bondy and M Sunkin, 'Accessing Judicial Review' [2008] *PL* 647.

[16] C Knight, 'Promptness and Judicial Review' [2009] *JR* 113. The promptness requirement complies with the ECHR: *R (Hardy) v Pembrokeshire County Council* [2006] Env LR 28, [11]–[18]; and it is unlikely to violate EU law: R Gordon, *EC Law in Judicial Review* (Oxford: Oxford University Press, 2007), 3.87. Section 31(6) of the Senior Courts Act 1981 allows permission or final relief to be refused on the basis of 'undue delay . . . likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration'.

to extend the time-limit (CPR 3.1(2)(a)).[17] For claims under ss 7 and 8 of the HRA the time-limit is 12 months; but this time-limit does not apply when another rule specifies a shorter time-limit for 'the procedure in question'. For CJRs made by the basic or alternative procedure, there is no fixed time-limit: delay in applying is a factor to be taken into account when the court exercises its discretion whether or not to award a declaration or injunction.

The time-limit for private-law claims (in tort and contract, for instance) is at least three years. However, if the claim could alternatively have been made under CPR Part 54, it may be struck out as 'an abuse of the process of the court' if there has been undue delay in commencing the proceedings.[18]

The chief functions of the relatively short time-limit under CPR Part 54 are to prevent public programmes from being unduly held up by litigation challenging their legality;[19] and to prevent steps already taken in implementation of challenged decisions having to be reversed long after the decision was acted upon. However, it may be argued that since proceedings brought under CPR Parts 7 and 8 can be struck out as an abuse of process even if brought within the limitation period, there is no need or justification for a special time limit applying to proceedings under CPR Part 54.[20]

11.3.2.3 Fact-finding

The third notable feature of JRP relates to fact-finding. JRP under Part 54 is a modified version of the alternative procedure in CPR Part 8. Part 8 procedure is designed as an alternative to Part 7 basic procedure for cases which are 'unlikely to involve a substantial dispute of fact' (CPR 8.1(2)(a)). Under this procedure (in contrast to the basic procedure), evidence is normally given in writing. Under CPR 8.6(2) and (3) the court has power to permit oral evidence to be given at a hearing, and witnesses to be cross-examined. It has sometimes been said

[17] N Andrews, *English Civil Procedure* (Oxford: Oxford University Press, 2003), 42.48. This is important because, for instance, a CJR may be made by a person who is only indirectly affected by a decision and who may not learn about it until some time after it is made.

[18] *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988; *Phonographic Performance Ltd v Department of Trade and Industry* [2004] 1 WLR 2893.

[19] And sometimes to promote certainty in commercial matters: *R v Registrar of Companies, ex p Central Bank of India* [1986] QB 1114 (reversed on unrelated grounds by the CA). A power to give advisory opinions might be useful in this context: H Woolf, *Protection of the Public—A New Challenge* (London: Stevens & Sons, 1990), 46–50.

[20] D Oliver, 'Public Law Procedures and Remedies—Do We Need Them?' [2002] *PL* 91.

that such an order should be no less readily made in judicial review proceedings than in other types of proceedings brought under the alternative procedure, but in practice a more restrictive approach has often been taken.[21] Under the basic procedure, each party is entitled to require the other to disclose relevant documents that are in the other's control (see 5.1.1), whereas under JRP disclosure is required only if the court so orders (PD 54A, 12.1).

One explanation for the restrictive approach to evidence in judicial review proceedings is that only in exceptional cases is error of fact an available ground of judicial review. The general appeal is the main mechanism for challenging findings of fact. On the other hand, certain grounds of judicial review, such as breach of procedural fairness, may often raise factual disputes; and claims of infringement of human rights are typically fact-sensitive, which explains why practice is changing in this context.[22]

The restrictive attitude might also be justified by a public interest that implementation of public programmes should not be unduly delayed by litigation. On the other hand, fair resolution of factual disputes is a basic requirement of justice that should be sacrificed for speed only when there is a very strong case for expedition. In the case of a CJR that has been, but was not required to be, made by JRP, the Administrative Court can order that the claim continue as if it had not been made by JRP (CPR 54.20). Such an order would allow the claim to proceed according to the basic procedure if the claimant so chose. But in cases where JRP has to be used, proper resolution of factual disputes depends on the court making appropriate orders to this end.

11.3.3 SEEKING A DECLARATION OR INJUNCTION IN A CJR

As stated above, in a CJR there are two procedural routes available for seeking declarations and injunctions without seeking a quashing, prohibiting, or mandatory order additionally or alternatively: JRP under CPR Part 54, and basic or alternative procedure under CPR Parts 7 and 8 respectively. By choosing the latter rather than the former an applicant might be able to avoid restrictive features of JRP. The Law Commission,

[21] Law Com No 226, *Judicial Review and Statutory Appeals*, Part VII.

[22] Concerning oral evidence and cross-examination see *R (Al Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin); and concerning disclosure see *Tweed v Parades Commission for Northern Ireland* [2009] 1 AC 650, [39] (Lord Carswell); [56]–[57] (Lord Brown of Eaton-under-Heywood).

which first suggested the introduction of the predecessor to the CJR, contemplated that claimants would have a free choice between the two procedural paths. However, in *O'Reilly v Mackman*[23] the House of Lords held that because the procedural regime laid down in the predecessor of CPR Part 54 (Order 53 of the Rules of the Supreme Court), introduced in 1978, was more advantageous to claimants than the previous regime and struck a sound balance between the interests of claimants and defendants, in certain cases it would be an 'abuse of the process of the court' for a claimant seeking a declaration or an injunction in an application for judicial review (as the CJR was then called) not to use JRP even though the claimant was not seeking a quashing, prohibiting, or mandatory order alternatively or additionally.

This ruling became known as the 'exclusivity principle'. Although *O'Reilly v Mackman* was strictly concerned with matters of procedure, its effect was to introduce into English law a new substantive distinction between public law and private law. Viewed in this way, the exclusivity principle stated that (what we might call) 'public' applications for judicial review (as opposed to 'private' applications) had to be made by JRP regardless of whether the claimant sought a quashing, prohibiting, or mandatory order or only a declaration or injunction. The principle was designed to prevent certain 'public-law' issues being raised by *any* procedure other than JRP. Another effect of the principle was to channel consideration of such public-law issues to the predecessor of the Administrative Court (the 'Crown Office List'), which was then the only forum in which a CJR could be made by JRP. Translating the exclusivity principle into the language of Part 54, it says that in certain cases JRP must be used to make a CJR in which a declaration or injunction is sought (whether or not in conjunction with a quashing, prohibiting, or mandatory order). Those cases are ones which raise issues of public law rather than private law—public CJRs, we might say. So what are public CJRs?

11.3.4 PUBLIC CJRs

In *O'Reilly v Mackman* the House of Lords held that a prisoner who was seeking (on the ground of breach of natural justice) to challenge a decision of a Board of Prison Visitors (the effect of which was to deprive him of remission of sentence) had to use JRP because he had no private-law right to remission but only a legitimate expectation that remission

[23] [1983] 2 AC 237.

would be granted if no disciplinary sentence of forfeiture of remission had been made against him. This legitimate expectation was recognized only in public law and not in private law. This decision established the general rule that if a judicial review claimant seeks to protect rights or interests recognized only in public law, he or she must do so by JRP.[24] In *Cocks v Thanet DC*[25] this rule was applied to a case in which an applicant wanted to challenge a decision of a local authority that he was intentionally homeless and not entitled to be housed. By contrast, in the same case it was held (*obiter*) that once the council had decided that the applicant was entitled to be housed, the right to be housed was a private-law right that did not have to be enforced by JRP but could be enforced in a tort action for breach of statutory duty in the county court. This latter proposition was rejected in *O'Rourke v Camden LBC*:[26] the statutory right of a homeless person to be housed by a local authority is a public-law right that can be enforced only by JRP.

To be contrasted with these cases is *Wandsworth LBC v Winder*.[27] The council passed a resolution increasing council house rents. The applicant considered it illegal and refused to pay the increased rent. When the council sought to evict him for non-payment of the extra rent he pleaded that the resolution was invalid. The House of Lords held, in effect, that since the applicant was arguing that he had a contractual right under his lease to remain at the lower rent, he was asserting a private-law right and so could raise the defence in the possession proceedings in the county court and did not have to raise it in an application for judicial review. In *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*[28] the applicant challenged a decision of the respondent to withhold part of his basic practice allowance. It was held that the case did not have to be brought by JRP because Dr Roy's relationship with the Committee, whether contractual or statutory, conferred on him a private-law right in respect of payment of the practice allowance.

The distinction between public-law and private-law rights and interests seems to rest on the assumption that the latter are in some way more

[24] For recent reassertion of the exclusivity principle in relation to a challenge to a notice of breach of a planning condition see *Trim v North Dorset Distrcit Council of Nordon* [2010] EWCA Civ 1446.

[25] [1983] 2 AC 286.

[26] [1985] AC 188.

[27] [1985] AC 461; applied in *Wandsworth LBC v A* [2000] 1 WLR 1246.

[28] [1992] 1 AC 624; see also *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48.

important and more worthy of protection than the former. JRP incorporates certain procedural protections for public agencies, and the rule that a claimant asserting public-law interests can only use JRP creates a disadvantage justifiable only on the assumption that public-law interests do not matter as much as private-law rights and, therefore, do not deserve as much legal protection. Considering the subject matter of some of the public-law interests that have generated litigation (eg remission of sentence, obtaining social housing) this assumption appears ill-founded. The fact that the public-law claimant is typically challenging the exercise of a discretionary power does not mean that what is at stake is any less important than the sort of interests protected by private law. This is obviously true where the basis of the claim is that the defendant has acted incompatibly with a Convention right; and it may be that the exclusivity principle does not apply to such a claim.[29]

Furthermore, determining whether JRP must be used by reference to the nature of the claimant's interest may sit uneasily with the fact that JRP is designed to deal with cases that do not raise substantial disputes of fact. In *Trustees of Dennis Rye Pension Fund v Sheffield City Council*[30] this feature of JRP led Lord Woolf rather unconvincingly to distinguish *O'Rourke v Camden LBC* (see above) in order to allow a claimant to use the basic procedure to assert a claim that turned mainly on issues of fact. It is true both that a private-law claim may raise no substantial issue of fact (and so might suitably be made under CPR Part 8/54) and that a public-law claim may raise substantial issues of fact for the resolution of which JRP would not be as suitable as the basic procedure. There is no necessary correlation between the nature of the claimant's interest (public or private?) and whether the claim raises disputed issues of fact.

11.3.5 PROTECTING PRIVATE-LAW RIGHTS BY JRP

Assuming that the underlying rationale of the distinction between public-law interests and private-law interests is to force claimants asserting the former to use the less advantageous JRP, it might seem to follow that a claimant would be free to choose JRP to protect private-law rights. And in some cases this is undoubtedly so: if he had wished, Dr Roy could have challenged the decision of the Family Practitioner Committee by an application for judicial review. Public law is concerned not only with protecting public-law rights but also with protecting

[29] Clayton and Tomlinson, *Law of Human Rights* (n 11 above), paras 22.62–22.64.

[30] [1998] 1 WLR 840. See also *Steed v Secretary of State for the Home Department* [2000] 1 WLR 1169.

private-law rights against illegal interference by public administrators. However, in some instances, private-law rights cannot be protected in this way. In the first place, JRP cannot be used for making a CJR against a body that owes its existence to contract.[31] This rule seems to be a hangover from the time when the only judicial review remedies were predecessors of the quashing, prohibiting, and mandatory orders. These were (and the equivalent orders are) not available against contractual bodies; but there seems no good reason of policy or principle why a declaration or injunction should not be sought against such a body by JRP.

Secondly, the contractual rights of an employee, even a public employee, cannot be enforced by JRP unless those rights are 'underpinned by statute' or by some constitutional principle[32] in a way that injects a 'public element' into the employment relationship.[33] This rule might be based on a policy that employment rights should be protected by an action for unfair dismissal in an industrial tribunal or by an ordinary action for breach of contract; and that in cases with no clear public element recourse should be had to such an alternative forum and not to the Administrative Court.[34] The point may be that an industrial tribunal or an 'ordinary' Queen's Bench judge is likely to have greater expertise and experience in employment matters than an Administrative Court judge. Of course, if there is no alternative forum and in the absence of statutory provision to the contrary, the Administrative Court may hear the claim even if the rights in issue are essentially ordinary employment rights.[35]

The question about the proper forum for protecting the employment rights of government employees has generated a large volume of litigation, and the resulting law is complex and unsatisfactory. The underlying problem is that cases concerning the employment rights of public employees often raise both public-law and private-law issues which are not easily separable, if at all. It has been argued that all public

[31] *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909; *Law v National Greyhound Racing Board* [1983] 1 WLR 1302. It may be, however, that this rule only applies where there is a contractual relationship between the claimant and the defendant: *R v Jockey Club, ex p RAM Racecourses Ltd* (1991) 3 Admin LR 265, 292–3 (Simon Brown J).

[32] Such as the desirability of preserving the independence of Crown prosecutors: *R v Crown Prosecution Service, ex p Hogg* (1991) 6 Admin LR 778.

[33] *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152; *R v British Broadcasting Corporation, ex p Lavelle* [1983] 1 WLR 23.

[34] See esp *R v Civil Service Appeal Board, ex p Bruce* [1988] 3 All ER 686, affirmed by CA [1989] 2 All ER 907.

[35] *R v Secretary of State for the Home Department, ex p Benwell* [1985] QB 554.

employment cases should be dealt with by one forum with power to resolve all the relevant issues, whether public or private.[36]

11.3.6 EXCEPTIONS TO THE EXCLUSIVITY PRINCIPLE

11.3.6.1 Agreement by parties

In *O'Reilly v Mackman*[37] Lord Diplock said that there were two exceptions to the exclusivity principle. First, JRP need not be used when none of the parties objects to the use of the basic or alternative procedure. The rationale of this exception is that there is no reason to protect a defendant who does not wish to be protected by the restrictive features of JRP. On the other hand, it could be argued that these features of JRP are in the public interest and should not be waivable. Also it is strange that an action which is an abuse of court process can be allowed to proceed simply because no party to the action objects.

11.3.6.2 Collateral challenge

The second exception arises where the challenge to the contested decision or action is collateral—that is, it arises out of and incidentally to some other legal claim. The challenge to the council's resolution in *Wandsworth LBC v Winder* was collateral in two ways: it was made in answer to a claim for possession of the premises by the council, and it was incidental to an assertion of a contractual right under the lease. Does a case fall within the exception only if it is collateral in both senses? There is no simple answer to this question.

On the one hand, it would seem that if a claim can be framed as one in contract, tort, or restitution,[38] or if it concerns a private legal right,[39] it need not be made by JRP even if the very ground on which the defendant's action is alleged to be an unlawful interference with a private-law right is that it was illegal in a public-law sense.[40] It is not, apparently, an abuse of process to assert private-law rights by a private action even if the action raises or turns on public-law issues. Of course, if a claim in tort or contract against a public functionary does not turn on

[36] S Fredman and G Morris, 'Public or Private? State Employees and Judicial Review' (1991) 107 *LQR* 298.

[37] [1983] 2 AC 237.

[38] *British Steel Plc v Customs and Excise Commissioners* [1997] 2 All ER 366.

[39] *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624; *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [70] (Lord Dyson).

[40] Statute may provide that judicial review is the only permissible mode of challenge; but there is a strong presumption against interpreting statutes as requiring this result: *Bunney v Burns Anderson Plc* [2007] 4 All ER 246.

any issue of public law, it need not be made by JRP.[41] On the other hand, it has been held that gypsies who camp on public land cannot argue, in defence to a claim for an eviction order by a council, that the council has failed to fulfil its statutory obligation to provide camping sites, because the gypsies had no legal right to the land on which they were camping.[42] So it would seem that even a defence may be an abuse of process if it is not based on private rights. One might conclude from these cases that the collateral attack exception is in fact a restatement of the distinction between public-law interests and private-law interests. However, in some cases at least it is permissible to argue, in defence to a prosecution for breach of a statute, regulation, or administrative order, that the relevant statutory provision, regulation, or order is illegal.[43] It is difficult to see how this involves assertion of a 'private-law right': there is no private-law right not to be prosecuted (as opposed to a right not to be prosecuted maliciously).[44] More significantly, perhaps, it has been held that by virtue of s 7(1)(b) of the HRA and the fundamental common law right of access to a court to protect legal rights, allegations of infringement of a Convention right can be raised by way of defence in any legal proceedings.[45]

The 'collateral attack' exception raises a number of problems. First, consider *Winder* again: the council sought to evict Winder years after the challenged resolution was passed. If Winder's challenge to the resolution succeeded this would mean that all the council's tenants would be in a position to refuse to pay the increased rent, and maybe to claim return of overpaid rent. Such an outcome would have caused a great deal of trouble for the council, which could largely have been avoided if the resolution had been directly challenged in a claim for judicial review soon after it was made. The short time-limit under CPR Part 54 is designed to deal with just such cases.[46] By contrast, although the claimant in *O'Reilly v Mackman* had also delayed well beyond the judicial review time-limit in bringing his claim, this delay would have caused no undue problem for the defendant. This suggests that there is

[41] *Davy v Spelthorne BC* [1984] AC 264.

[42] *Waverley DC v Hilden* [1988] 1 WLR 246. People in this situation may be able to claim that the decision to institute eviction proceedings was illegal in the public-law sense, but such a claim would have to be made by JRP: *Avon CC v Buscott* [1988] QB 656. They might also seek a mandatory order but only, of course, by JRP.

[43] eg *Boddington v British Transport Police* [1999] 2 AC 143.

[44] Malicious prosecution is actionable in tort.

[45] *Manchester City Council v Pinnock* [2010] 3 WLR 1441.

[46] In fact, Winder had applied for leave to apply for judicial review but it had been refused. See also *Wandsworth LBC v A* [2002] 1 WLR 1246, 1259.

a mismatch between the rationale for protecting defendants by a short time-limit and the criteria used to decide whether or not JRP must be used by the claimant. It also raises the general issue of whether collateral attacks should be subject to the procedural limitations attaching to CJRs; and if not, why not.

A second difficulty posed by the collateral attack exception relates to claims for damages or restitution. CPR 54.3(2) provides that a CJR made by JRP may include a claim for damages or restitution but may not seek damages or restitution alone; and s 31(4) of the Senior Courts Act 1981 provides that damages or restitution may be awarded in a CJR if the claim for damages or restitution arises from any matter to which the CJR relates (and the claimant would have been entitled to damages or restitution at the time the application was made). If a claim for damages or restitution is based on an allegation that a public administrator has acted illegally in a public-law sense, why should the claim not have to be made by JRP regardless of whether any other remedy is sought? The obvious answer is that claims for damages and restitution often raise substantial disputes of fact. But if that is the case, why should it be permissible to hook a damages claim onto a CJR?

This last question raises a third and larger difficulty with the collateral attack exception. Many collateral attacks are likely to raise factual issues. We have seen that JRP is not designed for cases that are likely to give rise to substantial disputes of fact. However, despite what Lord Diplock seemed to believe,[47] it is not the case that direct challenges to public decisions by CJR are unlikely to raise factual issues: in particular, challenges based on procedural unfairness, on error of fact, and, perhaps most significantly, on infringements of Convention rights, may well raise difficult and complex issues of fact. There is no direct correlation between whether or not a challenge is collateral and whether or not it is likely to raise issues of fact.

More generally, there is no direct correlation between the justifications for the restrictive features of JRP and the criteria relevant to deciding when JRP must be used (notably that based on the distinction between public-law interests and private-law interests). The permission requirement is designed to weed out frivolous, vexatious, or hopeless cases; but there is no reason to think that claims based on private-law rights will not sometimes be frivolous, vexatious, or hopeless, or that claims based on public-law rights are particularly prone to be frivolous,

[47] *O'Reilly v Mackman* [1983] 2 AC 237, 282.

vexatious, or hopeless. Nor is there any reason to think that claims based on private-law rights will not sometimes hold up public programmes if they are allowed to be brought after expiry of the Part 54 time-limit; or that claims based on public-law rights will necessarily cause trouble if brought after that time-limit has expired. Finally, claims based on public-law rights might well raise factual issues more suited to resolution by basic procedure than by JRP; conversely, claims based on private-law rights may well raise no such issues—which is why CPR Part 8 procedure is available as an alternative to the basic procedure. This produces a tension within the JRP scheme: on the one hand, CJRs may raise factual disputes, while on the other hand, JRP is not designed to resolve such disputes.[48]

In short, there is no reason to think that the JRP is ideally suited for all claims based on public-law rights and interests or, conversely, that the basic procedure is necessary for all claims based on private-law rights and interests. The exclusivity principle, therefore, seems to be based on a false premise, namely that JRP is necessary and desirable for dealing properly with all public CJRs.

11.3.6.3 Specialist forum

A third exception to the exclusivity principle has been recognized. In *Chief Adjudication Officer v Foster*[49] the applicant challenged refusal of a social security benefit on the ground that the regulation that justified the refusal was illegal. The House of Lords held that under the relevant legislation, the Social Security Commissioners (then the highest tribunal in the social security appeals system) had jurisdiction to decide the legality of the regulation even though the legality of secondary legislation is quintessentially a public-law issue. There were two main reasons for this decision. One was that the Commissioners were especially well equipped to decide such an issue by reason of their 'great expertise in this somewhat esoteric area of the law'; and secondly, to require the applicant in such a case to raise the issue of legality by JRP would create 'a cumbrous duplicity of proceedings[50] which could only add to the already overburdened list of applications for judicial review awaiting

[48] For a recent judicial denial that such tension exists and that factual disputes justify 'an exception to the exclusivity principle' see *Trim v North Dorset District Council of Nordon* [2010] EWCA Civ 1146.

[49] [1993] AC 754.

[50] If the Social Security Commissioners could not determine the issue of legality, the claimant's appeal would have to have been adjourned while a CJR was made to resolve that issue.

determination'.[51] This case raises fundamental issues which are also relevant to the collateral attack exception: are Administrative Court judges necessarily the best equipped to decide public-law issues, which can arise in a great diversity of factual contexts? Is there good reason not to adopt a rule that any court or tribunal before which a public-law issue arises has jurisdiction to decide the issue?

In the 4th edition of this book it was argued that 'decentralization' of the judicial review jurisdiction by the adoption of such a rule would be a way of coping with the steady increase in public-law litigation, which is unlikely to abate. It was suggested that public-law issues that arose in proceedings before courts or tribunals other than the Administrative Court, but that were thought to justify or require the 'judge-power' of the Administrative Court, could be referred to it (rather in the way that matters of European law can be referred to the European Court of Justice by courts of Member States)[52] or transferred to the High Court at an early stage. It was noted that 'human rights' issues can be raised in any proceedings to which they are relevant and in any court or tribunal before which such proceedings can be brought. This does not mean that any court or tribunal can entertain any and every human rights claim. For instance, only the High Court can hear a claim for a declaration of incompatibility; and the rules about when JRP has to be used apply to human rights claims as to other types of claim. However, it does cast doubt on the value of a policy of channelling public-law claims to the Administrative Court.

The force of such arguments has been recognized to some extent by the conferral of supervisory jurisdiction on the UT. The UT can hear claims for judicial review of decisions of the FtT in criminal injuries compensation cases and in other cases in which there is no right of appeal from the FtT to the UT, except data protection and freedom of information appeals relating to national security. Judicial review claims may also be transferred from the Administrative Court to the UT on a case-by-case basis and must be transferred in some cases.[53] Because the mechanics of judicial review in the UT mirror those in the Administrative Court, this arrangement does not really conflict with the exclusivity principle.

[51] [1993] AC 754, 766–7.

[52] TC Hartley, *The Foundations of European Community Law*, 6th edn (Oxford: Oxford University Press, 2007), ch 9.

[53] Senior Courts Act 1981, s 31A.

Further decentralization of the adjudication of public-law issues could probably not be achieved without undermining the procedural rationale for the exclusivity principle. It would not be possible or desirable to saddle the adjudication of public-law issues, wherever this took place, with the restrictive features of JRP. [54] However, the procedural rules under which any particular adjudicator operates are only one factor relevant to allocation of public-law disputes to various adjudicators. Equally important are the qualifications, expertise, and suitability of the adjudicator for deciding the dispute in question. It should be noted that whereas the initial discussion of the exclusivity principle in this chapter was in terms of a choice between making a CJR by JRP on the one hand, and by the basic or alternative procedure on the other, the issue of the proper forum before which to raise public-law issues, with which the exclusivity principle is concerned, is much wider and has to be considered not in terms of a choice between different divisions of the High Court but in terms of a choice between the Administrative Court and any one of a wide range of other courts and tribunals before which public-law issues might arise. So long as the choice of initial forum is between two divisions of the High Court, it can be seen as turning on procedural differences only. This approach makes much less sense when the choice may lie between two very different forums; then questions of expertise may appear to be at least as important as questions of procedure.

[54] For a general argument against special public-law procedures see D Oliver, 'Public Law Procedures and Remedies—Do We Need Them?' [2002] *PL* 91.

12

Judicial Review: Availability and Access

12.1 THE CPR DEFINITION

As we saw in Chapter 11, the scope of judicial review is defined in CPR 54.1(2)(a) in terms of the concept of a 'claim for judicial review', which is a 'claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function'. As would be expected, this definition confines judicial review to issues of legality. 'Enactment' is not defined, but presumably includes primary and secondary legislation. The other core concept in the definition is that of 'public function'.

12.1.1 PUBLIC FUNCTIONS

The origins of the functional definition of the scope of judicial review can be found in *R v Criminal Injuries Compensation Board, ex p Lain*[1] in which it was held that the Criminal Injuries Compensation Board (CICB) had to comply with administrative law (and was amenable to judicial review) essentially because the function it was performing was very similar to the (public) function performed by courts of law when they award damages in tort for personal injuries. In the landmark *Takeover Panel* case[2] in 1987 it was held that the City Panel on Takeovers and Mergers was amenable to judicial review because it was exercising a public function or a power with a public element. The CICB was a non-statutory public body whose powers derived from 'the prerogative'. The Takeover Panel was a private body whose powers did not derive from statute, the prerogative, or contract. Indeed, it was said that the Panel 'lacked visible means of legal support'. It exercised '*de facto*' (as opposed to '*de iure*') power merely as a result of the acquiescence of those subject to its decisions. These cases establish the general principle that the

[1] [1967] 2 QB 864.
[2] *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815.

amenability of an entity (whether public or private) to judicial review depends neither on the body's identity or status, nor on the source of its power, but rather on the nature of the functions it performs. This general principle must, however, be qualified in at least three ways.

First, although it is a public body and exercises public functions, the High Court is not subject to judicial review.[3] An obvious explanation for this is that it is the High Court that invented and exercises supervisory jurisdiction. Technically, the rule can be explained by saying that the High Court is a superior court of unlimited jurisdiction. In theory, the purpose of judicial review is to police limits of power (or 'jurisdiction'). So inferior courts of limited jurisdiction (such as magistrates' courts and the county court) are subject to judicial review, but the High Court is not. The standard procedure for challenging decisions of the High Court is by way of appeal to the Court of Appeal and the Supreme Court.

A second qualification to the basic principle about the scope of judicial review relates to Parliament. Traditionally, in accordance with the constitutional doctrine of Parliamentary sovereignty (or 'supremacy'), Parliamentary (that is, 'primary') legislation is not subject to judicial review because—despite the fact that Parliament is, of course, a public body performing public functions—there are no *legal* limits to the legislative power of Parliament. Courts interpret and apply legislation, but they cannot question its legal validity. As a result of Britain's membership of the EU, this traditional rule is now subject to an important exception: Parliamentary legislation that is inconsistent with EU law is subject to being invalidated by an English court. There is a second exception to the traditional rule. For the purposes of s 6 of the HRA, Parliament is not a 'public authority'[4] that must act compatibly with Convention rights. However, under s 4 of the HRA, certain courts have power to make a 'declaration of incompatibility' in relation to a provision of primary legislation that is judged to be incompatible with a Convention right. Such a declaration 'does not affect the validity, continuing operation or enforcement of the provision in respect of

[3] *R v Visitors of the Inns of Court, ex p Calder* [1994] QB 1. The Crown Court is not subject to judicial review in respect of 'matters relating to trial on indictment' (Senior Courts Act 1981, s 29(3)). R Ward, 'Judicial Review and Trials on Indictment: Section 29(3) of the Supreme Court Act 1981' [1990] *PL* 50; J Horder, 'Rationalising Judicial Review in Criminal Proceedings' [2008] *JR* 207.

[4] Indeed, neither House of Parliament (whether or not acting in a legislative capacity) is a public authority; nor is any 'person exercising functions in connection with proceedings in Parliament'.

which it is given' (HRA, s 4(6)(a)),[5] but it does establish that the provision is inconsistent with the 'higher law' contained in the ECHR, and in that limited sense 'illegal'.

A third qualification to the general principle about the scope of administrative law relates to the proposition that the source of a body's power is irrelevant to whether its decisions are subject to judicial review. In particular, there is considerable confusion about the amenability to judicial review of bodies whose existence and powers are based on a contract. Typical examples of such bodies are trade unions and trade associations. On the one hand, it has been held that such a body may be subject to administrative law principles in its dealings with a party to the empowering contract, such as an officer of a trade union;[6] and also in dealings with an individual who wishes to become a party to the empowering contract, such as an applicant for a horse-trainer's or boxing licence.[7] The basis of such decisions is that bodies of this sort exercise great, and often monopoly, power over some area of social or economic activity in which not only participants in the activity but also the wider public have an interest. On the other hand, in several cases it has been held that bodies which derive their existence and powers from a contract are not amenable to judicial review, at least at the suit of parties to that contract.[8] The basis of these decisions appears to be that the effect of the contract is to make the conduct of the body a matter to be judged purely by principles of private (contract) law,[9] even if the body operates within a statutory framework and is subject to a public regulatory regime.[10]

Julia Black argues that decisions such as this rest on a failure to distinguish between contract as 'an instrument of economic exchange'

[5] It is for the government to decide what to do about the legislation in the light of the declaration: HRA, s 10.

[6] *Stevenson v URTU* [1977] 2 All ER 941.

[7] *Nagle v Fielden* [1966] 2 QB 633.

[8] *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909; *R v Lloyd's of London, ex p Briggs* [1993] 1 Lloyd's Rep 176; *R v Football Association, ex p Football League* [1993] 2 All ER 833; *R v Panel of the Federation of Communication Services, ex p Kubis* (1999) 11 Admin LR 43; *R (West) v Lloyd's of London* [2004] 3 All ER 251.

[9] It appears, for instance, that admission and exclusion decisions made by state schools are amenable to judicial review, but that such decisions made by private schools are not: *R v Governors of Haberdashers' Aske's College Trust, ex p Tyrell* [1995] ELR 350; *R v Muntham House School, ex p R* [2000] LGR 255; unless the decision was made in relation to admission under a statutory scheme: *R v Cobham Hall School, ex p S* [1998] ELR 389.

[10] *R v Fernhill Manor School, ex p Brown* (1992) 5 Admin LR 159. In other words, the fact that the performance of a function is subject to a public regulatory regime does not make it a public function.

and as 'an instrument of governmental or non-governmental organisation and regulation'.[11] She thinks that if a body exercises 'regulatory power', its exercise of that power should be subject to judicial review regardless of its source—whether in statute, the prerogative, or a contract—because regulation is a public function. But the law has not yet got to the point where the source of power is completely irrelevant to its classification as public or private.

What is a public function? In relation to non-governmental entities, this question has been answered in two different ways.[12] One answer is that a function is public if the government would make provision for its exercise in case it was not being performed by the entity in question (a 'necessity' criterion).[13] The other answer is that a function is public if the agency charged with its performance operates as an integral part of a public statutory scheme of regulation or service provision (an 'integration' criterion).[14] Both factors were taken into account in the *Takeover Panel* case: the government had apparently made a conscious decision to encourage the setting-up of the Panel, and the Panel operated against the background of a network of statutory provisions relevant to its activities. It will be noticed that neither criterion refers specifically to the nature of the function being performed or the substance of the decision being challenged. Rather, both direct attention to the context within which the function was being performed. Both criteria provide what we might call a contextually functional approach, as opposed to a purely functional approach, to defining the scope of administrative law. In a contextually functional approach, certain factors other than the nature or substance of the function in question can be taken into account in deciding whether or not the function is public.

Many of the cases that discuss the concept of a public function do so in the context of s 6 of the HRA rather than judicial review; and in some (most notably, perhaps, *Poplar Housing and Regeneration Community Association Ltd v Donoghue*[15]) the integration criterion has been applied. However, it is by no means clear that the concept has the same meaning

[11] J Black, 'Constitutionalising Self Regulation' (1996) 59 *MLR* 24, 41–2.

[12] Ibid.

[13] eg *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1992] 1 WLR 1036.

[14] eg *R (Siborurema) v Office of the Independent Adjudicator* [2008] ELR 209. For strong criticism of the coherence of both criteria see CD Campbell, 'The Nature of Power as Public in English Judicial Review' (2009) 68 *CLJ* 90.

[15] [2002] QB 48.

or performs the same function in the two contexts. The cases contain dicta to the effect that although the scope of judicial review and the scope of the HRA are related, they are not identical. The scope of the HRA is defined not simply in terms of public functions but in terms of three concepts: 'public authority', 'public function' (or, more precisely, function 'of a public nature'), and 'private act' (or, more precisely, act 'of a private nature'). There are two types of public authorities: core public authorities and hybrid public authorities. A hybrid public authority is an entity certain of whose functions are public functions. Hybrid public authorities are not covered by s 6 in relation to 'private acts'. Core public authorities, by contrast, are covered in relation to private acts as well as public acts. In other words, core public authorities must act compatibly with Convention rights in all their activities, whether public or private. The distinction between core and hybrid public authorities is not part of the law of judicial review outside the HRA context. Leaving aside challenges to 'enactments', 'domestic' (non-HRA) judicial review is available, and is only available, to review the lawfulness of decisions, actions, and failures to act in relation to the exercise of public functions, regardless of the identity of the defendant.

The issues at stake in the two contexts are very different. As we saw in Chapter 11, the significance of the scope of judicial review is primarily procedural, remedial, and institutional whereas the scope of the HRA relates to the protection of fundamental rights. It is relevant to the scope of the HRA (but not to the scope of judicial review) that its purpose is to give effect to the ECHR and that in interpreting s 6, courts must take account of decisions of the ECtHR. Because the ECHR is an international treaty that only binds states, the sorts of issues that arise under s 6 are dealt with differently by the ECtHR than by English courts. In Strasbourg the relevant question is institutional, not functional: was the alleged infringement of the ECHR committed by the State or an entity for which it is responsible? The most that can be said at this stage is that the relationship between the scope of judicial review and the scope of the HRA is unresolved.[16]

Judicial review may also provide a medium for challenging administrative action on the ground that it is inconsistent with an EU law (see further 13.4.4). Such a claim can be made against the State or an 'organ

[16] It has been argued that the contextually functional approach is not appropriate in human rights cases: D Oliver, 'Functions of a Public Nature under the Human Rights Act' [2004] *PL* 329.

of the State'. In *Foster v British Gas Plc*[17] the European Court of Justice (ECJ) offered the following definition of an organ of the State:

> a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals.

This definition assumes the existence of a core 'State' that is left undefined. It contains both institutional and functional elements—in other words, it is a contextually functional definition. Institutionally, the entity must be a delegate of the State and under its control; and functionally, it must be providing a public service and have special powers for this purpose. If an entity meets the definition, it must comply with EU law in all its actions, whether of a public or a private nature.[18] A privatized water company has been held to fall within the definition,[19] as has a voluntary aided school[20] and the chief constable of a police force;[21] and it may be that the test was not meant to be exhaustive.[22]

Amidst this bewildering complex of approaches and tests, one thing is clear: no matter what definition or criterion of publicness is adopted, its application in any particular case will require a value-judgment about the desirable scope of administrative law. Functions are not public or private as a matter of their inherent nature but because we choose to treat them as such for various purposes. A good illustration is provided by a case in which the London Borough of Greenwich sought to challenge by judicial review the distribution by the government of a leaflet explaining the recently introduced 'poll tax'. The Borough argued that the leaflet was inaccurate and, therefore, that its distribution was illegal.[23] The court decided that the leaflet was not sufficiently misleading to justify finding in the Borough's favour; but implicit in the court's decision is a holding that the court had jurisdiction to decide the issue of legality—in other words, that the decision to distribute the

[17] [1990] 2 CMLR 833, 857.

[18] *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723.

[19] *Griffin v South West Water Services* [1995] IRLR 15.

[20] *National Union of Teachers v St Mary's School* [1997] 3 CMLR 630.

[21] *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

[22] T Hartley, *The Foundations of European Community Law*, 6th edn (Oxford: Oxford University Press, 2007), 215.

[23] *R v Secretary of State for the Environment, ex p Greenwich LBC* (unreported). Noted by CR Munro, 'Government Advertising and Publicity' [1990] *PL* 1, 7–8.

leaflet was amenable to judicial review. This aspect of the case provoked a vigorous correspondence in *The Times*.[24] Some argued, in effect, that the decision to distribute was not subject to judicial review because the distribution of information is not a public function but one which any individual is entitled to do. Against this, it was argued that government bodies which use public money to provide information to the public are under a special public-law obligation to ensure that the information is accurate; and this obligation, being a public-law one, was properly enforceable by judicial review.[25]

Nor does the addition to the concept of a public function of institutional elements, or concepts of integration or necessity, remove the need for such value-judgments. Integration can take various forms and is a question of degree. There is no objective or mechanical test of how integrated into a public statutory scheme a function must be in order to qualify as public. Normally, too, there will be no conclusive evidence relevant to answering the hypothetical question whether the government would provide for the performance of a particular function if it was not already being performed by a non-governmental organization. Ultimately, the court must decide whether the performance of the function *should* be subject to administrative law controls.

In the context of domestic judicial review, at least, there is a further complication: there are some functions that are undoubtedly public but which may not be amenable to judicial review. It is to this topic that we now turn.

12.1.2 STATUTE, PREROGATIVE, AND JUSTICIABILITY

In *Council of Civil Service Unions v Minister for the Civil Service*[26] one of the issues was whether prerogative powers of central government were subject to judicial review. Prerogative powers include the power to wage war, the power to make treaties, the power to conduct foreign relations, and the power to award honours. The position before this case was that if a power was properly classifiable as a prerogative power, the courts could determine the extent of the power and whether a proper occasion for its exercise had arisen, but they could not decide whether it had been exercised unreasonably or unfairly. In this respect, the law drew a clear

[24] 18, 20, 25, 26, 27 May 1989.

[25] For a similar debate about the disciplinary functions of universities see HWR Wade, 'Judicial Control of Universities' (1969) 85 *LQR* 468; J Garner, 'Students: Contract or Status?' (1974) 90 *LQR* 6.

[26] The '*GCHQ* case' [1985] AC 374.

distinction between prerogative and statutory powers: the basic rule was that the exercise of statutory powers was subject to judicial review on grounds of unreasonableness and unfairness. In other words, the source of the power (statute or common law) was relevant to its reviewability. In the *GCHQ* case, the House of Lords held that there was no general rule that prerogative powers were not subject to judicial review on grounds of unreasonableness and unfairness. Whether any particular exercise of a prerogative power was subject to review depended on the content of the power in question and the circumstances in which it was exercised. The question was whether there was any reason, based on the content of the power or the circumstances of its exercise, why it should not be subject to review for unreasonableness or unfairness.[27]

In *GCHQ*, Lord Roskill gave several examples of prerogative powers that would not be reviewable on grounds of unreasonableness and unfairness: 'those relating to the making of treaties,[28] the defence of the realm,[29] the prerogative of mercy,[30] the grant of honours, the dissolution of Parliament and the appointment of ministers'.[31] Another is the power of the Attorney-General to 'lend his or her name to relator proceedings'.[32] Nor can the grounds on which payments of *ex gratia* compensation are made or refused be judicially reviewed,[33] unless criteria for the payment of such compensation are published.[34] On the other hand, it has been held that exercises of the power to issue passports can be reviewed[35] unless, for example, the particular case involves

[27] Note that under s 21(1) of the HRA, exercises of prerogative powers by Order in Council (a form of non-Parliamentary legislation) are classified as 'primary legislation' for the purposes of the Act. This means that they are reviewable under s 4 of the Act but not under s 6. To this extent, the source of power is relevant to reviewability. See further DB Squires, 'Judicial Review of the Prerogative after the Human Rights Act' (2000) 116 *LQR* 572; P Billings and B Pontin, 'Prerogative Powers and the Human Rights Act: Elevating the Status of Orders in Council' [2001] *PL* 21.

[28] *Blackburn v Attorney-General* [1971] 1 WLR 1037; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552.

[29] ie national security. This was held to be in issue in the *GCHQ* case itself. See also *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400.

[30] But see *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349; *Lewis v Attorney-General of Jamaica* [2000] 1 WLR 1785.

[31] [1985] AC 374, 418.

[32] *Gouriet v Union of Post Office Workers* [1978] AC 435. See also *R v Solicitor General, ex p Taylor* (1996) 8 Admin LR 206 (criticized by DJ Feldman and CJ Miller, 'The Law Officers, Contempt and Judicial Review' (1997) 113 *LQR* 36).

[33] *R v Secretary of State for the Home Department, ex p Harrison* [1988] 3 All ER 86.

[34] *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; *R v Secretary of State for the Home Department, ex p Chubb* [1986] Crim LR 806.

[35] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 11.

matters of national security. Also reviewable are decisions of prosecuting authorities (other than the Attorney-General)[36] whether or not to institute proceedings, although the grounds of illegality may be limited.[37]

It is clear, too, that the reasonableness and fairness of the exercise of statutory powers (and the performance of statutory duties) might be unreviewable in a court if the particular case raises issues, such as matters of national security, which are considered unsuitable for judicial review. This follows from the basic proposition that the nature and content of a power rather than its source determines whether or not it is reviewable.

Decisions and acts which are unreviewable in a court are sometimes called 'non-justiciable'.[38] The idea of non-justiciability is complex,[39] but may be said to involve an amalgam of several related ideas. The first concerns what might be called 'political questions': because courts are neither representative of nor responsible to the electorate, they should not pronounce on the reasonableness of decisions which raise issues of 'high policy'.[40] For example, the duty of the Secretary of State for Health under the National Health Service Act 1977 to promote the establishment of a comprehensive health service is, no doubt, non-justiciable: this duty could be enforced, if at all, only by the political process.

This example also illustrates a second idea which is sometimes referred to as 'polycentricity'.[41] A polycentric issue is one which involves a large number of interlocking and interacting interests and considerations. Fuller gave several examples of polycentric problems: how to divide a collection of paintings between two art galleries in equal shares; the task of establishing levels of wages and prices in a centrally planned economy; how to decide the positions in which members of a football team will play. By this definition, the question of what would count as a comprehensive health service could be said to be a polycentric one. Fuller argued that court proceedings and the judicial process

[36] *R v Solicitor General, ex p Taylor* (1996) 8 Admin LR 206.

[37] *R v Director of Public Prosecutions, ex p C* [1995] 1 Cr App R 136; *R v Inland Revenue Commissioners, ex p Mead* [1993] 1 All ER 772; Y Dotan, 'Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review? A Comparative Analysis of the Law in England and Israel' [1997] *PL* 513.

[38] Colloquially, 'no-go areas'.

[39] G Marshall in AG Guest (ed), *Oxford Essays in Jurisprudence, First Series* (Oxford: Clarendon Press, 1961), ch 10.

[40] For a discussion of the reviewability of Cabinet decisions see MC Harris, 'The Courts and the Cabinet: "Unfastening the Buckle"?' [1989] *PL* 251.

[41] LL Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard LR* 353.

('adjudication') are not suitable for the resolution of polycentric issues and disputes.

The essential feature of the judicial process that Fuller considered makes it unsuitable to deal with polycentric problems is its bipolar and adversary nature. It is designed for one party to put forward a proposition which the other party denies or opposes. For example, the claimant asserts that he or she owns a piece of land and the defendant denies it; or the claimant asserts that he or she is entitled to compensation for personal injuries from the defendant and the latter denies it. None of Fuller's examples lends itself to being dealt with in this all-or-nothing way. For example, one of the galleries might want the Picasso if it also gets the Cezanne but not the Turner; but it would not insist on the Picasso if it got the Turner; but would want both if it did not get the Cezanne. The other gallery might have an equally complex set of preferences, and the greater the number of works involved, the more complex the preference sets might become. The workers in an industry might claim a wage increase of £X and their employers might resist it and offer £Y; but the interests of another part of the economy might be affected in such a way by either proposal that neither is acceptable.[42] It might be impossible to decide who in particular should play in a particular position on the football field without knowing where other players are going to be: the permutations are numerous and interdependent. In all these cases some form of consultation of all interested parties and groups, and mutually acceptable or advantageous adjustment of the competing possibilities in as wide a context as possible, is desirable.

A good example in the administrative law context of a polycentric problem is provided by a motorway inquiry.[43] The ramifications of the decision whether or not to build a motorway are enormous. At stake are not only the interests of potential motorway users and of persons whose land might be compulsorily acquired to provide a route for the motorway. Also involved are the inhabitants of villages and towns which will be

[42] An example of this sort of difficulty in English law is *Launchbury v Morgans* [1973] AC 127 in which the House of Lords declined to extend the vicarious liability of the owner of a car for negligence of its driver because it lacked information about the impact this would have on the insurance industry. Many issues with which governments have to grapple are so complex that no matter how well-informed the decision-maker, it is not possible confidently to predict all the likely consequences or knock-on effects of any particular decision. Courts are particularly handicapped in dealing with such issues.

[43] eg *Bushell v Secretary of State for the Environment* [1981] AC 75. See also *Ridge v Baldwin* [1964] AC 40, 72, 76 *per* Lord Reid; and R Baldwin, *Regulating the Airlines* (Oxford: Clarendon Press, 1985), chs 10 and 11. See also *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42.

relieved of through-traffic by the motorway. The railways may have an interest in inhibiting the development of alternative means for the transport of goods. Improved transport and communications facilities provided by the motorway may benefit some businesses at the expense of others; and motorways have, of course, serious environmental effects which lovers of the countryside and people who live near the proposed route will be anxious to avoid. Not only would accommodation and compromise between these various interests be desirable, but also it may be that the best solution would be some alternative to a motorway, or some alternative route not already considered. The complexity of the issues involved makes the model of bipolar adversary presentation of fixed positions by parties in conflict seem inappropriate to the sound resolution of the issues involved.

It is important to realize, however, that problems do not present themselves pre-labelled as polycentric or not. It depends on how they are viewed. Many problems that we are prepared to treat as bipolar have ramifications that could be taken into account if they were thought to be as important as the impact of the decision on the two contestants.[44] For example, the decision in *Paris v Stepney BC*,[45] in which it was decided that the employer of a one-eyed motor mechanic had a special duty of care to provide him with goggles to protect his good eye, may have had the perhaps unexpected and certainly undesired consequence of making it harder for disabled workers to get jobs in which they need special protection. The wider interests of disabled people could not easily have been taken into account in that case, but they were undoubtedly relevant. Similarly, we could decide the question of whether a motorway should be built solely by considering whether landowners, whose property is to be acquired, will be properly compensated; but to do so would be to ignore a large number of other important interests. Very many court decisions have an impact far beyond the interests of the litigants, if only because the doctrine of precedent makes them relevant to the affairs of others. The bipolar adversary process often involves paying little attention to these wider interests. Furthermore, polycentricity is a matter of degree. How many of the ramifications of a particular decision ought to be explicitly taken into account by the decision-maker?

A third idea underlying the concept of justiciability is related to the second. As one might expect, the procedures followed by courts are designed to deal with bipolar disputes in an adversary way. The logic of

[44] JA King 'The Pervasiveness of Polycentricity' [2008] *PL* 101.
[45] [1951] AC 367.

adversary adjudication is that the decision of the court should be based on the case put to it by the parties in dispute and not on material or information supplied by third parties; and rules of evidence are designed to achieve this result. On the other hand, polycentric disputes can be satisfactorily resolved only if the solution takes account of the interests of all affected parties and if the decision-maker has access to all relevant information and opinions from whatever quarter they come. Court procedures are not well-adapted to resolving polycentric disputes, and this is a good reason why courts should decline to entertain polycentric disputes.[46]

On the other hand, we will see later in this chapter that the rules governing who may initiate and intervene in judicial review proceedings are generous and permissive, suggesting that judicial review should be understood as a mechanism for protecting the interests not merely of individuals directly affected by administrative action but also of stakeholders more generally and even of the public at large. The more liberal the rules of access and intervention, the more likely that polycentric issues will arise in judicial review proceedings. Whether this is thought desirable or not depends on views about the proper function of courts and tribunals in the governmental process and their suitability for addressing and resolving polycentric issues.

A fourth idea implicit in the concept of non-justiciability is that of expertise: there are some decisions that can only properly be made and reviewed by experts in the relevant area. On some such basis, courts have refused to review decisions about the grading of examination papers by university examiners;[47] a decision to remove a person from a list of approved foster parents on grounds of reputation, character, and temperament;[48] and a 'run-of-the-mill management' decision to terminate a police officer's secondment to a special investigation unit.[49] This approach should not be taken too far. The thing that judges are expert in is law: they are very often not expert in the subject matter of the disputes which come before them. This does not relieve judges of the need to decide technical issues arising in litigation: expert testimony is given and judges are often required to choose between the conflicting testimony of expert witnesses called by opposing parties. Nevertheless, in some cases

[46] J Allison, 'The Procedural Reason for Judicial Restraint' [1994] *PL* 452.
[47] *Thorne v University of London* [1966] QB 237.
[48] *R v Wandsworth LBC, ex p P* (1989) 87 LGR 370.
[49] *R (Tucker) v Director General of the National Crime Squad* [2003] ICR 599.

at least, an argument from lack of expertise might well support a refusal by a judge to hear a particular dispute.

The idea of non-justiciability can be distinguished from that of judicial restraint (or 'deference') in reviewing public decisions. If a decision is non-justiciable the court will decline to review it at least on grounds of unreasonableness or unfairness. However, the arguments that underlie the concept of justiciability can also be used to support the idea that in reviewing public administration, courts should award remedies to aggrieved parties only in cases where the public administrator has gone wrong in some fairly extreme way or only on grounds that do not raise non-justiciable issues. However, the willingness of courts to review public administration has increased markedly in recent years, and it may be that there are very few, if any, types of public decisions that are non-justiciable in the strict sense of not being subject to judicial review at all.[50]

12.2 EXCLUSION OF REVIEW

12.2.1 EXCLUSION BY STATUTORY PROVISION

In general, statutory provisions will be interpreted as excluding judicial review only if the very clearest of words to that effect are used.[51] For instance, it has been held that a provision in a statute that regulations made under the statute will take effect as if enacted in the statute (ie they will be unchallengeable as if they were made by Parliament) does not prevent a court holding a regulation to be illegal.[52] A provision that a decision shall not be subject to appeal (or that it shall be 'final') does not exclude judicial review.[53] But even very clear words may be narrowly interpreted.[54] In *Anisminic Ltd v Foreign Compensation Commission*[55] it was held that a statutory provision that decisions of the Commission were not to be 'called in question in any court of law' was ineffective to exclude the quashing of a decision affected by 'jurisdictional' error of

[50] P Daly, 'Justiciability and the "Judicial Question" Doctrine' [2010] *PL* 160.

[51] eg *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475.

[52] *Minister of Health v R (on the Prosecution of Yaffe)* [1931] AC 494; such provisions are no longer used.

[53] *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574; *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475.

[54] An attempt by the government in 2003 to enact a provision that would have excluded judicial review of immigration decisions was defeated by vociferous opposition from the legal profession and the judges: R Rawlings, 'Review, Revenge and Retreat' (2005) 68 *MLR* 378.

[55] [1969] 2 AC 147.

law: its only effect was to prevent a decision being quashed for 'non-jurisdictional' error of law.[56] The significance of *Anisminic* has increased since the time it was decided because all errors of law made by administrators are now classified as 'jurisdictional', which means that they bring illegality in their wake.

Of course, *Anisminic* is authority only in relation to the precise wording of the provision in issue in that case, and it would not prevent a court interpreting different wording more favourably to the decision-maker. So, for example, more recent authority suggests that a provision to the effect that the issuing of a certificate 'shall be conclusive evidence' that the conditions for the issue of the certificate had been satisfied would normally be effective to exclude judicial review of the decision to issue the certificate.[57] A clause giving a tribunal exclusive jurisdiction over claims against the intelligence services under s 7 of the HRA has been held not to fall foul of the *Anisminic* principle despite the fact that the statute unambiguously ousted judicial review of the tribunal's decisions.[58]

12.2.2 EXCLUSION BY ALTERNATIVE REMEDIES

As a matter of discretion, permission to make a claim for judicial review may not be given if an equally or more 'convenient, beneficial and effectual' alternative remedy is available.[59] The mere existence of an alternative remedy does not exclude judicial review.[60] For example, it is in the discretion of the court whether or not to award a mandatory order to enforce the performance of a statutory duty despite the existence of a statutory default power.[61] However, it has often been said that judicial

[56] See also *R v Maidstone Crown Court, ex p Harrow LBC* [2000] QB 719 (provision excluding judicial review of matters arising out of trials on indictment ineffective where it is alleged that the trial court lacked jurisdiction and there is no other remedy); *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228.

[57] *R v Registrar of Companies, ex p Central Bank of India* [1986] QB 1114. The court was told that there were some 300 such clauses on the statute book.

[58] *R (A) v B* [2010] 2 WLR 1.

[59] *R v Paddington Valuation Officer, ex p Peachey Property Corporation Ltd* [1966] 1 QB 380; *R v Hillingdon LBC, ex p Royco Homes Ltd* [1974] QB 720; *Scott v National Trust* [1998] 2 All ER 705.

[60] *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533; *R v Bedwellty Justices, ex p Williams* [1997] AC 225; *R v Director of Public Prosecutions, ex p Kebeline* [2000] 2 AC 26. But the fact that the claimant has no remedy alternative to judicial review does not necessarily mean that permission will be granted to make a CJR: *R (Tucker) v Director-General of the National Crime Squad* [2003] ICR 599.

[61] *R v Inner London Education Authority, ex p Ali* (1990) 2 Admin LR 822; *R v Secretary of State for the Environment, ex p Ward* [1984] 1 WLR 834. The exercise of default powers is

review will be allowed in the face of an alternative remedy only in exceptional cases.[62] Judicial review might be refused on the ground that the alternative dispute-settling body possessed relevant expertise which the court lacked; or that the case raised issues which could be considered by the alternative body but not by the court on judicial review; or that the alternative body's procedure was better suited to resolving the case than judicial review procedure;[63] or that the alternative procedure was likely to be more speedy than judicial review.[64] Permission to make a claim for judicial review may be refused even if there is no alternative 'remedy' 'if a significant part of the issues between the parties could be resolved outside the litigation process' (eg by mediation or a statutory or non-statutory complaint procedure).[65]

Even so, judicial review may be allowed, despite the existence of an alternative remedy, if the claimant alleges bias or procedural irregularity,[66] malice on the part of the decision-maker,[67] lack of jurisdiction, or breach of human rights.[68] Even in cases where the claimant has pursued the alternative remedy, permission for judicial review may be granted if the alternative procedure appears unlikely to produce a satisfactory outcome;[69] or if it has become seriously delayed.[70]

12.2.3 THE IMPACT OF EU AND HUMAN RIGHTS LAW

Mrs Johnston was a reserve officer in the Royal Ulster Constabulary. Her contract of employment was not renewed because there was a policy that women officers should not carry arms and, as a result, there were

itself subject to judicial review: eg *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014. The existence of a statutory default power can also affect the availability of private-law causes of action such as nuisance: *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42; or unjust enrichment: *Child Poverty Action Group v Secretary of State for Work and Pensions* [2011] 2 WLR 1.

[62] eg *R v Chief Constable of Merseyside Police, ex p Calveley* [1986] QB 424, 433 (Lord Donaldson MR); *R v Panel on Takeovers and Mergers, ex p Guinness Plc* [1990] 1 QB 146, 178; *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475.

[63] Because, for example, the claim raises significant factual questions for the resolution of which judicial review procedure is not designed: *R v Falmouth and Truro Port Health Authority, ex p South West Water Ltd* [2000] 3 All ER 306.

[64] *R v Birmingham City Council, ex p Ferrero Ltd* (1991) 3 Admin LR 613; *R v Falmouth and Truro Port Health Authority, ex p South West Water Ltd* [2000] 3 All ER 306.

[65] *Cowl v Plymouth City Council* [2002] 1 WLR 803.

[66] *R v Hereford Magistrates' Court, ex p Rowlands* [1998] QB 110.

[67] *R v Birmingham City Council, ex p Ferrero Ltd* (1991) 3 Admin LR 613.

[68] *R (Sivasubramanian) v Wandsworth County Court* [2003] 1 WLR 475; *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533.

[69] *R v Ealing LBC, ex p Times Newspapers Ltd* (1985) 85 LGR 316, 331.

[70] *R v Chief Constable of Merseyside Police, ex p Calveley* [1986] QB 424.

enough full-time women officers in the RUC to do all the jobs open to women. When Mrs Johnston made a claim to an industrial tribunal that she had been a victim of sex discrimination, the Secretary of State issued a certificate (which the relevant statute said was 'conclusive') that she had been dismissed on grounds of national security. This certificate deprived the tribunal of jurisdiction. Sex discrimination in employment is a matter dealt with by EU law, and the tribunal referred a number of questions to the ECJ which held, *inter alia*, that the Order in Council under which the certificate was issued was inconsistent with a requirement of EU law that the right of men and women to equal treatment recognized by EC law should be effectively protected by national legal systems.[71]

It is clear, therefore, that rules of English law which restrict access to courts, tribunals, and remedies may fall foul of EU law; and the greater the restriction, the more likely they are to do so. On the other hand, being required to have recourse to one remedy rather than another would not be contrary to EU law unless the latter gave significantly less effective protection to the aggrieved party than the former.

Provisions excluding judicial remedies, and rules about the effect of alternative remedies may be incompatible with Art 6 of the ECHR (right to a fair hearing by an independent and impartial tribunal), or with Art 13 (right to an effective remedy for breaches of the ECHR).

12.3 ACCESS

12.3.1 STANDING

To be entitled to make a claim for judicial review the claimant must have standing (or *locus standi*). The requirement of standing applies only to cases in which the claimant alleges that a public administrator has committed a 'public-law wrong'. Breaches of the rules and principles of administrative law are public-law wrongs in this sense. Standing is not normally a requirement for bringing a 'private-law claim'—for instance, a claim in tort or for breach of contract—against a public agency. There are certain private-law concepts that resemble rules of standing: for example, duty of care in the tort of negligence, the principle that breach of a statutory duty will be actionable in tort only if the duty is owed to the claimant as an individual (as opposed to the public generally), and the doctrine of privity of contract. However, these

[71] *Johnston v Chief Constable of Royal Ulster Constabulary* [1987] QB 129.

are not seen as separate from the rules that define the relevant wrong, but as part of the definition of the wrong. In administrative law, on the other hand, rules of standing are seen as rules about entitlement to complain of a wrong rather than as part of the definition of the wrong. The explanation for this may be that public-law wrongs are first and foremost wrongs against the public; they infringe the public's right to be lawfully governed. Thus the wrong is defined in terms of the public interest whereas the right to initiate legal proceedings in respect of it is described in terms of the claimant's interest in the matter.

12.3.2 PERSONAL STANDING

Before 1978 the standing requirement for judicial review varied according to the remedy sought by the claimant. Order 53 of the Rules of the Supreme Court—the predecessor to CPR Part 54—introduced (in 1978) a common standing rule applicable to all judicial review claims brought under that Order, namely that the claimant was required to have 'a sufficient interest in the matter to which the application[72] relates'.[73] This formulation gave the courts more or less unfettered discretion to rewrite the standing rules, and its effect was to render the existing rules more or less defunct. The rule was repeated in s 31(3) of the Senior Courts Act 1981. CPR Part 54 makes no mention of standing, but the Supreme Court Act provision is still in force.

The leading case on the meaning of the 'sufficient interest' test is *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* (the *Fleet Street Casuals* case).[74] In this case the applicant (a trade association) challenged a tax amnesty granted by the Revenue to casual workers in the newspaper industry: the Revenue had agreed not to seek to recover unpaid tax provided the workers ceased their tax-evading tactics in the future. It was held that the applicants lacked a sufficient interest in the matter because the Revenue had acted within the discretion permitted to it in the day-to-day administration of the tax system. There was some disagreement amongst the judges about whether the test of sufficient interest varied according to the remedy

[72] Under Order 53, judicial review proceedings were called 'applications' rather than 'claims'.

[73] Does this mean the outcome of the challenge or the arguments supporting it? Contrast *R (Kides) v South Cambridgeshire DC* [2003] 1 P & CR 19 (outcome) with *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] 1 CMLR 19 (arguments).

[74] [1982] AC 617. At the time of this case, many national newspapers had their premises in Fleet Street.

sought. In *R v Felixstowe Justices, ex p Leigh*[75] it was made clear that standing is related to the claimant's interest and not to the remedy sought. In that case it was held that a journalist lacked standing for a mandatory order requiring the chair of the justices to reveal the names of the magistrates who had heard a particular case, but that he did have standing for a declaration that a policy of not disclosing the names of justices who heard certain types of cases was contrary to the public interest and unlawful. The point was that the journalist's investigative purpose was sufficiently served by the declaration, and that he did not need to know (and had no sufficient interest in knowing) the identities of the justices who had heard the particular case. The implication of this decision is that whether or not a claimant has standing does not depend on which remedy is sought. It so happened that two different remedies were sought in this case, but the decision on the issue of standing would have been the same even if the applicant had sought two declarations in different terms.

The *Fleet Street Casuals* case established that the question of whether an interest is sufficient is partly a matter of legal principle (what do earlier cases say about standing?) and partly a question to be decided in the light of the circumstances of the case before the court. So it will often be impossible to be sure, in advance of litigation, whether any particular applicant has a sufficient interest. The question of sufficient interest has to be judged in the light of relevant statutory provisions—what do they say or suggest about who is to be allowed to challenge decisions made under the statute? For example, suppose a statute gives a Minister two different but related powers. Suppose further that the statute provides that before the Minister exercises power A, he or she must consider representations made by 'any person', and that before the Minister exercises power B, he or she must consult a particular government body with responsibility for some relevant aspect of government policy. It could be argued that these provisions would justify allowing any person to challenge exercises of power A, but also applying a more restrictive standing rule (perhaps something like 'special interest') to challenges to exercises of power B on the ground that Parliament had intended the government body in question to be the prime guardian of the public interest in the exercise of power B.

Fleet Street Casuals also established that sufficient interest has to be judged in the light of the substance of the claimant's complaint. Looking

[75] [1987] QB 582.

at the substance of the complaint has a number of purposes. There is no point granting leave to a person with sufficient interest if it is clear, for example, that the case is hopeless on its merits and is bound to fail for that reason; or that it raises only non-justiciable issues. The *Felixstowe Justices* case illustrates another way in which standing is related to the substance of the claim: just as the journalist had a sufficient interest only in the general policy of secrecy and not in its application to a particular case, so the remedy to which he was entitled related only to the general policy. In other words, whatever the claimant's interest in the subject matter of the application may be, that interest not only determines whether the claimant has standing, but also dictates the nature and terms of the relief which the applicant can expect.

Finally, whether the claimant's interest is sufficient depends to some extent on the seriousness of the alleged breach of administrative law. Whatever the claimant's interest, the more serious the breach, the more likely will that interest be sufficient. This last point raises a fundamental question about the nature and function of standing rules. There is a sense in which standing is a preliminary question, separate from that of the substance and merits of the claim: standing rules determine entitlement to raise and argue the claim, and it makes little sense to say that entitlement to argue the claim depends on whether the claim is a strong one. Only if the chance of failure at the end of the day approaches certainty should the likely outcome affect the question of access to the court.

This argument assumes that there is some value in separating the issue of entitlement to apply for judicial review from the question of entitlement to a remedy at the end of the day. A counter-argument might be that standing rules are just one mechanism for weeding out hopeless or frivolous cases at an early stage and protecting public administrators (rightly or wrongly) from harassment by 'professional litigants' or 'busybodies'[76] meddling in matters that do not really concern them. If this assertion is correct, it would not matter if the standing requirement was abolished entirely, provided some other mechanism was put in its place for weeding out hopeless and crank cases. The requirement of obtaining permission to proceed with a judicial review claim under CPR 54.4 performs this function, and this may explain why standing is largely a non-issue in English law.

[76] Who else would expend the time and resources necessary to mount a hopeless case?

12.3.3 REPRESENTATIVE STANDING

A representative claimant is one who comes to court not to protect their own interests but to represent the interests of other parties not before the court. Three different types of representative standing can usefully be distinguished: surrogate standing, associational standing, and citizen standing.[77] Surrogate standing refers to a situation in which the claimant purports to represent an individual with a personal interest in the claim. Unless there was some good reason why that individual should not make the claim personally (such as the individual's age or mental condition), a court would be unlikely to accord standing to a surrogate.[78] Associational standing refers to a situation in which the claimant purports to represent a group of individuals who have a personal interest in the claim.[79]

Citizen (or 'public-interest') standing refers to a situation in which the claimant purports to represent 'the public interest' as opposed to the interests of any particular individual(s). Citizen standing can be supported by arguing that because Parliament is under the effective control of the government and is relatively ineffective as a forum for holding the executive accountable, courts can and should provide an alternative forum for the airing of widely held grievances about the way the country is being run and for ensuring that public functionaries observe the law. On the other hand, it might be said that the more the courts are opened up to arguments about the interests of the public or of sections of the public rather than of individuals, the more likely are the judges to be drawn into debates that ought to be held in the political arena and not in courts. The courts, it might be said, should not provide a 'surrogate political process' in which battles that have been fought and lost elsewhere can be reopened. A middle path might be to distinguish between public interests that are quite uncontroversial and, in some sense, of fundamental constitutional importance (for instance, that there be 'no taxation without Parliamentary approval'), and interests that are sectional or politically controversial. It might be thought appropriate that the courts should protect basic principles on which society and

[77] For more detailed discussion see P Cane, 'Standing, Representation and the Environment' in I Loveland (ed), *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995), ch 5.

[78] *R v Legal Aid Board, ex p Bateman* [1992] 1 WLR 711.

[79] A representative claimant cannot have standing unless the persons represented have a sufficient interest in the subject matter of the claim: *R v Secretary of State for the Environment, ex p Rose Theatre Trust Ltd* [1990] 1 QB 504.

government is based when asked to do so by ordinary citizens, but not that they should mediate between sectional and contested points of view about the way government and society should operate.[80]

Whatever the justification for citizen standing, it is clear that English law allows 'citizen' or 'public-interest' actions. In the *Felixstowe Justices* case (mentioned earlier) it was held that the claimant journalist was entitled to represent the public interest as a 'private Attorney-General'. It has also been held that a taxpayer would have standing to challenge the legality of an Order in Council authorizing the payment of public money to the European Union.[81] In one case a citizen with a 'sincere concern for constitutional issues' was held to have standing to challenge ratification of the Maastricht Treaty on European Union;[82] and in another a mother was allowed to challenge government guidelines to doctors about the giving of contraceptive advice to girls under the age of 16.[83] In none of these cases did the individual claimant allege a personal interest in the outcome of the litigation. Organizations and groups may also bring public-interest actions. For example, a trade union was allowed to challenge a decision by the Home Secretary to change the basis on which criminal injuries compensation was awarded;[84] and a non-governmental organization was allowed to challenge a decision to provide funding for the building of a dam in Malaysia out of the foreign aid budget.[85] Statutory bodies may also be accorded public-interest standing: for instance, the Equal Opportunities Commission was allowed to challenge legislation on the ground of inconsistency with EC law.[86]

[80] P Cane, 'Open Standing and the Role of Courts in a Democratic Society' (1999) 20 *Singapore LR* 23.

[81] *R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657.

[82] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552. In *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546 it was held (obiter) that an individual might not be granted standing to raise an issue of public interest if the claim is motivated by 'ill-will or some other improper purpose' (at [23]) as opposed to a genuine desire to protect the public. The question of whether and when a claimant's motives ought to affect the success of the claim is complex (see 11.3.2.1). This holding might suggest, for instance, that organizations are more likely than individuals to be granted public-interest standing because they are, perhaps, less likely to be driven by unacceptable motives.

[83] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112.

[84] *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513.

[85] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 115.

[86] *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1. Ironically, it was held that an individual co-claimant, who had a personal interest in the

English law also seems to recognize associational standing. The applicant in the *Fleet Street Casuals* case was a trade association which purported to represent its members, but the House of Lords did not consider this a reason not to accord the applicant standing—indeed, the representative nature of the applicant was not mentioned. It has also been held that the Child Poverty Action Group (a non-governmental organization that represents the interests of social security claimants) has standing to make applications for judicial review of decisions in the area of social security.[87] Greenpeace—the non-governmental environmental organization—has been accorded standing to challenge authorizations for the discharge of nuclear waste from a reprocessing plant at Sellafield in Cumbria partly on the basis that it had some 2,500 'supporters' in the affected area.[88] There are some good reasons why courts should, in principle, allow associational claims: they may facilitate access to justice by making it easier for groups (especially the poor and unorganized) to invoke the judicial process; and they may promote the efficient conduct of litigation by allowing numerous bilateral disputes, which raise similar issues, to be resolved in one set of proceedings.

It must be said, however, that English law does not draw the distinction between associational and public-interest standing; and in the *Greenpeace* case, at least, there is some doubt about whether the claimant was accorded standing as a representative of personally interested individuals or as a representative of the public. Nevertheless, the distinction is important for two reasons. First, the sort of arguments which could be used to support a challenge to a decision in the name of the public may be different from the arguments which could be used on behalf of a group of personally interested individuals. In other words, the public's interest in a decision may be different from that of a group of individuals or a discrete section of the public. Secondly, it may be argued that a claimant can plausibly purport to represent particular individuals, and should be allowed to do so before a court, only if the claimant has taken adequate steps to ascertain the views of those individuals and whether they want the claim to be made on their behalf. In no claim for judicial review brought before an English court by a

claim, lacked standing on the basis that the proper way for her to challenge the legislation was in an action for compensation before an employment tribunal.

[87] *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1990] 2 QB 540, 556.

[88] *R v Inspectorate of Pollution, ex p Greenpeace Ltd (No 2)* [1994] 3 All ER 329. For more detailed discussion of these cases see P Cane, 'Standing up for the Public' [1995] *PL* 276.

representative claimant has the question of whether the claimant had a 'mandate' from the represented been raised.

Apart from this issue of mandate, does the law require representative claimants to have any other qualifications? In the case of public-interest actions brought by individuals, it seems that anyone who is genuinely concerned about the issues involved can make a judicial review claim. By contrast, in cases where standing has been granted to non-governmental organizations, courts have remarked upon the respectability of the claimant, its experience, expertise, and financial resources, thus implying that standing might not be granted to a group or organization which was thought 'unsuitable' in some sense. In my view, if an organization or group claims standing on an associational basis, it should be required to demonstrate that it has an appropriate mandate from those it purports to represent;[89] but if it can do this, no other qualifications should be required. So far as public-interest actions are concerned, if they are to be allowed at all, then in my view, any genuinely concerned individual or group should be allowed to represent the public interest.

The concern that the claimant should be suitably qualified perhaps springs from three worries. One is that the claimant may in fact be seeking to further its own interests or a sectional interest rather than the 'public interest'. This concern can be met by allowing public-interest actions only in cases where the public interest is genuinely at stake and by requiring the applicant to restrict its case to that interest. A second worry is that the claimant may not be able to pay the defendant's costs if the application is unsuccessful. This worry should be addressed through rules as to costs and the funding of litigation (see 12.3.8), not through the rules of standing.

A third worry is that the claimant may not be able to present the case effectively if it lacks adequate resources, knowledge, and experience. This is not a consideration that is taken into account in ordinary litigation, and it suggests that the judicial role in public-interest litigation is different from that in other types of litigation. This suggestion finds support in the way that the law deals with the related issue of intervention in judicial review proceedings initiated by someone else (see 12.3.6).

12.3.4 WHAT IS A SUFFICIENT INTEREST?

The guidance given in the *Fleet Street Casuals* case as to the meaning of the term 'sufficient interest' is very abstract. Can anything more

[89] For a different view see C Harlow, 'Public Law and Popular Justice' (2002) 65 *MLR* 1, 4–5.

concrete be said on this topic? This question has two parts. First, what can be said about when an individual has a sufficient interest in the subject matter of a claim?[90] Secondly, what can be said about when the public has an interest to support a public-interest claim? An individual would obviously have a sufficient interest in a decision that adversely affected the claimant's health or safety. A person would also have a sufficient interest in a decision that affected his or her property or financial well-being. For instance, neighbours have sufficient interest to challenge planning decisions in respect of neighbouring land. Producers and traders have standing to challenge the grant of a licence or other benefit to a competitor;[91] and a taxpayer might have standing to complain about the favourable treatment of a competitor by the Revenue.[92] The expenditure of time, energy, and skill in caring for a particular species of wildlife or some feature of the natural environment could give a person a sufficient interest in a decision adversely affecting that species or feature.[93] An aesthetic interest in the built environment may also generate a sufficient interest.[94]

What about public interests? It seems clear that the public has a sufficient interest in the observance of basic constitutional principles such as 'no taxation or expenditure without Parliamentary approval'.[95] The public also has an interest that governmental powers, such as that to ratify treaties,[96] or to set up a non-statutory compensation scheme,[97] or to issue informal guidance on medical matters (for instance),[98] should be exercised in accordance with law. The public has an interest that UK legislation should comply with EU law.[99] It also has an interest in freedom of information.[100] Normally the public would not have a

[90] This question is relevant both to claims by individuals on their own behalf and 'associational' claims on behalf of other individuals.

[91] *R v Thames Magistrates' Court, ex p Greenbaum* (1957) 55 LGR 129.

[92] *R v Attorney-General, ex p Imperial Chemical Industries Plc* [1987] 1 CMLR 72.

[93] *R v Poole BC, ex p Beebee* [1991] COD 264.

[94] *Covent Garden Community Association Ltd v Greater London Council* [1981] *JPL* 183; *R v Hammersmith & Fulham LBC, ex p People Before Profit Ltd* [1981] *JPL* 869; *R v Stroud DC, ex p Goodenough* [1992] *JPL* 319.

[95] *R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386.

[96] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552.

[97] *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513.

[98] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112.

[99] *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.

[100] *R v Felixstowe Justices, ex p Leigh* [1987] QB 582.

sufficient interest in the way an individual was treated by government but it may in a case, for instance, of exercise of planning powers in relation to a site of great public importance.[101]

So far as concerns challenges by citizens to government spending decisions, the law seems to draw a distinction between central and local government. It has long been clear that local taxpayers have standing to challenge a wide variety of decisions, including expenditure decisions, by local authorities; whereas the *Fleet Street Casuals* case suggests that taxpayers would not normally have standing to challenge spending decisions by central government. Local authorities owe a fiduciary duty to their ratepayers in the use of rate revenue (see 6.5.1), and the right of local taxpayers to challenge local authority spending decisions is a corollary of this duty. Central government, by contrast, owes no legal duties to taxpayers as such relating to the use of the 'tax pound'. There has been litigation in the US in which taxpayers have sought to challenge some use to which taxes have been put. The American cases draw a distinction between a genuine personal interest (which gives a right to sue) and generalized grievances about the way the country is being run (which do not). English law does not, of course, require a claimant for judicial review to have a personal interest, but courts in this country are almost certain to take the view that the way taxes are spent is a political question which the courts are not the proper bodies to consider, and that no taxpayer has sufficient interest to raise this matter in court.

12.3.5 STANDING UNDER THE HRA/ECHR

Under s 7(1) of the HRA a person may make a claim against a public authority on the ground that the authority has acted incompatibly with a Convention right (contrary to s 6) only if the person is (or would be) a 'victim' of the allegedly unlawful action. Section 7(3) provides that if the claim made is for judicial review, the claimant has 'sufficient interest' in the claim only if the claimant is (or would be) a victim of the action.[102] Furthermore, under s 7(1)(b), only a victim can 'rely on' a Convention right in legal proceedings in which it is alleged that a public authority has acted unlawfully under s 6. The victim test of standing is copied from Art 34 of the ECHR, and a person can be a victim for the purposes

[101] *Save Britain's Heritage v No 1 Poultry* [1991] 1 WLR 153.

[102] J Miles, 'Standing under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication' [2000] *CLJ* 133. However, the victim test does not apply to the Equality and Human Rights Commission: Equality Act 2006, s 30.

of the HRA only if they would be a victim for the purposes of Art 34 (HRA s 7(7)). This seems to mean that UK courts not only must take account of decisions of the ECtHR in deciding whether someone is a victim but that they are bound by such decisions.

Although the ECtHR applies the victim test flexibly and generously, it is significantly narrower than the sufficient interest test as it has been developed and applied in the non-HRA judicial review case law.[103] It would certainly rule out associational and public-interest claims in respect of action incompatible with a Convention right. But it would not prevent a corporation, organization, or group making a claim if the corporation, organization, or group itself was a victim.

Under Art 34 only a 'person, non-governmental organization or group of individuals' can complain of infringement of a Convention right. Because the UK government is bound by the ECHR, it cannot claim under Art 34. It is widely assumed that this rule applies to all agencies that are core public authorities under s 6 of the HRA, although this assumption has been questioned.[104] It is similarly assumed that the rule does not apply to hybrid public authorities, at least in relation to its private acts; and there is some ECtHR authority supporting this assumption.[105]

The adoption of the victim test has been much criticized. Nothing would have prevented the adoption of a more generous test in the HRA although doing so would not, of course, have affected access to the ECtHR. Some people think it undesirable that the standing rule should differ according to whether or not the claim is based on s 6 of the HRA. The strength of this objection depends on what the respective functions of administrative law and human rights law are considered to be. Liberalization of standing for judicial review may be seen as involving a reorientation of judicial review away from the protection of individual rights and interests against undue interference by public functionaries and towards regulation of the performance of public functions and

[103] Miles, 'Standing' (n 102 above), 137–8; R Clayton and H Tomlinson, *The Law of Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009), paras 22.29–22.49. The standing rule under EU law applicable to judicial review of acts of Community institutions is also more restrictive than the English rule: TC Hartley, *The Foundations of European Community Law*, 6th edn (Oxford: Oxford University Press, 2007), ch 12; A Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?' [2003] *CLJ* 72; E Berry and S Boyes, 'Access to Justice in the Community Courts: a Limited Right?' (2005) 24 *CJQ* 224.

[104] H Davis, 'Public Authorities as "Victims" under the Human Rights Act' (2005) 64 *CLJ* 315.

[105] Clayton and Tomlinson, *The Law of Human Rights* (n 103 above), 22.27.

deterrence of 'illegal' conduct. Sedley LJ expressed this view neatly when he said that administrative law is 'at base about wrongs, not rights'.[106] From this perspective, it might seem entirely unproblematic that the victim test should provide the standing rule for human *rights* claims. This argument is slightly complicated by the fact that many Convention rights (such as freedom of speech and the right to a fair trial) are also protected by the common law, and breach of such common law rights may provide grounds for a non-HRA judicial review claim. However, although the sufficient interest test applicable to judicial review claims can be applied widely, it could also be interpreted more narrowly along the lines of the victim test in cases where this seems appropriate. Claims based on breaches of fundamental rights might be such cases.

It should be noted also that under s 7, the victim test applies only to claims that a public authority has acted contrary to s 6. It does not, expressly at least, apply to an application for a declaration under s 4 that a provision of primary legislation is incompatible with a Convention right. Nor, apparently, would it prevent a non-victim from 'relying on' a Convention right in legal proceedings by alleging that some provision of primary legislation was incompatible with the right.[107]

12.3.6 INTERVENTION

In an adversary system such as the English system, litigation is basically a two-sided affair. In general, interested third parties are not given the opportunity to intervene and express their point of view about the matters in dispute between the claimant(s) and the defendant(s) even if their contribution would assist in achieving a sound resolution of the dispute. While it may be reasonable that third parties should not, in general,[108] be allowed to intervene in cases in which the claimant seeks to protect their own personal interests or the interests of some other individual(s), it seems much less reasonable to prevent people other than the claimant and the defendant from intervening in cases in which the claimant seeks to protect the public interest. Unless one takes the (implausible) view that the public interest is monolithic and obvious, it would seem unwise to give one person a monopoly on its protection. In a

[106] *R v Somerset CC, ex p Dixon* [1998] Env LR 111, 121.

[107] M Elliott, 'The Human Rights Act and the Standard of Substantive Review' [2001] *CLJ* 302, 322–34.

[108] An exception might be made for third parties who have a personal interest in the claim: S Hannett, 'Third Party Interventions: In the Public Interest?' [2003] *PL* 128, 130–1.

public-interest action the main difficulty may be to identify what the public's interest in the matter is. The public interest may, in fact, be many-faceted[109] and contested, and the claimant may be promoting a sectional interest rather than the public interest. Moreover, even if a public-interest claimant has expertise and experience relevant to the subject matter of the claim (and especially if it does not), it seems hard to argue that the court should be deprived of the wisdom and knowledge of other expert or experienced parties.

On the other hand, it is not obviously a good idea to allow extensive rights of public-interest intervention. As a result, court proceedings might become very much more complex, costly, and lengthy. The nature of the judicial process might be significantly changed so that courts hearing public-interest judicial review claims, instead of resolving cases by adjudicating upon the rights and obligations of the litigating parties, would do so by formulating public policy on the basis of consultations with the litigating parties and interveners. Such transformation of judicial proceedings might undermine the legitimacy of the courts by opening them to accusations of straying beyond their proper legal domain into the political sphere.[110] Here, then, is a dilemma: once the law allows 'public-interest claims', the case for allowing 'public-interest interventions' becomes strong, if not irresistible. At the same time, however, the potential disadvantages of too readily allowing public-interest interventions may argue against allowing public-interest claims in the first place.

Under CPR 54.7 the judicial review claim form must be served on 'any person the claimant considers to be an interested party'. An 'interested party' is a person (other than the claimant or the defendant) 'who is directly affected by the claim' (CPR 54.1(f)); and it seems that the term 'directly affected' covers only those with a personal interest in

[109] 'Polycentric': see 12.1.2.

[110] 'Interest group politics'—consultation of interested parties and groups—is a defining feature of so-called 'participatory' (as opposed to 'representative') democracy. Traditionally, courts—even in relation to public-law matters—have not been seen as democratic policy-making institutions. The danger inherent in a very liberal regime of standing and intervention rules is that courts may come to be seen as illegitimately providing a forum of political contestation for parties disappointed by the outcome of the mainstream policy-making process. To what extent should courts act as umpires of interest-group politics? Should standing and intervention rules be used to prevent the over-politicization of the judicial process? For a supportive assessment of intervention see M Arshi and C O'Cinneide, 'Third-Party Interventions: the Public Interest Reaffirmed' [2004] *PL* 69; and for a contrary view see C Harlow, 'Public Law and Popular Justice' (2002) 65 *MLR* 1.

the claim.[111] By contrast, under CPR 54.17 'any person may apply for permission (a) to file evidence; or (b) to make representations at the hearing of the judicial review'. As a result, a person may apply for permission to intervene even if they were not entitled to receive the claim form. In the higher courts, the making and granting of applications to intervene (especially by public agencies and NGOs) has increased significantly in recent years.[112] However, as in the case of representative standing, no distinction has been drawn between associational and public-interest interveners; and no principles have been developed about when interventions will be allowed, who will be allowed to intervene, or the form the intervention should take.

It has been proposed that in exercising its discretion to allow interventions, the court should consider whether the intervention would be likely to assist the court and whether it would cause undue delay or otherwise prejudice the rights of the parties to the action. Interventions would normally take the form of relatively short written submissions.[113] The court could attach conditions to a grant of leave to intervene (concerning the payment of costs, for instance), and it would specify the date by which the written submission would have to be filed. The makers of these proposals think that they strike a reasonable balance between the advantages and disadvantages of public-interest intervention which were canvassed above. Whether you agree may depend on your view about the proper role of the courts in regulating the performance of public functions.

Despite the narrowness of the victim test of standing under the ECHR, Art 36(2) gives the ECtHR power to allow interventions (both oral and written) by 'any person concerned'.[114] This combination of a narrow standing rule and a potentially generous approach to interventions suggests a view of the latter not as a corollary of a generous approach to standing but as a counter-balance to restricted rights of claim-initiation.

[111] *R v Legal Aid Board, ex p Megarry* [1994] COD 468; *R v Liverpool CC, ex p Muldoon* [1996] 1 WLR 1103; *R v Broadcasting Complaints Commission, ex p British Broadcasting Commission* (1995) 7 Admin LR 575.

[112] Hannett, 'Third Party Interventions: In the Public Interest?' (n 108 above); Justice, *To Assist the Court: Third Party Interventions in the UK* (2009).

[113] Justice/Public Law Project, *A Matter of Public Interest* (London, 1996). See also D Smith, 'Third Party Interventions in Judicial Review' [2002] *JR* 10.

[114] The HRA says nothing about intervention except that the government is entitled to be joined as a party to a claim for a declaration of incompatibility: s 5.

12.3.7 THE FUNCTIONS OF STANDING AND INTERVENTION RULES

What is the function of standing rules? A common answer is that they restrict access to judicial review. But why restrict access? One suggested reason is to protect public bodies (and the courts) from vexatious litigants ('busybodies') with no real interest in the outcome of the case but just a desire to make things difficult for public functionaries.[115] There are such litigants; but the requirement to obtain permission to make a judicial review claim should be adequate to deal with them. Other reasons for restricting access have been suggested: to reduce the risk that civil servants will behave in overcautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources;[116] to prevent the conduct of government business being unduly hampered and delayed by 'excessive' litigation; to ensure that the argument on the merits is presented in the best possible way and by a person with a real interest in presenting it;[117] to ensure that people do not meddle paternalistically in the affairs of others.[118] Arguably, each of these aims could be furthered by standing rules; but there are probably other ways in which each of them could be achieved. What is distinctive about standing rules is that they direct attention to the interest of the claimant in the outcome of the claim. The sort of interest the judicial review claimant is required to have will depend on what we think judicial review is for.

So far as personal standing is concerned, if the prime aim of judicial review is seen as being the protection of individuals (whether people or corporations), this would suggest and justify standing rules which require the claimant to have been specially affected by what was done or decided.[119] If judicial review is seen as going further and being concerned with the protection of groups as well as individuals, standing rules should only require that the claimant share some personal interest with others. If the prime function of judicial review is seen as being to provide remedies against unlawful behaviour by government, then there should be no requirement of personal interest.

[115] See eg *Broadmoor Hospital Authority v R* [2002] 2 All ER 727, 733 (Lord Woolf MR).

[116] These two reasons were suggested by Schiemann J in the *Rose Theatre Case* [1990] 1 QB 504.

[117] But quality of presentation and personal interest do not always go together.

[118] A requirement that an associational claimant be able to show that it has a mandate from the represented parties would reduce the risk of paternalism.

[119] TRS Allan, *Law, Liberty and Justice* (Oxford: Oxford University Press, 1993), 223–36.

So far as representative standing is concerned, the prime function of associational standing is to facilitate the protection of what might be called 'diffuse interests', that is interests shared by many people. If each member of a group has a personal interest which has been interfered with, the protection of that interest by court action is made much easier if one person can bring an action as representative of the group. Associational applications are particularly useful when the impact of the challenged action on any particular individual is too slight to justify litigation, but the aggregate impact on all members of the affected group is considerable. Viewed in this way, associational standing is a sort of substitute for a class or representative action,[120] that is, an action in which a large number of litigants can consolidate their claims into one for the purposes of having it decided by a court.

The function of public-interest standing is to facilitate the enforcement of legal limits on public powers. The two main questions in a public-interest action are whether the public functionary has acted illegally and whether the public has a justiciable interest in the subject matter of the claim—that is, an interest which the court should protect. If we were to say that the public always has a justiciable interest that the government should act legally, there would, in effect, be no issue of standing in such cases—the only question would be whether or not the respondent acted legally. As a test of standing, the requirement of public interest performs two functions: it marks the boundary between decisions in which the public have a legitimate interest and decisions in which only affected individuals have a legitimate interest; and it marks the boundary between public interests which are, and those which are not, suitable for protection by the judicial process. An illustration of the former function is the principle (derived from the *Fleet Street Casuals* case) that the general body of taxpayers normally has no legitimate interest in dealings between the Inland Revenue and any individual taxpayer. In performing the latter function, public-interest standing is really indistinguishable from the idea of justiciability (see 12.1.2).

Whereas standing rules regulate the initiation of claims that public functionaries have acted contrary to law, intervention rules regulate participation in claims initiated by others. The standard justification for allowing interventions is to assist the court to resolve the claim in the best possible way. Thus interventions can be allowed even though neither of the parties to the claim consents. Third-party interventions

[120] See CPR 19.II.

are most likely to be helpful in this way when the court conceives the issue facing it as having wide social or political ramifications. A liberal attitude to interventions is likely to go hand-in-hand with a public-interest standing rule. Interventions are less likely to be helpful in cases where the issues at stake are understood and defined more narrowly in terms of the claimant's personal interests.

One of the main arguments against a regime of broad public-interest standing and intervention rules is that it might fundamentally change the nature of the judicial process. However, rather than viewing such a change as an undesirable side-effect, we could say that bringing about such a change was the very reason for adopting such a regime of standing and intervention rules. This line of thought might lead us to reject the idea with which this section began—namely that the function of standing rules is to restrict access to judicial review. Instead, we might see standing rules as facilitating the presentation of a certain class of disputes to the courts for resolution; and, in conjunction with intervention rules, providing the court with sources of information and opinions for the appropriate resolution of those disputes. On this interpretation, the significant differences between various regimes of standing and intervention rules relate to the types of disputes they respectively allow to be brought before courts and the types of information and opinions they allow to be presented.

12.3.8 COSTS

One of the most important factors affecting access to judicial review is cost. Partly because of the procedural differences between judicial review and other civil proceedings (11.3.2), judicial review proceedings tend to be comparatively cheap. However, the basic rule of English law is that the loser must pay the winner's costs as well as their own; and the risk of having to pay the other side's costs may be a significant disincentive to making a claim. Some claimants for judicial review may receive legal aid for representation, which removes the risk;[121] but many do not. In particular, legal aid is available only to individuals,[122] whereas the

[121] Judicial review claims (and claims for damages against public authorities) form a priority category for funding under the legal aid scheme: see Legal Services Commission, *The Funding Code: Decision Making Guidance*, Parts 16 and 17 (see also Part 6 on HRA claims).

[122] This helps to explain the use of 'test case' strategy as an alternative to public-interest claims by NGOs. A test case is an individual claim sponsored by an organization and chosen because it raises issues common to a group of individual claims. The disadvantage of this strategy is that the individual claimant might be 'bought off' by the defendant with an out-

rules of standing have been liberalized precisely in order to make it possible for NGOs to make claims for judicial review.

A technique for ameliorating the chilling effect of potential costs liability for judicial review on claimants without legal aid[123] is the protective costs order (PCO).[124] 'The general purpose of a PCO is to allow a claimant of limited means access to the court . . . without the fear of an order for substantial costs being made against him . . .'[125] However, a PCO can be made only if the claimant has no personal interest in the outcome, the issues raised are of general public importance, and the claimant would probably withdraw the claim if the order is not made. A recent review of litigation costs has recommended instead a qualified one-way fee-shifting regime under which an unsuccessful claimant for judicial review would be required to pay no more by way of costs than is 'reasonable' in light of their financial means and their conduct of the claim.[126] In favour of this departure from the normal rule it can be argued that the permission procedure serves to weed out unmeritorious cases and that all judicial review claims serve a public interest in ensuring that public administrators act legally. On the other hand, it may be said that such a regime would impose an undue burden on public agencies especially if it encourages more judicial review claims.[127]

of-court settlement or the claim might be decided on issues personal to the claimant rather than common to the group.

[123] It has been held *Wednesbury* unreasonable for the Legal Services Commission to require as a condition of funding that the claimant seek a PCO: *R (E) v Governing Body of JFS* [2009] 1 WLR 2353.

[124] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2607.

[125] Ibid, [6].

[126] *Review of Civil Litigation Costs: Final Report* (London: TSO, 2010), ch 30. The Government has rejected the proposal: *Reforming Civil Litigation Funding and Costs in England and Wales—Implementation of Lord Justice Jackson's Recommendations. The Government Response*, Cm 804 (March 2011), para 27.

[127] A Tew, 'The Jackson Report and Judicial Review' [2010] *JR* 118.

13

Judicial Review: Remedies

The remedies available in a CJR fall into two broad groups. On the one hand there are 'public-law remedies'. These used to be known as the 'prerogative orders' of *certiorari*, prohibition, and mandamus. They are now called 'quashing orders', 'prohibiting orders', and 'mandatory orders' respectively.[1] On the other hand there are the 'private-law' remedies of declaration, injunction, damages, and restitution. Leaving damages and restitution aside, these remedies perform four main functions: ordering something to be done is the function of the mandatory order and the (mandatory) injunction; ordering that something not be done is the function of the prohibiting order and the (prohibitory) injunction; depriving a decision of legal effect is the function of the quashing order; and stating legal rights or obligations is the function of the declaration.

13.1 PUBLIC-LAW REMEDIES

13.1.1 QUASHING ORDERS

A quashing order deprives a decision of legal effect. There is a theoretical problem here because a decision which is illegal in the public-law sense is usually said to be void or a nullity, which means that the decision is treated as never having had any legal effect. A decision which has never had any legal effect cannot be deprived of legal effect. On this view, when we say that an order quashes (or 'sets aside') an illegal

[1] Into this category also fall injunctions under s 30 of the Senior Courts Act 1981 restraining a person from acting in an office in which the person is not entitled to act: see CPR 54.2(d). The remedy of *habeas corpus* is extremely important in the context of immigration control. The procedure for claiming the remedy is contained in RSC Order 54 (contained in Schedule 1 to the CPR). There is some reason to think that the rules governing the availability of *habeas corpus* are more restrictive than those governing the other judicial review remedies. For discussion see Law Com No 226, *Administrative Law: Judicial Review and Statutory Appeals*, Part XI (1994).

decision, what we really mean is that the order formally declares that from the moment it was purportedly made ('*ab initio*') the decision had no effect in law. Thus anything done in execution of the decision is illegal. This is the declaratory view of the effect of a quashing order. An alternative view is that an illegal decision is valid until a court decides that it is illegal, at which point it can quash it with retrospective effect.[2] On this view, a quashing order has a constitutive rather than a purely declaratory effect.

Even if the declaratory view of the quashing order is theoretically correct, and illegal decisions never have legal effect, it may not be possible or wise for a person simply to ignore such a decision, especially if it authorizes the government to act to that person's detriment. Apart from the fact that it is often unclear whether or not a decision is illegal (and so it would be unsafe just to ignore it), it is not the case that a void decision is forever void. However illogical it may seem, a void decision will become valid unless it is challenged within any time-limit for challenges by a claimant with standing, and unless a court exercises its discretion to award a remedy to the claimant.[3] Once the decision 'matures into validity' as it were, acts already done in execution of it also mature into legality because maturity is retrospective.[4] So whatever the position in theory, in practice, quashing orders are not just declaratory in effect.

13.1.2 PROHIBITING ORDERS

The prohibiting order, as its name implies, performs the function of ordering an agency to refrain from illegal action. Its issue presupposes that some relevant action remains to be performed, and this sets an internal time-limit after which the order could not issue (although an applicant can be denied the order because of undue delay even before the expiry of this time).

It used to be the law that quashing and prohibiting orders were available only against decision-makers who had a duty to act judicially.[5]

[2] See M Taggart, 'Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (Auckland: Oxford University Press, 1986).

[3] See 13.3 for discussion of the remedial discretion.

[4] In the constitutive view of the effect of quashing orders, illegal decisions are valid until quashed, and acts done under them are legally valid until the decision that supports them is quashed.

[5] *R v Electricity Commissioners, ex p Electricity Joint Committee Co* [1924] 1 KB 171, 205 (Atkin LJ).

The meaning of this phrase was never very clear, but it now seems that whatever it meant, the availability of these two remedies is not limited in this way.

13.1.3 MANDATORY ORDERS

Quashing and prohibiting orders are concerned with control of the exercise of discretionary powers whereas the mandatory order is designed to enforce the performance of duties. Breach of statutory duty can take the form either of nonfeasance (ie failure to perform the duty) or misfeasance (ie substandard performance). In certain circumstances,[6] a person who suffers damage as a result of a breach of statutory duty by a public functionary can bring an action in tort for damages or an injunction. Nonfeasance by public agencies can be remedied by an order requiring performance of the duty. The mandatory order (or a mandatory injunction) is the remedy for this purpose. A mandatory order sometimes issues in conjunction with a quashing order to require a public administrator whose decision has been set aside to repeat the decision-making process. In many cases of this type, the duty enforced by the mandatory order is not statutory but the common law duty, which every power-holder has, to give proper consideration to the question of whether or not to exercise the power.

13.1.4 QUASHING, PROHIBITING, AND MANDATORY ORDERS ARE PUBLIC-LAW REMEDIES

Quashing, prohibiting, and mandatory orders are not available against decision-makers who derive their powers solely from contract.[7] This limitation is technical and historical. It is concerned with defining the scope of judicial review. As we have seen,[8] it is not clear to what extent contractual bodies are subject to judicial review; but to the extent that they are, there is no good reason why they should not be amenable to a quashing order. Immunity from the prohibiting order is of no practical importance because the function of this remedy is also performed by the injunction, to which contractual bodies are amenable.

It is not clear whether a mandatory order is available in respect of any and every failure by a statutory authority to perform a statutory duty.

[6] See 8.3.

[7] *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, 882 *per* Lord Widgery CJ. They may be available against decision-makers that 'lack visible means of legal support': *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815.

[8] See 12.1.1.

Probably it is available only in respect of public duties. If this were not so a claimant could, by seeking a mandatory order, evade the restrictive rule that an action in tort for an injunction to restrain breach of statutory duty will lie only if the duty is owed to the claimant individually[9]—as we have seen, a person claiming a mandatory order only needs to have a 'sufficient interest' in the performance of the duty.

13.1.5 THE CROWN AND THE PUBLIC-LAW REMEDIES

The traditional rule was that prerogative orders of *certiorari*, prohibition, and mandamus (now quashing, prohibiting, and mandatory orders respectively) were not available against the Crown (ie central government) or any servant or officer of the Crown acting in his or her capacity as such.[10] The appropriate remedy against the Crown was the declaration. Now, however, it is clear that in judicial review proceedings, these remedies can be awarded against Ministers of the Crown acting in their official capacity because Ministers are constitutionally responsible for the conduct of government business.[11] Moreover, if an officer of the Crown disobeys a mandatory or prohibiting order, that officer personally may be held to be in contempt of court; and a Minister may be held to be in contempt of court in his or her official capacity if such an order is disobeyed by an officer of the Crown for whom the Minister is responsible. In the former case, the officer can be punished for the contempt; but in the latter case the Minister cannot be punished because of a legal principle that court orders cannot be 'executed' (that is, enforced) against the Crown. The effect of this principle is that as against the Crown, prohibiting and mandatory orders have only declaratory or admonitory (ie non-coercive) force.

Why is central government immune from the execution of court orders? Historically, the reason is that central government inherited most of the powers of the Monarch. This is why it is called 'the

[9] See 8.3.

[10] *R v Secretary of State for War* [1891] 2 QB 326, 334. This is a complicated topic. For a helpful exploration of some of the complexities see T Cornford, 'Legal Remedies against the Crown and its Officers Before and After *M*' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999).

[11] *M v Home Office* [1999] 1 AC 377; S Sedley, 'The Crown in its Own Courts' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford: Clarendon Press, 1998). To appreciate the full significance of this development it is necessary to know that at the time, although the declaration—which was available against the Crown—provided an alternative form of final relief, there was no such thing as an interim declaration. There is now: CPR 54.6(1)(c) and 25.1(1)(b).

Crown'. Because the Monarch was also seen as the 'fount of justice' and the courts were seen as the Monarch's, it was felt inappropriate that the courts should be able to coerce the Monarch's 'heir', the Crown, into complying with its orders or punish it for failure to do so.[12] Now, the courts take the view that central government can and should be trusted to obey their orders. Perhaps the judges fear that in any serious confrontation with the government, the courts would suffer. Certainly, the increasingly active and even aggressive use in recent years by the courts of their judicial review powers against central government has not been without its critics. At the end of the day, it may be that the strength of the courts must lie in the esteem they can command from government and people rather than in the power to fine or imprison for disobedience of their orders.

13.2 PRIVATE-LAW REMEDIES

The private-law remedies are so called because they were originally used only in private law and only later came to be used in public law.

13.2.1 INJUNCTION

The injunction may perform either a prohibiting or a mandatory function. The injunction found its way into public law partly as a means of enforcing public-law principles, especially the rules of procedural fairness, against non-governmental regulatory bodies that derived their powers from contract and so were not amenable to orders of prohibition or mandamus. This use of the injunction is now subject to the doubts noted earlier about the applicability of public-law principles to the conduct of contractual bodies.[13]

The other context in which injunctions are important in public law is that of 'interim relief'. When a party challenges the validity of a public decision, the claimant's interests might be irreparably damaged if, pending the hearing and resolution of the case by the court, it was open to the decision-maker to implement the decision. The main function of interim relief is to prevent this happening by ordering the defendant to refrain from giving effect to its decision pending the trial of the action. When a claimant seeks permission to make a judicial review claim, CPR 54.10(2) allows the court to order 'a stay of the proceedings

[12] A Tomkins, *Public Law* (Oxford: Oxford University Press, 2003), ch 2, esp 51–60.
[13] See 12.1.1.

to which the claim relates'. Such a stay of proceedings can be ordered against any defendant amenable to these orders, including the Crown.[14] However, the precise nature and effect of a stay of proceedings is unclear,[15] and as a result its usefulness as an interim remedy is limited.

The most important form of interim relief in both public and private law is the interim injunction. Traditionally, injunctions (whether final or interim) could not be awarded in proceedings against the Crown. Now, the position differs according to whether the proceedings are 'civil proceedings' or judicial review proceedings. Actions for torts, breaches of contract, and other private-law wrongs are civil proceedings for this purpose, while judicial review claims under CPR Part 54 are judicial review proceedings.[16] In judicial review proceedings injunctions, both final and interim, are available against Ministers of the Crown either in respect of their own conduct or in respect of conduct of servants or officers of the Crown for which they are constitutionally responsible. This position was first established in relation to interim injunctions in a case involving an alleged breach of EU law;[17] and it was later extended to injunctions generally and to breaches of English law.[18] A Minister or other officer of the Crown who fails to comply with an injunction can be held to be personally in contempt of court and can be punished for the failure. A Minister can be held in contempt in respect of failure to comply on the part of any servant or officer of the Crown for whose conduct the Minister is constitutionally responsible; but the Minister cannot be punished for such contempt (see 13.1.5).

A claimant who seeks an interim injunction is normally required to give an undertaking to compensate the defendant for irreparable monetary loss suffered as a result of compliance with the injunction in case the defendant wins at the hearing and the injunction is not made permanent but is discharged; but the court has a discretion not to require an 'undertaking as to damages'. If the defendant is a government agency, an undertaking may not be required if any damage likely to be suffered will be intangible or unquantifiable injury to the public. Where a government agency seeks an injunction against a private individual or corporation, an undertaking is less likely to be required if the purpose of

[14] *R v Secretary of State for Education, ex p Avon CC* [1991] 1 QB 558.

[15] See Law Commission Consultation Paper No 126, *Administrative Law: Judicial Review and Statutory Appeals*, paras 6.8–6.12.

[16] Concerning the availability of injunctions against the Crown in civil proceedings see 15.4.

[17] *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603.

[18] *M v Home Office* [1994] 1 AC 377.

the action is to enforce the law than if its purpose is to protect the government's proprietary or contractual interests.[19] A relevant factor is whether, if no undertaking is required and the legal rule being enforced is ultimately found to have been unlawful, the defendant will nevertheless be able to recover for any loss suffered as a result of the award of the injunction by suing the government. If so, it is less important to demand an undertaking.

The decision of the House of Lords in *Factortame (No 2)* (above), that interim injunctions are available in respect of breaches of EU law, was necessitated by a ruling of the European Court of Justice to the effect that English courts are under an obligation to ignore any rule of English law that stands in the way of the award of such an injunction in a case involving an alleged breach of EU law. The decision created a glaring anomaly between the rule governing breaches of EU law and the rule governing breaches of English law (namely, that injunctions were not available against the Crown). The House of Lords took an early opportunity to remove this anomaly (in *M v Home Office*) (above).

However, the incident has wide implications for English public law. The basic principle of EU law is that the provision of remedies for the enforcement of rights in EU law against Member States is a matter for the legal systems of the Member States (although, of course, EU law itself provides remedies for breaches of EU law by the Community's own legal institutions).[20] This principle creates the possibility that remedies for breaches of EU law by Member States might vary significantly from Member State to Member State, and from the remedies available in respect of breaches of EU law by EU institutions. The European Court views large divergences of this sort as undesirable and has laid down various principles to be followed by Member States in designing remedies for breaches of EU law.[21] To the extent that such principles make the remedies available for breaches of EU law by the UK government more generous to claimants than the remedies available for analogous breaches of English law by the government, serious anomalies may arise within English public law. This is what happened in respect of interim injunctions. Such anomalies may appear hard to

[19] *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227.

[20] See TC Hartley, *Foundations of European Community Law*, 6th edn (Oxford: Oxford University Press, 2007), Part IV.

[21] For more details see ibid, 226–36.

justify,[22] and as a result, developments in EU law may precipitate analogous 'spillover' developments in English law to bring the two into line.[23]

13.2.2 DECLARATION

The declaration is a non-coercive remedy, which means that failure to comply with a declaration does not amount to a contempt of court.[24] Originally a private-law remedy, the declaration proved useful in public law as an alternative to the injunction, which was not available against the Crown. Like the injunction, it became popular in the 1960s and 1970s because it was free of certain procedural limitations that applied to the prerogative orders until 1978. The declaration is an attractive remedy in any situation where the seeking of a coercive remedy might be thought unnecessarily aggressive, and where the claimant is confident that the defendant will do the right thing once a court says what it is. In more recent years the declaration has been used in public-interest actions where it often serves the claimant's purpose at least as well as any other remedy.

The declaration, as its name implies, only declares what the legal position of the parties is; it does not change their legal position or rights. A declaration (which we might call a 'surrogate declaration') can provide a non-coercive alternative to one of the other judicial review remedies. By granting a declaration that a decision is invalid a court may give guidance to future decision-makers or enable a person to avoid some negative consequence of the decision[25] even in cases where the court is, for some reason, unwilling to quash the decision. However, a declaration (which might be called an 'autonomous declaration') can be awarded even when no other remedy would be available. For example, a declaration is the only remedy available in a case where primary legislation is challenged for inconsistency with EU law—the High Court has no power to make an order to quash an unlawful provision in a statute.[26]

[22] Even so, the principles governing the award of interim injunctions differ as between English and EU law: *R v Secretary of State for Health, ex p Imperial Tobacco Ltd* [2002] QB 161.

[23] See 13.4.4 and 12.2.3.

[24] A coercive order may be obtained if the defendant deliberately refuses to comply with a declaration: *Webster v Southwark LBC* [1983] QB 698.

[25] *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815, 842. See further C Lewis, 'Retrospective and Prospective Rulings in Administrative Law' [1988] *PL* 78.

[26] *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1. For further discussion of declarations see P Cane, 'The Constitutional Basis of Judicial Remedies in Public Law' in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (London: Blackstone Press, 1997), 262–8.

A third type of declaration is the so-called 'declaration of incompatibility'. This is the remedy available under the HRA for establishing that a provision of primary legislation is incompatible with a Convention right.

The Law Commission has recommended that the High Court have power to award 'advisory' declarations.[27] An advisory declaration is one which does not resolve any existing dispute. A court may be willing to make such a declaration even though the parties are no longer in dispute[28] if, by doing so, it can give useful guidance for the future on a matter of public interest.[29] It is less clear that a court would, or should, make a declaration about an issue over which no dispute has yet arisen—the courts are not a legal advisory service.[30] Particular caution should be exercised in cases where the question the court is asked is highly abstract in the sense that it has very little factual background. The basic function of the courts is adjudication, not the making of abstract statements of law in the nature of legislation.

13.3 DISCRETION TO REFUSE A REMEDY

Quashing, prohibiting, and mandatory orders, declarations, and injunctions are all discretionary remedies. This means that even if the claimant has standing, has made the application in good time, and can establish that the defendant has acted illegally, relief may be denied if the court thinks, for some reason, that it should not be granted.[31] This discretion can also be used to justify refusal of permission to proceed with a claim for judicial review; and so it is sometimes said that the whole judicial review jurisdiction is discretionary, not just the remedies.

The general idea underlying the remedial discretion seems to be that a court should not award a judicial review remedy if to do so would cause (*query* serious[32]) damage to the 'public interest' such as would outweigh the injury which the claimant would suffer as a result of refusal of a

[27] Law Com No 226, paras 8.9–8.14.

[28] Or, as it is sometimes put, if the issue is 'moot'.

[29] *R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450; *R v Board of Visitors of Dartmoor Prison, ex p Smith* [1987] QB 106.

[30] Nor will a court make a declaration of incompatibility under the HRA simply in order to 'chivvy Parliament into spring-cleaning the statute book': *R v Attorney-General, ex p Rusbridger* [2004] 1 AC 357, [36] (Lord Hutton). But note that under both the Government of Wales Act 1998 and the Scotland Act 1998 devolution issues can be raised independently of any legal dispute: P Craig and M Walters, 'The Courts, Devolution and Judicial Review' [1999] *PL* 274, 278, 285–6.

[31] T Bingham, 'Should Public Law Remedies be Discretionary?' [1991] *PL* 64.

[32] See *R v Attorney-General, ex p Imperial Chemical Industries Plc* [1987] 1 CMLR 72.

remedy. This principle is hopelessly vague. Are there any more concrete principles governing the exercise of this discretion? In one case it was said that courts must show 'a proper awareness of the needs of public administration';[33] a court should be wary of striking down a decision if it is clear that the same decision would have been made even if the decision-maker had not acted unlawfully; or if doing so would unduly delay the conduct of government business;[34] or if members of the public are likely already to have relied on the challenged decision; or if the court thinks that the claimant's motivation in making the application was improper or vexatious or frivolous. Several of these points were taken up in the *Takeover Panel* case[35] in which Lord Donaldson said that the court should be wary of allowing judicial review to be used as a tactical or delaying device by a company which is the target of a takeover bid or by one of several rival bidders.[36]

It has been said that a mandatory order ought not to be made if the defendant is doing all that can reasonably be done to remedy the breach of duty.[37] Relief has also been refused on the ground that the claimant's behaviour in relation to the application has been unreasonable or unmeritorious;[38] and on the ground that the remedy sought would achieve no practical benefit for the applicant.[39] In cases where subordinate legislation is challenged on the ground of lack of consultation, it has been said that a court may decline to make a quashing order if the claimant makes no real complaint about the substance of the rule but only about lack of consultation; or if the court thinks that to revoke the rule would generate undue administrative inconvenience;[40] or would have a significantly detrimental impact on the interests of third parties

[33] *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 1 WLR 763, 774–5.

[34] This consideration is distinct from the question of whether the claim has been made within the time-limit.

[35] *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815.

[36] This principle would not prevent award of a declaratory remedy after the takeover battle was over. Judicial review will not normally be allowed before the decision-maker has completed consideration of the case: *R v Association of Futures Brokers and Dealers Ltd, ex p Mordens Ltd* (1991) 3 Admin LR 254.

[37] *R v Inner London Education Authority, ex p Ali* (1990) 2 Admin LR 822.

[38] HWR Wade and CF Forsyth, *Administrative Law*, 9th edn (Oxford: Oxford University Press, 2004), 701–2.

[39] *R v Governors of St Gregory's Roman Catholic Aided High School and Appeals Committee, ex p M* [1995] ELR 290.

[40] *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 WLR 1.

but minimal impact on the interests of the applicant.[41] However, the basic principle appears to be that if the procedural defect is substantial, a quashing order should normally be made precisely because the rule will affect a large number of people.[42] Even if, as a matter of discretion, a court is not prepared to make a quashing order, it may be prepared to make a declaration to similar effect.[43]

The discretion to refuse relief (and permission) raises a number of very important issues. First, is it right that a remedy should be refused because the defendant would have made the same decision even if it had not acted illegally? At first sight it certainly seems wasteful in such circumstances to require the decision-maker to decide again, and in some cases refusal of relief might be justifiable. The danger is that if relief is too often refused on such grounds it may give decision-makers the signal that it does not really matter whether or not they act within the law, so long as the decision is 'right'. A way of avoiding the problem is for the court, instead of refusing relief completely, to grant a declaration which would not impugn the decision affecting the claimant but would state a rule or principle applicable to future cases.

Secondly, is it right that relief should be refused because the court disapproves of the claimant personally or of the motives behind the making of the claim? In extreme cases perhaps it is; but relief should not be refused unless the claimant's conduct or motive makes it inappropriate to award the relief sought in *this* case. Courts should not refuse relief in order to penalize a claimant for bad conduct unrelated to the relief sought.

Thirdly, it can be argued that the discretion creates unacceptable uncertainty and unpredictability in the law because it allows a person to be refused relief on unexpected and ill-defined grounds. It is certainly essential that the grounds on which the discretion to refuse relief can be exercised should be spelled out as clearly as possible, and that those grounds should be supportable by rational argument. The courts will always wish to retain a residual and undefined discretion to deal with unexpected cases, but the scope for its operation must be kept as narrow as possible.

[41] *R v Secretary of State for the Environment, ex p Walters* (1998) 10 Admin LR 265.
[42] *R (C) v Secretary of State for Justice* [2009] QB 657.
[43] *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 WLR 1; *Chief Constable of North Wales v Evans* [1982] 1 WLR 1155.

13.4 MONETARY REMEDIES

13.4.1 DAMAGES

Unlike the declaration and the injunction, which are private-law remedies (ie remedies for the redress of private-law wrongs) which have been extended to redress public-law illegality, in English law damages are a purely private-law remedy.[44] What this means is that in order to obtain an award of damages it is necessary[45] that the claimant has suffered a 'private-law wrong' such as a tort or a breach of contract. Damages cannot be awarded simply on the basis that a governmental body has acted illegally.[46]

It is not clear why the remedy of damages is not available for public-law wrongs. Why should a citizen who is injured in a pecuniary sense by a public-law wrong have to be satisfied with having the decision reversed if reversal does not undo the pecuniary injury? The explanation may lie in the fact that all the remedies we have so far considered are discretionary. On the other hand, the remedy of damages is not discretionary, and so the courts do not have as much control over the award of this remedy as over the judicial review remedies. Another possible explanation is related to the nature of judicial review. One of the characteristics of judicial review is that the supervising court typically does not substitute its decision for that of the public agency. To award damages, on the other hand, is in a sense to substitute a decision for that of the public authority.

Should damages be made available as a remedy in public law? And if so, on what basis? There seems no good reason why damages should not, at least in some cases, be a suitable remedy in public law.[47] The second question is, therefore, the more important. Two main theories have been suggested as providing a suitable basis for an award of damages: the illegality theory and the risk theory.

[44] *R v Northavon DC, ex p Palmer* (1996) 8 Admin LR 16.

[45] In the absence of a statutory right to compensation for unlawful conduct such as that created by the Regulation of Investigatory Powers Act 2000, s 67(7).

[46] Contrast restitution: see Chapter 10 above. Concerning procedural fairness see E Campbell, 'Liability to Compensate for Denial of a Right to a Fair Hearing' (1989) 15 *Monash ULR* 383. At common law, the government is not allowed to confiscate property without paying compensation. This rule is not an exception to the statement in the text because it deals with lawful confiscation; unlawful confiscation would normally be actionable in private law. There is legislation dealing with lawful confiscation.

[47] P Cane, 'Damages in Public Law' (1999) 9 *Otago LR* 489.

13.4.1.1 Damages for illegality

Under the illegality theory, as the name implies, the ground for the award of damages is that the defendant has acted illegally. The main problem with this theory is that because of the nature of judicial review for illegality it would, in many cases, be extremely difficult, if not impossible, for a claimant to prove a causal link between the illegal action and the loss suffered. Suppose a claimant suffers loss as a result of an illegal administrative decision. The decision is quashed and the agency makes a fresh and legal decision. That decision might be the same as the first one and cause the claimant the same loss.

Many grounds of illegality do not rule out the making of the same decision again. A decision can be illegal because, for example, it was made in contravention of the rules of procedural fairness; or because relevant considerations were ignored in making it; or because the authority was unduly influenced by some external factor, such as the opinion of some other agency or an agreement with a third party. None of these grounds of illegality removes the possibility that exactly the same decision might be made legally; and so until the decision is made again, it is not possible to say whether the loss would not have been suffered but for the illegal decision. A solution might be to postpone the decision on the issue of damages until after the agency has deliberated again. The danger of this is that the fear of an award of damages against it would unduly encourage the authority to reach the same decision again and, by giving the agency a financial interest in the outcome, create an appearance of bias.

There are cases in which this problem of proving causation might not arise. For instance, in some cases of error of law or fact it is clear that if the decision-maker had got the law or the facts right, its decision would have been different and could only have been one way. Again, if the court holds that a particular decision was unreasonable, *that* decision could not lawfully be made again. In such cases the claimant may be able to show that if the defendant had not acted unlawfully, no loss would have been suffered. The same is obviously true in any case where a court or tribunal substitutes its own decision for an illegal administrative decision.

There are certain other circumstances in which a scheme of compensation might be feasible and desirable: where there is no question of a decision being re-made, notably where the time-limit for challenging an allegedly illegal decision has run out (through no fault of the claimant); or where a citizen has suffered loss by relying on a representation by a public functionary that it will act in a particular way, in circumstances

where the law will not require the functionary to make good its representation because it has undertaken to act illegally;[48] or where a court exercises its discretion not to quash an illegal decision. In such cases the causation problem does not exist because the decision in question will not be reconsidered.

13.4.1.2 Damages for risk

A risk theory operates independently of any concept of illegality. The idea here is that citizens would be entitled to damages in respect of harm resulting from a particular public activity regardless of whether that activity was conducted legally or illegally—simply on the basis that the harm was a 'risk of the activity'. Under a risk theory, compensation might be awarded for public-law wrongs, but it might also be awarded for action that was perfectly legal in the public-law sense.

There are situations in which, by statute, compensation is already payable on a risk theory. For example, under the Land Compensation Act 1973 property owners are entitled to compensation for depreciation in the value of their land caused by noise, vibration, smells, and fumes, and so on, resulting from public works. The underlying reasoning is that since the public is presumed to benefit from the building of a motorway (for example), private citizens who suffer as a result of its construction should not have to bear their loss for the sake of that wider public interest. Risk theory requires a value-judgment in relation to any particular public activity: if that activity inflicts loss on private individuals, should those individuals be expected to bear it or should the public purse pick up the bill?

Since government is responsible for a very large number of activities or influences them in important ways, there may be sound political arguments for thinking seriously about a more extensive and rationalized set of 'risk theory schemes' of compensation for loss caused by public action. It may be, of course, that what we really want is that some losses should be compensated for if they result from illegal action, and some other losses compensated for regardless of whether or not they result from illegal action. The category into which particular losses are put will depend on the value we place on the interests with which the public action in question has interfered, weighed against the value we

[48] See 8.3.1.1. The Parliamentary Ombudsman may recommend that compensation be paid in such cases: P Brown, 'The Ombudsman: Remedies for Misinformation' in G Richardson and H Genn (eds), *Administrative Law and Government Action* (Oxford: Clarendon Press, 1994), ch 13.

put on the end which the public action was designed to serve. The creation of such schemes would certainly require legislation.

13.4.2 VOLUNTARY COMPENSATION SCHEMES

Central government may voluntarily pay '*ex gratia*'[49] compensation to injured individuals without being held liable to do so, and even when legal liability to do so may be doubtful or nonexistent. This may happen when a government department settles a case out of court or when compensation is paid as a result of a recommendation of an ombudsman.[50] The government has accepted as a general principle that when a person has suffered financial loss as a direct result of maladministration, compensation should be paid to put the person in the position they would have been in if the maladministration had not occurred.[51] Voluntary compensation may be paid for alleged breaches of private law, but also for alleged breaches of public law or for conduct that is not alleged to be in breach of either private or public law. In this way, voluntary compensation schemes can, to some extent, make up for the common law's unwillingness to award damages for breaches of public law.

If there is a large group of potential claimants, the government may formalize the awarding of compensation. Sometimes this is done by statute.[52] *Ex gratia* compensation schemes are attractive to governments because the class of beneficiaries and the amounts paid out are under their direct control. On the other hand, such schemes inevitably create anomalies: chosen beneficiaries are often no more 'worthy' of compensation than other victims of government action who are not covered by a similar scheme. The creation of such schemes is more often a reaction to political pressure than the result of a coherent approach to the issue of

[49] That is, grace and favour, without admission of liability. See C Harlow, *Compensation and Government Torts* (London: Sweet & Maxwell, 1982), 119–43; 'Rationalising Administrative Compensation' [2010] *PL* 321.

[50] M Amos, 'The Parliamentary Commissioner for Administration, Redress and Damages for Wrongful Administrative Action' [2000] *PL* 21. Concerning compensation for 'misinformation' see P Brown, 'The Ombudsman: Remedies for Misinformation' in G Richardson and H Genn, *Administrative Law and Government Action* (Oxford: Clarendon Press, 1994), ch 13.

[51] Government Response to the First Report from the Select Committee on the Parliamentary Commissioner for Administration 1994–5, Maladministration and Redress (1994–5, HC 316), iv, vi. Payment of compensation for failure to meet published standards of service was a feature of the Citizen's Charter, which became the Service First programme (C Scott, 'Regulation Inside Government: Re-Badging the Citizen's Charter' [1999] *PL* 595) and then the Striving for Better Public Services programme.

[52] eg Vaccine Damage Payments Act 1979; Criminal Justice Act 1988, s 133 (compensation for victims of miscarriages of justice).

compensation for the effects of government action. The administration of non-statutory, *ex gratia* compensation schemes may be subject to judicial review to ensure that the provisions of the scheme are properly interpreted and applied.[53] The provisions of a non-statutory scheme may also be challenged on the ground that they are 'unreasonable'[54] or otherwise contrary to law. It can be argued that such schemes should be embodied in statutes so as to put their administration and the principles of compensation on a firm legal footing.

Local authorities have no general power to make *ex gratia* payments, but may do so on the recommendation of the Local Government Ombudsman.[55]

13.4.3 RESTITUTION

Unlike damages, which is a purely private-law remedy, restitution is a remedy for unjust enrichment resulting from public-law illegality as well as for unjust enrichment resulting from causes such as mistake (see Chapter 10).

13.4.4 EUROPEAN UNION LAW

In certain circumstances, monetary compensation is available in EU law as a remedy against EU governmental institutions for the equivalent of what, in English law, would be called public-law wrongs.[56] The European Court of Justice (ECJ) has also developed principles under which Member States can be held liable in national courts to pay damages for loss directly resulting from a serious breach of any provision of EU law so long as the provision was intended to confer rights on individuals.[57] Such liability can arise out of the actions of any branch of government, whether the legislature, the executive, or the judiciary.[58] It is for national courts to create a head of liability to give effect to this principle; but the rules governing Member State liability for breach of EU law must be no

[53] *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; *R v Secretary of State for the Home Department, ex p Harrison* [1988] 3 All ER 86; *R (Mullen) v Secretary of State for the Home Department* [2002] 1 WLR 1857.

[54] *R v Ministry of Defence, ex p Walker* [2000] 1 WLR 806; *R (Association of British Civilian Internees, Far East Region) v Secretary of State for Defence* [2003] QB 1397.

[55] Local Government Act 2000, s 92.

[56] PP Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006), 764–84.

[57] *R v Secretary of State for Transport, ex p Factortame Ltd (No 4)* [1996] QB 404. See also *Dillenkofer v Federal Republic of Germany* [1997] QB 259. For more detailed discussion see Hartley, *Foundations of European Community Law* (n 20 above), 230–36.

[58] Including the highest court: *Köbler v Austria* [2003] 3 CMLR 1003; *Cooper v Her Majesty's Attorney-General* [2010] 3 CMLR 28.

less favourable to claimants than the rules relating to similar domestic claims, and they must not be such as to make it impossible or excessively difficult to obtain compensation. The ECJ held that any rule requiring malice on the part of the Member State would fall foul of this latter requirement; as would any rule that totally excluded liability for purely economic loss or required fault greater than a serious breach of EU law.

These principles require English courts to award damages for serious breaches of EU law by organs of the UK government (including the legislature and the courts) regardless of whether such breaches amount to a wrong in English private law. As a result, they create the potential for significant divergence between the liability of governmental bodies for breaches of EU law and their liability for breaches of English public law. Such divergence may, sooner or later, generate pressure to bring EU law and English law into line.

13.4.5 HUMAN RIGHTS LAW

This topic was discussed in 8.8.3, and readers are referred to that section.

14

Appeals

14.1 INSTITUTIONS

All rights of appeal are created by statute. Jurisdiction to hear appeals from decisions of public administrators may be conferred on both courts and tribunals. Jurisdiction to hear appeals from decisions of (first-tier) tribunals may also be conferred on both courts and (second-tier) tribunals. Although the characteristics of a particular appeal may vary according to the identity and nature of the agency that made the decision under appeal and of the appellate body, the general concept of an appeal is of universal application.

14.1.1 ADMINISTRATIVE TRIBUNALS

The 'justice system' (a concept discussed further in Chapter 19) can be thought of as having at least three main components: criminal, civil, and administrative. The Administrative Court is a component of the administrative justice system, as are county courts which, for instance, have jurisdiction under s 204 of the Housing Act 1996 to hear appeals on points of law from homelessness decisions made by local authorities. Tribunals are another major component of the administrative justice system. Some tribunals are part of the civil justice system—employment tribunals are the most well-known example. Tribunals that belong to the administrative justice system are, in effect (although not technically), administrative courts. The most important of these are the First-tier Tribunal (FtT) and the Upper Tribunal (UT), on which the discussion in this chapter will focus.

The identification of administrative tribunals as specialist administrative courts is possible as the result of a long process of development that culminated in the enactment of the Tribunals, Courts and Enforcement Act 2007 (TCE Act). The TCE Act established the FtT and the UT and authorized transfer to them of the jurisdiction of the bulk of

existing administrative tribunals operating in areas as diverse as social security, immigration, taxation, education, data protection, pensions, and mental health. The main function of the FtT is to hear general appeals (as opposed to appeals on points of law) from decisions of public administrators. The UT also performs this function in certain areas; but for present purposes its main function is to hear appeals (on points of law) from the FtT.

One major component of the administrative justice system that has not been absorbed into the TCE Act regime is the system of planning appeals. Technically, appeals from planning decisions made by local authorities are handled by the Secretary of State. However, the Secretary of State may appoint a person to act in his/her stead; and in practice, most appeals are decided by planning inspectors after a written or oral hearing or a local inquiry. Planning inspectors are, in effect, single-member tribunals. Decisions of the Secretary of State and planning inspectors are amenable to judicial review. Structurally, the most significant distinction between the planning inspectorate on the one hand, and the FtT and UT on the other, is that planning inspectors are officers of the department of central government responsible for planning (although housed in an executive agency). By contrast, the FtT and the UT are free-standing bodies, not associated with any government department. The standard justification for the special position of the planning inspectorate and the Secretary of State in the administrative justice system is that land-use planning is a highly political process that needs firm central coordination by a Minister of State.

In fact, the nineteenth-century predecessors of modern administrative tribunals were embedded within administrative agencies in much the same way as planning inspectors today. The model of the free-standing administrative tribunal emerged in the early twentieth century. However, like that of their predecessors, the jurisdiction of free-standing tribunals was limited to a particular area of administration; and throughout the twentieth century administrative tribunals remained closely associated with their respective 'sponsoring' departments. Typically, tribunal members were appointed by the Minister, and the tribunal was funded and housed by the department, which provided administrative support. The embeddedness of early tribunals in administrative agencies and their later association with departments and areas of administration explain why, by the turn of the twenty-first century, there were some seventy tribunals.

In 1957 the Report of the Franks Committee on Tribunals and Enquiries[1] established the principle that despite their association with the administration, tribunals should be considered part of the justice system, not the administrative process. Fifty years later, the TCE Act gave practical expression to this principle. The Senior President of Tribunals is a Court of Appeal judge. High Court and even Court of Appeal judges may sit in the UT in appropriate cases. Legally qualified members of tribunals are called 'judges' (rather than 'members'). The Judicial Appointments Commission manages the appointment of tribunal judges and members, and they enjoy the same guarantee of independence (under s 3 of the Constitutional Reform Act 2005) as court judges. The UT is a 'superior court of record' and it has judicial review jurisdiction in addition to its primarily appellate jurisdiction. The TCE Act has significantly judicialized tribunals. By virtue of these arrangements, there is no doubt that the FtT and the UT are independent for the purposes of Art 6 of the ECHR. By contrast, in hearing an appeal against a planning enforcement notice (which involves determination of civil rights), a planning inspector is not an independent tribunal.

The relationship between courts and tribunals is regulated in ways that reinforce the identification of administrative tribunals as specialist administrative courts. Tribunals are subject to judicial review. This includes the UT, although the grounds on which its decisions are reviewable may be limited.[2] However, the prime avenue for challenging a decision of the FtT is an appeal on a point of law to the UT; and the prime avenue for challenging a decision of the UT is an appeal on a point of law to the Court of Appeal. The general principle that judicial review is a last resort and will not be available where there is an adequate alternative remedy (12.3.2) means that judicial review of administrative decisions is likely to be very rare where there is an appeal to a tribunal. Judicial review is most important in areas where there is no right of appeal to a tribunal.[3]

In aggregate terms, tribunals are a much more significant element of the administrative justice system than courts. Most disputes between citizens and the State that find their way into the judicial component of

[1] Cmnd 218.

[2] *R (Cart) v Upper Tribunal* [2010] 2 WLR 1012. Concerning the position in Scotland see *Eba v Advocate General for Scotland* 2010 SLT 1047.

[3] The areas in which judicial review jurisdiction has been conferred on the UT are ones in which there is no appeal from the FtT to the UT.

the system are processed by appeal to a tribunal, not judicial review by (or appeal to) a court. Annually, judicial review applications are numbered in the thousands, but tribunal appeals in the hundreds of thousands. Even so, cases processed by judicial institutions of administrative justice represent a miniscule proportion of the decisions made by public administrators.

One other type of tribunal deserves brief mention. So-called 'domestic tribunals' typically hear appeals from licensing and disciplinary decisions of private regulators such as sporting and professional organizations. To the extent that such regulators perform public functions, domestic tribunals can be understood as part of the administrative justice system. Their decisions may be subject to judicial review and they may qualify as hybrid public authorities for the purposes of the HRA.

14.1.2 TRIBUNALS AND COURTS

The nineteenth-century predecessors of today's tribunals were created partly out of dissatisfaction with courts, which were widely thought to be inaccessible, formal, expensive, slow, and ideologically unsympathetic to and ignorant of public welfare and regulatory programmes introduced to tackle social and economic consequences of rapid industrial development. By the end of the nineteenth century, however, it had become clear that whatever their advantages over courts, tribunals and courts performed essentially similar adjudicatory functions; and commentators started to worry about the independence of tribunals. The advent of the free-standing tribunal in the early twentieth century allayed these concerns to some extent. However, as we have seen, throughout the twentieth century tribunals continued to be more-or-less closely associated with the administration; and it was not until the creation of the FtT and the UT in 2008 that the issue of independence was finally addressed.

The idea that tribunals offer a more accessible, less formal, cheaper, and quicker, specialist alternative to courts is still central to thinking about tribunals despite radical changes in both the court system and the tribunal system in the past 150 years. Tribunals began life as an alternative to courts—in modern jargon, a form of alternative dispute resolution (ADR). Now, however, tribunals, as much as courts, are seen as part of the problem that ADR is designed to address, and the introduction of ADR into the conduct and resolution of administrative litigation is a

central plank of administrative justice policy in relation to tribunals as much as courts.

On the other hand, the values that are said to underpin the court system are essentially identical to those that underpin the tribunal system. The TCE Act requires the Senior President of Tribunals, in managing the system, to have regard to the need for tribunals to be accessible, quick and efficient, procedurally fair and innovative, and expert. Not surprisingly, the Civil Procedure Act 1997 also establishes accessibility, efficiency, and fairness as goals for civil courts. Although civil courts tend to have wide jurisdiction—in the case of the High Court, unlimited—there are specialist courts (notably, the Administrative Court) and individual judges may specialize in particular areas of law, such as intellectual property.

In terms of procedure and the modes of operation, courts and tribunals are similarly diverse, ranging from the very formal and adversarial to the much less formal and inquisitorial. At the formal end, proceedings are characterized by independent presentation by the parties of their respective evidence and arguments to a largely passive, neutral third-party adjudicator. At the informal end, only one of the parties may be present, and the adjudicator may play a much more active, investigatory, and 'enabling' role in the collation of evidence and the marshalling of arguments.[4] In between these extremes lie many variations on the general theme of formality and informality. Relevant variables include the identity of the citizen-claimant (individual or small business or multi-national corporation, for instance); the subject matter (social security or corporate taxation, for instance); and the caseload, resources, and composition of the tribunal.

In aspiration, therefore, tribunals and courts follow the same tune. But what about the reality? This is an empirical question and there is not much relevant empirical evidence. An initial problem is ensuring that like is being compared with like. Most litigation in courts is between citizens. Litigation against the administration in courts consists of claims for either a monetary remedy or judicial review, or appeals on a point of law. Tribunals have no jurisdiction over money claims. The core business of the FtT is hearing general appeals from administrative decisions. The UT's jurisdiction includes general appeals (from administrative decisions), and appeals on a point of law from, and judicial review of, decisions of the FtT. Such differences between the business of

[4] E Jacobs, *Tribunal Practice and Procedure* (London: Legal Action Group, 2009), 1.39–1.67.

courts and tribunals respectively make comparison complex and difficult.

Perhaps because of such difficulties, empirical researchers tend not to ask comparative questions about courts and tribunals; rather they investigate the performance of tribunals in terms of guiding values, such as accessibility.[5] Researchers have investigated the expectations and experiences of tribunal users. All of the research predates the TCE Act reforms; and so, understandably, individual research projects are concerned with one or a small number of tribunals, and the more general validity of the results is unclear or doubtful. Importantly, too, researchers have focused on people who have appealed rather than people who have been deterred from appealing. Nevertheless, the authors of a survey of research available in 2003 suggested that certain broad conclusions can be drawn: for instance, that the *procedure* for initiating an appeal is sufficiently simple that ignorance of the possible *grounds* for appealing is not a significant barrier to access. It is also suggested that cost is not considered to be a significant barrier, although researchers have not investigated appellants' views about the optimum balance between cost, speed, and quality of tribunal decision-making. It is said that in general, appellants are satisfied with the independence and impartiality of tribunals. On the other hand, many appellants are confused by and about various aspects of the appeal process and have difficulty obtaining pre-hearing advice.[6]

More recent research on three types of tribunals paints a rather dismal picture of ignorance, apprehension, and confusion about tribunals, especially among members of ethnic minorities.[7] The researchers conclude that:

> members of the public who challenge the decisions of public bodies and who take the step of initiating an application to a tribunal and then attend tribunal hearings, are either the most determined and confident, or those fortunate enough to obtain advice and support . . . language barriers coupled with poor or inaccurate information about systems of redress were identified as the critical obstacles to people accessing and using the tribunal system.

Concerns about the cost and difficulty of seeking redress and the time it would take were also found to be significant, as were negative, general

[5] eg H Genn *et al*, *Tribunals for Diverse Users*, DCA Research Series 1/06 (2006).

[6] M Adler and J Gulland, *Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review* (Council on Tribunals, 2003).

[7] H Genn *et al* (n 5 above).

images of the justice system. While this research, like earlier projects, focused on people who had actually appealed, the data suggests that the availability of legal advice and help is a major determinant of whether or not an appeal is made. Many appellants have little idea in advance of what the hearing will be like. On the other hand, researchers found that on the whole, tribunal members conducted hearings in an approachable, informal, and enabling way that offered appellants a fair opportunity to present their cases.

A topic on which a significant amount of research has been conducted is representation of appellants before tribunals. Appellants before the FtT and the UT have a right to be represented, but legal aid to pay for legal representation (as opposed to advice) is available in only a few types of cases;[8] and a successful appellant is much less likely to be awarded costs in a tribunal than in a court. Research into the operation of four types of tribunals in the 1980s showed that appellants who were represented (not necessarily by a lawyer) enjoyed significantly higher success rates than unrepresented appellants.[9] This research was used to support calls for legal aid to be made available more widely in the tribunal system and to challenge assumptions that tribunals necessarily provide accessible and affordable justice. However, more recent research shows that in certain tribunals, at least, the disadvantage associated with lack of representation is considerably less than it was twenty-five years ago.[10] The adoption of a more enabling approach by tribunals may partly explain this observation. Even so, research also suggests that however effective tribunal members may be in assisting appellants, representation may be necessary to overcome significant linguistic, educational, and cultural barriers.[11]

Empirical researchers also question whether goals as general as speed, cheapness, and informality are meaningful aspirations. For instance, in individual cases speed may not be desirable if it results in difficult and

[8] See generally Legal Services Commission, *Funding Code*, Part 22. Legal aid for judicial review proceedings before the UT is available on the same basis as legal aid for a CJR before the Administrative Court. Judicial review cases are a priority under the *Funding Code*, as are claims against administrative agencies that raise significant human rights issues.

[9] H Genn and Y Genn, *The Effectiveness of Representation at Tribunals* (Lord Chancellor's Department, 1989); T Mullen, 'Representation at Tribunals' (1990) 53 *MLR* 230.

[10] M Adler, 'Tribunals ain't what they used to be', <http://www.ajtc.gov.uk/adjust/articles/AdlerTribunalsUsedToBe.pdf>, accessed 4 January 2011. *Tribunals for Diverse Users* (n 7 above) found little difference between represented and unrepresented appellants in how well prepared they were for the hearing.

[11] *Tribunals for Diverse Users* (n 5 above), ch 7. In two of the three types of tribunal studied, representation was not significantly associated with the outcome of the case.

complex questions receiving inadequate consideration. More generally, if speed[12] were valuable in its own right, it might be better not to have tribunals at all but to rely on internal reviews within departments and agencies. On the other hand, tribunals can promote other important goals such as allowing complainants to participate in the decision-making process and providing an assurance of impartiality and independence.[13] Indeed, the possibility of an appeal to a tribunal may be important in satisfying the requirements of Art 6 of the ECHR.

Again, while informality may make tribunals somewhat less intimidating and more accessible, especially for appellants who are poor and ill-educated, its importance depends partly on whether such appellants have access to competent advice and representation.[14] Informality is partly a function of the subject matter of the appeal, and the more technical the issues with which a tribunal deals, the more formal its proceedings are likely to be. Research in the 1980s found that members of social security tribunals often took a quite active role in proceedings to help unrepresented applicants;[15] while officers responsible for representing the department before such tribunals typically adopted a passive or reactive stance rather than an aggressively adversarial approach.[16] Even so, in many cases applicants were at a disadvantage if only as a result of being unfamiliar with tribunal proceedings and with putting a case.[17] On the other hand, it has been observed that informality of procedure may be positively disadvantageous to claimants because 'cases . . . may not be properly ventilated, the law may not be accurately applied, and ultimately justice may not be done'.[18] From this perspective, procedure should be as formal as is reasonably necessary to maximize the chance that a sound decision will be reached. Anyway, tribunals must comply with the common law rules of procedural fairness, and this may limit permissible departures from the adversarial model (on which they are based) and judicial involvement in the presentations of the parties.

[12] Or low cost, for that matter: R Sainsbury, 'Internal Reviews and the Weakening of Social Security Claimants' Rights of Appeal' in G Richardson and H Genn (eds), *Administrative Law and Government Action* (Oxford: Clarendon Press, 1994), 302–3.

[13] Ibid.

[14] H Genn, 'Tribunals and Informal Justice' (1993) 56 *MLR* 393, 398.

[15] J Baldwin, N Wikeley, and R Young, *Judging Social Security* (Oxford: Clarendon Press, 1992), ch 4.

[16] Ibid, ch 7.

[17] Ibid, ch 6.

[18] H Genn, 'Tribunal Review of Administrative Decision-Making' in Richardson and Genn (eds), *Administrative Law and Government Action* (n 12 above), 263.

The other commonly accepted advantage of tribunals is that they are 'specialist' adjudicators whereas the typical court is much more generalist. Tribunals are specialized in two ways.[19] The first relates to jurisdiction. As we have seen, until very recently, most tribunals were associated with a particular government department or a single public programme. One of the aims of the reforms put into place by the TCE Act was to reduce the number of tribunals; and the two main administrative tribunals, the FtT and the UT, are the recipients of the jurisdiction of a large number of single-topic tribunals. Jurisdictional specialization is to some extent preserved in the new structure by the fact that both tribunals operate in 'chambers'. However, each tribunal has only a few chambers that have broad subject-related remits. Whereas under the old system, most tribunal members served on only one tribunal, under the new system it is anticipated that at least some judges and members will cross the old jurisdictional boundaries. The general aim is to preserve as much jurisdictional specialization as is consistent with other aims of the reforms, such as a more accessible point of entry for users of the tribunal system and a better career structure for tribunal judges.

The main alleged advantage of jurisdictional specialization is that it enables tribunal judges and members to gain much more knowledge and experience of the area of law and administration with which their tribunal deals than would be possible if the tribunal's jurisdiction were wider. Such knowledge and experience may improve the quality of the tribunal's decisions and lessen the need for parties before the tribunal to be legally represented. Whatever the effects of jurisdictional specialization, it has been used to justify caution on the part of courts when reviewing decisions of tribunals.[20] For instance, it has been said that courts should take account of tribunal specialization in deciding whether to give permission to appeal on a point of law[21] and in deciding appeals;[22] and in reviewing judgments of proportionality in the context of challenges to immigration decisions on the ground of incompatibility with Art 8 of the ECHR.[23]

[19] For detailed consideration of this topic see S Legomsky, *Specialized Justice* (Oxford: Oxford University Press, 1990).

[20] eg *Hinchy v Secretary of State for Work and Pensions* [2005] 1 WLR 967 (tribunal better understands administrative practicalities). Specialization may also be relevant to deciding the scope of a tribunal's jurisdiction: *Chief Adjudication Officer v Foster*: see n 31 below.

[21] *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279.

[22] *HH (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49.

[23] *Secretary of State for the Home Department v Akaeke* [2005] Imm AR 701.

Secondly, while multi-member tribunals are typically chaired by a lawyer and in many areas single-member tribunals consist of a legally trained person, multi-member tribunals may have a majority of members who are non-lawyers.[24] Non-legal members of tribunals are typically appointed because they have relevant professional expertise (eg social workers may sit on social security appeals) or knowledge and experience relevant to the subject matter of the appeal.[25] The main alleged advantages of 'non-legal expertise' are greater consistency in decision-making and a greater ability to give effect to the policy behind the legislation in a way that makes sense of the realities of the matters regulated by the legislation and reflects current social conditions. It is said that knowledgeable lay persons may be more able than lawyers to foresee potential consequences of their decisions, and as a result they may be able to avoid potential anomalies and inconsistencies in decision-making.[26]

However, there is another side to this second aspect of specialization. The knowledge and experience of lay members of tribunals is in the non-legal aspects of the tribunal's work. Even in areas where tribunals are reviewing discretionary powers not heavily structured by legal rules or formal policy guidelines, they operate within a framework of legal rules, and tribunal members need to understand these rules. Lack of legal expertise may reduce the 'legal accuracy' of decisions or, alternatively, result in the marginalization of lay members or their non-participation in the tribunal's proceedings and their domination by the legal chair.[27] To the extent that the presence of non-lawyers on tribunals reduces the legal accuracy of decisions, it is in tension with the rationale for jurisdictional specialization. The main legal techniques for dealing with the possibility of legal mistakes by tribunals are to require tribunals to state reasons for their decisions that make clear the legal basis on which the decision was made[28] and to provide for a right of appeal on a point of law. Thus, there is a general right of appeal from the FtT to the UT. On the other hand, to the extent that legal accuracy is emphasized at the expense of non-legal expertise and experience, there may be pressure to formalize procedure and make it more adversarial. Lawyers may get more involved in representing appellants and tribunal

[24] See *Tribunals for Users* (n 5 above), paras 7.19–7.26.

[25] On the relationship between non-legal expertise and experience, and impartiality see *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781.

[26] M Adler, 'Lay Tribunal Members and Administrative Justice' [1999] *PL* 616.

[27] Baldwin, Wikeley, and Young, *Judging Social Security* (n 15 above), ch. 5.

[28] Jacobs, *Tribunal Practice and Procedure* (n 4 above), 14.180–14.249.

proceedings may become more lengthy, expensive, and intimidating for some applicants, thus reducing accessibility.

14.2 CHARACTERISTICS

The characteristics of appeals can be described more briefly than those of judicial review because the supervisory jurisdiction is residual in the sense that judicial review is available unless excluded by some statutory provision or common law rule. By contrast, a right of appeal exists only if it is expressly created by statute. The result is that the characteristics of appellate jurisdiction are easier to identify than those of the supervisory jurisdiction. The following discussion is in general terms the precise significance of which, in any particular case, depends ultimately on the relevant statutory provisions creating the right of appeal and specifying its characteristics.

14.2.1 NATURE

Whereas the supervisory jurisdiction applies both to decisions and actions, the appellate jurisdiction applies only to decisions. So, for instance, failure to make a decision may provide grounds for a court to make a mandatory order, but cannot provide grounds for an appeal.

The grounds on which an appeal can be made are determined by the statutory provision that confers the right of appeal. Broadly, however (as we have seen: 11.2), there is an important distinction between general appeals and appeals on a point of law. The 'substantive grounds for intervention' in an appeal on a point of law are the same as those in a claim for judicial review. However, an appeal is typically limited to the decision appealed against whereas a claim for judicial review of a particular decision may allow review of 'subsequent decisions of the same agency... or even related decisions of other agencies'.[29]

The TCE Act provides that appeals from the FtT to the UT and from the UT to the Court of Appeal are on a point of law. The TCE Act says nothing about the grounds of appeal from administrators to the FtT—this depends on the provisions of the various statutes that confer rights of appeal to the FtT. Typically, such statutes provide for a general appeal, although the precise grounds of appeal may vary from one provision to another. It is important to stress that a general appeal is an appeal not limited to law, not an appeal on issues other than law. This

[29] *E v Secretary of State for the Home Department* [2004] QB 1044, [40]–[43].

means that the legality of a decision can be challenged in a general appeal as well as in an appeal on a point of law or in a claim for judicial review.[30] Traditionally, only a court could determine the validity of delegated legislation; but in 1993 the House of Lords held that the Social Security Commissioners (then the highest tribunal in the social security system) had jurisdiction to decide this question.[31] However, no tribunal (not even the UT) has power to grant a declaration of incompatibility under s 3 of the HRA.

Whereas the issue in judicial review proceedings is whether a decision was legal or illegal, in an appeal the question is whether or not the decision was right ('correct') or wrong. Asking whether a decision was correct as a matter of law is the same as asking whether it was legal; and as we have seen, questions of law have a single correct answer. It does not follow, of course, that people may not disagree about the correct answer to a question of law; and it has been said that generalist courts should be cautious in granting permission to appeal on a point of law from a specialist tribunal on the basis that a specialist may be more likely than a generalist to answer correctly a question of law that arises in the area of their specialty.[32]

The concept of correctness is more problematic when applied to questions of fact and more problematic still when applied to questions of policy. This is because it is accepted that answering either type of question may require an exercise of discretion or judgment. Not all errors of fact are errors of judgment: a decision-maker may, for instance, simply ignore a relevant fact or some relevant piece of evidence. However, finding facts often involves interpreting as well as collecting and taking account of evidence, and it may also involve drawing inferences from 'primary' facts. Such exercises of judgment may be assisted by hearing oral evidence being given (rather than merely reading a transcript) and by long and regular experience of making a particular type of decision. Appellate bodies are less likely to enjoy these advantages than primary decision-makers. So far as policy is concerned, unless taking account of a particular policy consideration is required or prohibited as a matter of law (6.5.1), decision-makers will always enjoy a greater or lesser measure of choice in deciding what purposes and objectives to pursue.

[30] eg *Oxfam v Her Majesty's Revenue and Customs* [2010] STC 686.

[31] *Chief Adjudication Officer v Foster* [1993] AC 754.

[32] See nn 21 and 22 above; R Carnwath, 'Tribunal Justice—A New Start' [2009] *PL* 48, 56–64.

This means that whether a particular decision is right or wrong will depend on factors such as the type of decision, the context of the decision, and the ground(s) of appeal. In Australian law, this insight is captured in the formula 'correct or preferable': the task of the appellate body is to decide whether the decision under appeal was the correct or preferable one. The word 'preferable' is used to refer to cases in which the primary decision-maker had choice or discretion. It does not mean that the appeal can be allowed merely because the choice or discretion *could* have been exercised differently. The appeal will succeed only if the appellate body decides that the discretion *should* have been exercised differently.[33] In this respect, there is no difference between judicial review and appeal. Administrators have no discretion in deciding issues of law; but when deciding issues of fact and implementing policy, administrative law allows them a greater or lesser degree of freedom. This freedom necessarily implies limitations on the amount of control exercised by way of judicial review and appeal. Whether discretion should have been exercised differently depends, to some extent, on the applicable test—whether, for instance, *Wednesbury* unreasonableness or proportionality. Whatever the test, however, the task of the appellate body is to decide for itself whether it is satisfied.[34]

The variable intensity of scrutiny of the decision under appeal leads to a distinction between different types of appeal. In what is sometimes called an appeal 'by way of review' the court or tribunal may confine itself to reviewing the decision and the decision-making process and may only allow the appeal in cases of serious error.[35] Fresh evidence is relatively unlikely to be admitted in such an appeal. In an appeal 'by way of rehearing' the court or tribunal reconsiders the decision and the evidence for itself. Fresh evidence may be more readily admitted and the court or tribunal may be more willing to substitute its decision for that of the original decision-maker. An appeal 'by way of retrial' involves a complete re-run of the decision-making process, taking account of all

[33] *Subesh v Secretary of State for the Home Department* [2004] Imm AR 112, [44].

[34] *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

[35] However, '[a] review here is not to be equated with judicial review... [it] will engage the merits...': *EI Du Pont de Nemours & Co v ST Dupont* [2006] 1 WLR 2793, [94] (May LJ). The meaning of this statement is unclear. The grounds of judicial review and the possible grounds of an appeal are the same—errors of law, fact, policy, procedure, and reasoning. The difference between judicial review and an appeal by way of review must reside in the intensity of review. In both cases, this is variable. The main difference between judicial review and a general appeal from an administrative decision appears to be that review of fact-finding is potentially more intense on an appeal than on judicial review: *Subesh v Secretary of State for the Home Department* [2004] Imm AR 112, [40].

relevant evidence available at the time of the retrial and involving substitution of the decision on retrial for the original decision. The distinction between appeals by way of review and appeals by way of rehearing is one of degree; and at the margin, they overlap.[36] The precise powers of the court or tribunal will depend on the relevant statutory provisions and the way the court or tribunal thinks they should be applied in the particular case.

Administrative appeals are either by way of review or by way of rehearing. An appeal to the FtT is likely to be by way of rehearing,[37] while an appeal on a point of law to the UT or the Court of Appeal[38] is likely to be by way of review. One relevant factor is whether the relevant statute provides that the appeal is to be decided as at the date of the original decision or, by contrast, as at the date of the appeal. If the former, the tribunal may be prepared to admit fresh evidence relating to the period before the date of the original decision. If the latter, the tribunal has power, in addition, to admit relevant evidence relating to the period between the date of the original decision and the date of the appeal. The basic principles governing admission of fresh evidence are that the evidence (1) could not have been obtained with reasonable diligence for presentation to the original decision-maker; (2) would have influenced the result had it been available; and (3) appears credible.[39] However, in public-law cases there is some flexibility in the application of these principles.[40] It may be that new evidence would be more readily admitted in appeals from an administrative decision to the FtT than in an appeal from the FtT to the UT or from the UT to the Court of Appeal.[41]

Because the basic issue in an appeal is whether the decision under appeal is correct or preferable, it might seem to follow that unfair or incorrect procedure or defective reasoning would not, in themselves, be grounds for appeal but would justify allowing an appeal only if they resulted in an incorrect decision. This is the position in Australia. In England, by contrast, the grounds of appeal may include procedural or reasoning errors provided the error makes the decision 'unjust'.[42]

[36] *EI Du Pont de Nemours & Co v ST Dupont* [2006] 1 WLR 2793, [96]–[98] (May LJ).

[37] Especially if the record of the original decision is inadequate: Jacobs, *Tribunal Practice and Procedure* (n 4 above), 4.80.

[38] CPR 52.11 establishes a presumption that an appeal to a court is by way of review.

[39] *Ladd v Marshall* [1954] 1 WLR 1489.

[40] *E v Secretary of State for the Home Department* [2004] QB 1044.

[41] Ibid, [73]–[75], [77]; *British Telecommunications Plc v Office of Communications* [2011] EWCA Civ 245, [68]–[74].

[42] Jacobs, *Tribunal Practice and Procedure* (n 4 above), 4.18, 4.321–4.334, 4.378ff; A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 2nd edn (London: Thomson Sweet & Maxwell, 2006), 23.175–23.176; CPR 52.11(3)(b).

However, the ground of appeal may affect the appropriate outcome. For instance, if an appeal is allowed on a procedural ground, the tribunal may substitute a decision to the same effect.[43]

Although, in principle, matters of law, fact, policy, procedure, and reasoning may all provide grounds for a general appeal, in practice the typical general appeal from an administrator's decision to a tribunal is concerned with issues of fact. Whereas factual errors can only exceptionally be the subject of a claim for judicial review or an appeal on a point of law, they are of central concern in the typical general appeal. The paradigm function of tribunals is to monitor fact-finding by public administrators. This creates a puzzle. The standard explanation of why findings of fact can be challenged only exceptionally in a claim for judicial review is that separation of powers and judicial independence might be threatened if courts became too involved in the 'merits' of administrative decisions. Why, then, is it acceptable for tribunals to go where courts fear to tread? This question could easily be answered if administrative tribunals were part of the executive (as they are in France) or were embedded in administrative agencies (as they are in the US). But in England, tribunals are effectively courts. Although tribunal judges and members may not enjoy the protections of salary and tenure conferred on court judges by the Act of Settlement 1700, they do enjoy the same guarantee of independence under the Constitutional Reform Act 2005.

Another puzzle arises from the fact that courts tend to be cautious in reviewing not only fact-finding by administrators but also fact-finding by inferior courts. This can be explained by arguments against intrusive review of fact-finding (based, for instance, on the need for finality[44] and for preserving scarce judicial resources, and advantages enjoyed by the fact-finder who actually collects the evidence and hears the witnesses first-hand[45]) that do not depend on ideas of separation of powers and judicial independence. Why do such arguments not support restrained review by tribunals of fact-finding by administrators? Part of the answer may be that tribunals more often provide the opportunity for an oral hearing than do administrative decision-making procedures. It may be, too, that inferior courts are assumed to be better fact-finders than administrators and that they need less supervision. But whether, on average, magistrates (for instance) make fewer factual errors than

[43] Jacobs, *Tribunal Practice and Procedure* (n 4 above), 4.461.
[44] *Subesh v Secretary of State for the Home Department* [2004] Imm AR 112, [48].
[45] Ibid, [41].

administrators is unknown. At all events, it can be argued that tribunals should not be thought of as a substitute for improving the quality of administrative fact-finding if only because there are probably much more efficient ways of doing that, such as better training of administrators and better design and management of administrative fact-finding processes. Anyway, it is unlikely that all, or even a representative sample of, factually defective administrative decisions are appealed to a tribunal. Whatever its justification, the core activity of tribunals is reviewing administrative fact-finding.

14.2.2 AVAILABILITY AND ACCESS

As already noted, a right of appeal will exist only if created expressly by legislation. Typically, the only party with a right to appeal to a tribunal from an administrative decision will be the immediate subject of the decision. However, a statute may provide, for instance, that any person 'aggrieved' or 'affected' by or 'interested' in the decision may appeal.[46] The width of such phrases may depend on the context.[47] In general, however, it is probably safe to say that persons without some sort of personal interest in a decision are unlikely to have a right of appeal. Public-interest challenges to administrative decisions are the province of judicial review. Furthermore, in general, only a 'party to the case' will have a right of appeal from a decision of a tribunal to another tribunal or a court.

14.2.3 MECHANICS

14.2.3.1 Review of decisions

As we have noted, there is a right of appeal from a decision of the FtT to the UT and from a decision of the UT to the Court of Appeal. In addition, however, both the FtT and the UT have power to review their own decisions. The basic rule is that once[48] a decision has been communicated to the parties, the only way it can be reconsidered is by an appeal or claim for judicial review to a higher tribunal or a court. This rule is based on the value of finality in litigation. However, under the TCE Act the FtT and the UT have wide power to review their own decisions either on their own initiative or at the request of a party who

[46] eg Child Support, Pensions and Social Security Act 2000, Sch 7, para 8(2)(a).

[47] Jacobs, *Tribunal Practice and Procedure* (n 4 above), 4.146–4.153.

[48] But not until: *R v Secretary of State for the Home Department, ex p Anufrijeva* [2004] 1 AC 604.

has a right of appeal against the decision. These wide powers have been greatly restricted by tribunal procedural rules. In general, a decision may be reviewed only if permission is sought to appeal from the decision and only if the tribunal is satisfied that the decision contains an error of law.[49] If the FtT sets aside its decision it may either re-decide the point of law or refer the matter to the UT. If the UT sets aside its decision it re-decides the point of law. A tribunal may also have power to set aside one of its decisions on the basis that there was a procedural defect or, for instance, that the decision was obtained by fraud.[50]

Courts also have limited power to review their own decisions;[51] but it may be that a court would be less likely to exercise this power than a tribunal. If so, this may be understood as a manifestation of the greater informality and 'accessibility' of tribunals.

14.2.3.2 Time-limits for appeals

The time-limit for appealing depends, of course, on the provisions of the legislation that creates the right of appeal.[52] However, in general, time-limits for appeals tend to be short: twenty-eight days and six weeks are common limits. This is a general feature of appeals and not only of appeals against decisions of public administrators. It may reflect the fact that, typically, the only parties who may appeal against a decision are the person(s) immediately subject to the decision or (at later stages) the decision-maker.

14.2.3.3 Permission to appeal

In this context, we may distinguish three categories of appeals. 'First appeals' (as we may call them) are appeals from a decision of a public administrator to a tribunal or court. 'Second appeals' are appeals from a first-tier tribunal (such as the FtT) to a second-tier tribunal (such as the UT). 'Third appeals' are appeals from a tribunal (often a second-tier tribunal) to a court (such as the Court of Appeal). Typically, permission is not required to make a first appeal. However, permission is typically required to make a second or third appeal. Permission to appeal serves essentially the same function as permission to make a CJR: to weed out weak cases.

[49] Jacobs, *Tribunal Practice and Procedure* (n 4 above), 15.38–15.58.
[50] Ibid, 15.26–15.37.
[51] N Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003), 40.66–40.75; A Zuckerman, *Zuckerman on Civil Procedure*, 2nd edn (London: Thomson Sweet & Maxwell, 2006), 22.40–22.46.
[52] Jacobs, *Tribunal Practice and Procedure* (n 4 above), 7.65–7.106.

The criteria for granting permission to make a third appeal may be more stringent than those for granting permission to make a second appeal. For instance, permission to appeal on a point of law from the FtT to the UT may be given if the FtT clearly made or may have made an error of law, or if an appeal would be desirable to enable the UT to clarify the law.[53] On the other hand, in most cases permission will be given to appeal from the UT to the Court of Appeal only if, in addition to having a real chance of success, the appeal raises some important point of principle or practice, or there is some other compelling reason to give permission.

14.2.3.4 Inquisitorial procedure

First appeals, whether to the FtT or to the UT, are general appeals and typically they are primarily concerned with issues of fact. In general, tribunals approach review of administrative fact-finding differently from the Administrative Court in judicial review proceedings. Before the Administrative Court, evidence is typically given in writing, and disclosure of documents and cross-examination of witnesses must be ordered by the court. Judicial review proceedings are basically adversarial. This means that each of the parties decides what factual issues to raise, what evidence to present in support of their factual contentions, and what legal arguments to make. The judge normally takes no part in the issue-defining and evidence-gathering process.

In principle, at least, tribunals hearing general appeals operate very differently. In pursuit of accessibility and informality, tribunals often proceed inquisitorially rather than adversarially. This means that the judges and members of the tribunal take a more-or-less active part in defining the issues (both factual and legal), identifying relevant evidence and, perhaps, eliciting evidence by questioning the parties. The default rule is that there should be an oral hearing at which the parties and witnesses can give oral evidence;[54] although in certain areas (such as social entitlement), cases are often decided 'on the papers'. The basic rule is that all relevant documents must be disclosed. Whether or not to allow cross-examination is normally in the discretion of the tribunal. On the one hand, allowing cross-examination may jeopardize informality

[53] Ibid, 4.185–4.189.

[54] For views about the value of oral hearings see Council on Tribunals, *Consultation on the Use and Value of Oral Hearings in the Administrative Justice System: Summary of Responses* (2006); G Richardson and H Genn, 'Tribunals in Transition: Resolution of Adjudication?' [2007] *PL* 116, 125–32.

and accessibility. On the other hand, an inquisitorial approach by the tribunal may reduce the need for cross-examination.

It is sometimes said that the ordinary rules of evidence do not apply in tribunals. This suggests that tribunals can admit evidence that a court would not. In general, however, this is not the case. The basic principle in tribunal proceedings is that all relevant evidence should be admitted unless there is some compelling reason why it should not, such as national security. This rule is not essentially different from that which applies to analogous proceedings before a court; and observation of Social Security Appeal Tribunals in the 1990s suggested that they handled evidence in much the same way as courts.[55] On some issues, such as entitlement to social security benefits, tribunals may take a more flexible attitude to burden of proof than courts on the basis that the process of determining entitlement to benefits should be one of 'cooperative investigation'.[56] In proceedings before tribunals that have members with non-legal expertise, a corollary of this arrangement is that such members are entitled to draw on their own knowledge and experience to a greater extent than may be acceptable in a court or tribunal whose members have only legal expertise. The presence of experts on the bench may also affect tribunal practice in relation to calling expert witnesses.

Looming constantly in the background are the common law rules of procedural fairness and Art 6 of the ECHR. In English law the basic model of a fair hearing is adversarial. Tribunals have great procedural flexibility but only within the limits set by that model.

14.2.3.5 Precedent

Courts can make law: the common law, like legislation, is 'hard law' that can determine people's rights and obligations. The common law is found in the reasons courts give for their decisions in individual cases. Under the doctrine of precedent as traditionally developed, courts lower in the judicial hierarchy are bound to 'follow' and apply legal rules and statements made by higher courts in the course of deciding individual cases. Tribunals, as much as inferior courts, are bound by legal rules made by higher courts.

[55] P Rowe, 'The Strict Rules of Evidence in Tribunals: Rhetoric Versus Reality (1994) 17 *J of Social Security L* 9.

[56] *Kerr v Department for Social Development* [2004] 1 WLR 1372, [62] (Baroness Hale of Richmond).

Tribunals also answer questions of law and make statements of law in the process of adjudicating individual cases. However, it does not follow from this that tribunals can make hard law. In Australia, for instance, federal tribunals can answer questions of law and make legal statements, but they cannot do so 'conclusively'. This means that they cannot make hard law, but only soft law. As we have seen (6.2.2), soft law must be taken into account by decision-makers to whom it is addressed but they must not treat it as if it were binding hard law.

Before the creation of the UT, the status and effect of legal statements by English tribunals was unclear. The most important decisions of the highest social security and tax tribunals, for instance, were reported and an informal system of precedent operated within the various tribunal hierarchies. However, the question of whether tribunals could make hard law was not addressed. It is widely understood that one of the reasons for creating the UT is to facilitate the development of general legal principles applicable across the whole spectrum of tribunal activity.[57] Effective performance of this function requires that important decisions of the UT be reported and that they bind the FtT and other first-tier tribunals. The UT has been designated a 'superior court of record' but the implications of this designation are yet to be fully worked out, and it remains unclear whether the UT can make hard law or only soft law.[58] It is even less clear whether the FtT (and other first-tier tribunals) can make hard law. The answer to this question determines the impact of answers to questions of law and statements of law by the FtT on administrative decision-making: administrators are bound to apply hard law but need (and must) only take account of soft law.

[57] R Carnwath, 'Tribunal Justice—A New Start' [2009] *PL* 48.

[58] In deciding individual asylum cases, the UT may give 'country guidance'—ie general statements—about relevant political and social conditions in countries from which asylum-seekers come, relevant to the question of whether they can lawfully be returned to their country of origin. Such guidance has been called 'factual precedent'. However, the concept of precedent only applies to statements of law, and country guidance (like soft law) can provide no more than considerations to be taken into account. (For a general study of asylum appeals see R Thomas, *Administrative Justice and Asylum Appeals* (Oxford: Hart Publishing, 2011).) The Senior President of Tribunals contemplates an important general role for the UT of giving 'guidance' (on issues of proportionality, for instance) in a way that straddles the distinction between law and fact: Carnwath, 'Tribunal Justice—A New Start' (n 57 above), 58–68. However, specialist tribunals have been criticized for being 'more prone than courts to yield to the temptation of generous general advice and guidance': *Office of Communications v Floe Telecom Ltd* [2009] EWCA Civ 47, [21] (Mummery LJ); see also [122] (Collins LJ).

14.2.4 OUTCOMES

The typical outcome of a general appeal is either that the decision is affirmed, varied, or set aside and replaced by a substitute decision of the tribunal. Less commonly, when a decision is set aside on appeal it may be remitted to the decision-maker for reconsideration. Traditionally, tribunals—unlike courts—had no power to enforce their decisions. Enforcement is an important issue in judicial review proceedings because when a decision or action is invalidated, the typical outcome is that the court orders the administrator to take or to refrain from some action. By contrast, when a tribunal makes a substitute decision, that decision is deemed to be the decision of the administrator without the need for any action on the latter's part. Nevertheless, the UT has all the powers of the High Court, including the power to enforce its decisions.

14.3 CONCLUSION

One of the core distinctions in administrative law is that between judicial review of and appeal from administrative decisions. The discussion in this chapter, however, shows that the distinction is a complex and, in many respects, fine one. Appeals on points of law are functionally equivalent to claims for judicial review: they are both concerned with legality. The jurisdiction to hear such appeals from administrative decisions is conferred on courts as well as tribunals, and supervisory jurisdiction is exercised by the UT as well as by the Administrative Court. Unsurprisingly, the legal norms of administrative decision-making policed by appeals are essentially the same as those policed by judicial review. Both tribunals and courts respect administrative discretion in finding facts and implementing policy. The only significant difference between appeals on law and judicial review relates to the outcome of the two processes: the typical outcome of a successful claim for judicial review is setting aside of the decision and remittal for reconsideration whereas the typical outcome of a successful appeal is variation of the decision or setting aside and substitution of a new decision. But even this difference is by no means rigid.

In fact, the more important distinction is not that between judicial review and appeal but that between judicial review and appeals on law, on the one hand, and general appeals on the other. This is because errors of fact are only exceptionally classified as errors of law and general appeals are not limited to errors of law. This means that mistakes in fact-finding are more likely to provide grounds for a successful general

appeal than for a successful appeal on a point of law or claim for judicial review. It does not follow that any and every error of fact can provide grounds for a successful general appeal. A general appeal is not a complete re-run of the decision-making process but, at most, a close reconsideration of the evidence available to the decision-maker in the light of fresh evidence and evidence of events that occurred after the decision was made. However, it is generally true to say that judicial review and appeals on law involve less extensive and intensive reconsideration of administrative fact-finding than general appeals.

15

Civil Claims

For the sake of completeness, this chapter provides a brief discussion of civil proceedings against the administration. For our purposes, civil proceedings involve claims in tort, contract, and unjust enrichment.

15.1 INSTITUTIONS

Adjudication of civil claims is considered to be a core judicial function. In general, jurisdiction to adjudicate civil claims is conferred only on traditional courts. Jurisdiction to adjudicate claims that are statutory analogues of civil claims may exceptionally be conferred on a tribunal. For instance, employment tribunals have jurisdiction to adjudicate claims for unfair dismissal and employment discrimination. Neither the First-tier Tribunal (FtT) nor the Upper Tribunal (UT) has jurisdiction over civil claims even against the administration.

15.2 AVAILABILITY AND ACCESS

The availability of a civil claim depends on establishing a cause of action in tort, contract, or unjust enrichment. There are, as such, no standing requirements for making such claims. However, there are some analogous rules. For instance, the basic rule is that only a person with an interest in affected land may sue in tort for nuisance; and that only a party to a contract may sue for its breach.

15.3 MECHANICS

Civil proceedings are brought under CPR Parts 7 and 8. Damages and restitution may be claimed in a claim for judicial review (CJR) under CPR Part 54 provided some other remedy is sought alternatively or additionally. Time limits for making civil claims are determined by rules of 'limitation of actions'. Typically, the 'limitation period' for making a

civil claim is three years or more. In general, permission is not required to make a civil claim within the limitation period. However, under CPR Part 24 a defendant may apply for, and the court may enter, 'summary judgment' if the claim has no real prospect of success. In recent years, many of the most important tort claims against administrative agencies have been decided on motions for summary judgment on the issue of whether the agency owed the claimant a duty of care.

15.4 CIVIL PROCEEDINGS AGAINST THE CROWN

Historically, there were special rules relating to civil proceedings against the Crown ('Crown proceedings').[1] For instance, the Crown could not be sued in tort, and the '*fiat*' of the Attorney-General was required for an action in contract against the Crown. Both rules were abolished by the Crown Proceedings Act 1947.

However, the Crown still enjoys certain protections in civil proceedings. For example, under s 21 of the Crown Proceedings Act a court cannot, in civil proceedings, grant an injunction or make an order of specific performance against the Crown.[2] Secondly, by virtue of s 25 of the Act, money judgments cannot be executed against the Crown: the claimant must be satisfied with a certificate of the amount due (backed up by a statutory duty to pay). The disbursement of money by central government is lawful only if authorized by Parliament. In practice, however, a specific appropriation for the purpose of paying damages would not usually be necessary: expenditure is typically authorized in large amounts and in respect of broadly defined heads of government activity.

Thirdly, s 40(2)(f) of the 1947 Act preserves the principles of statutory interpretation that the Crown may take the benefit of a statute even if the statute does not expressly (or by necessary implication) mention the Crown as a beneficiary; and that the Crown is not subject to any statutory obligation or burden even if the statute does not expressly (or by necessary implication) relieve it of the obligation or burden.[3]

[1] Concerning the criminal liability of the Crown see M Sunkin, 'Crown Immunity from Criminal Liability in English Law' [2003] *PL* 716.

[2] Concerning remedies against the Crown in judicial review proceedings see 13.1.5 and 13.2.1.

[3] See also *Lord Advocate v Dumbarton DC* [1990] 1 AC 580.

Fourthly, the Crown's liability in tort is limited in several ways. For instance, the Crown is not liable for breach of statutory duty unless the duty in question also rests on persons other than the Crown and its officers;[4] and statutory immunities or limitations of liability accruing to any government department or officer also accrue for the benefit of the Crown.[5]

Because 'the Crown' still enjoys certain legal protections, it is important to say more about what the term means. The privileged position of the Crown dates from a period when the monarch personally wielded a great deal of political and governmental power. When, as a result of the constitutional changes of the seventeenth and later centuries, many of the powers of the Monarch were transferred to Parliament and to Ministers, a distinction developed between the Crown in a personal sense (the Monarch), and the Crown in an impersonal, governmental sense. This would suggest that in historical terms at least, the Crown in this latter sense encompasses all persons and bodies who exercise powers which were at some time exercised by the Monarch. However, the term in its modern sense clearly does not extend this far. For example, Her Majesty's judges of the High Court in theory dispense royal justice, but judges are not thought of as being comprehended by the term 'the Crown'. And because of the development of the doctrine of Parliamentary supremacy over all other organs of government including the Monarch, Parliament is not thought of as being a part of the Crown even though it was a major beneficiary of the shift of powers from the Monarch.

This leaves the executive branch of central government (local government has always been subordinate to and separate from central government, whether in its present form or in its monarchical form). By the 'executive branch of central government' is meant Ministers of State and the departments for which they are constitutionally responsible. There are dicta that support exactly this definition of the Crown.[6] At the same time, however, it is clear that servants, agents, and officers of the Crown (including Ministers) may, for instance, be sued personally for torts committed in the course of performing their public functions, and that such an action would not count as an action against the Crown.[7]

[4] Crown Proceedings Act 1947, s 2(2).
[5] Ibid, s 2(4).
[6] *Town Investments Ltd v Department of Environment* [1978] AC 359, 381 (Lord Diplock).
[7] *M v Home Office* [1994] 1 AC 377. The personal liability of government officials was central to Dicey's concept of the rule of law.

The 'Crown' is to be understood in a corporate sense as referring to departments of central government and to Ministers as the individuals who are constitutionally responsible (to Parliament) for the conduct of those departments. It follows that there is a distinction between the Crown, and servants, agents, and officers of the Crown. For example, 'common law' and 'prerogative' powers belong to central government by virtue of its being the Crown, while statutory powers conferred by Parliament on Ministers do not.[8] Thus, in *Town Investments Ltd v Department of Environment*[9] it was held that a contract made with a Minister acting in an official capacity is made with the Crown, not with the Minister.

A context in which the issue of defining the Crown often arises is whether a statutory provision applies to a particular agency: remember that the Crown is not subject to statutory obligations unless the statute expressly (or by necessary implication) provides that it applies to the Crown, but that it can take the benefit of a statute even if not expressly (or by necessary implication) mentioned as a beneficiary. This issue is particularly important in relation to non-departmental governmental bodies and private bodies performing public functions.

A number of factors emerge from the cases as being important in determining whether particular statutory provisions apply to particular bodies. First, the degree of control which the organs of central government exercise over the body has to be considered. For example, in *British Broadcasting Corporation v Johns*[10] it was held that the BBC does not enjoy Crown immunity from taxation. The Court of Appeal stressed the fact that the BBC was set up as an independent entity and precisely, no doubt, to avoid both the appearance and the actuality of central government control over its activities. Conversely, in *Pfizer Corporation v Ministry of Health*[11] it was held, in effect, that the supply of drugs to the NHS is supply 'for the services of the Crown'. The question in this case was whether the NHS had certain rights under patent legislation, and the fact that the decision benefited the NHS financially may have been an important factor influencing the court. It was also relevant that although the NHS was made up of a system of statutory corporations, these were subject to a high degree of central government control and

[8] See A Lester and M Weait, 'The Use of Ministerial Powers Without Parliamentary Authority: the Ram Doctrine' [2003] *PL* 415.

[9] [1978] AC 359.

[10] [1965] Ch 32.

[11] [1965] AC 512. Since this case was decided, the organization of the NHS has changed significantly, and it is unclear what conclusion would be reached if a similar issue arose now.

were directly, and almost entirely, dependent on the government for finance. Agencies that operate in a commercial way would be unlikely to be treated as part of the Crown in any sense.

A second factor relates to the nature of the function that the agency performs. For example, in *BBC v Johns* the court rejected the BBC's argument that it should be treated as part of the Crown because wireless telegraphy was a public function. In the light of the role now assigned by administrative law to the concept of 'public function', the argument that the nature of the function being performed is relevant to whether the functionary counts as part of the Crown seems to rest on a confusion of categories. 'The Crown' is an institutional concept, and the fact that an entity performs a public function does not determine (although it is relevant to) its institutional status. Bodies that perform public functions may not be governmental, let alone part of the Crown (which is a sub-category of governmental bodies). A functional interpretation of the BBC's argument might involve asking whether, given the nature and purpose of the particular immunity or benefit, a body performing the function in question is an appropriate recipient of the immunity or the benefit. Take the *Pfizer* case, for instance. It could be argued that since the provision of basic health care is thought to be a function of great public importance, there is a good case for relieving the NHS of any statutory obligation to pay royalties to private drug manufacturers for the use of drug patents. However, if such an argument is valid, its validity is not dependent on whether or not the NHS is part of the Crown.

A third factor is the relationship between the claimed benefit or immunity and the particular ground on which it is claimed. For example, in *Tamlin v Hannaford*[12] it was held that the British Transport Commission was an independent commercial entity and not part of the Crown. Thus, it was not entitled to ignore the provisions of the Rent Acts in ejecting a tenant from its premises. But even if the Commission had been held to be an arm of central government, there would be a good case for arguing that it should not be allowed to ignore legislation designed for the protection of tenants. The Commission did not need such immunity for the proper conduct of its statutory functions. In an Australian case[13] the question was whether a statutory body charged with the job of investing the assets of a superannuation fund for government employees had to pay stamp duty in respect of

[12] [1950] 1 KB 18.
[13] *Superannuation Fund Investment Trust v Commissioner of Stamps* (1979) 145 CLR 330.

transactions it entered in performance of its statutory functions. One judge drew a distinction between this issue and the question of whether, for example, landlord and tenant legislation would apply to acquisition by the Investment Trust of office accommodation. He seems to have thought that the latter was less central to the functions of the Trust and, therefore, less likely to give rise to entitlement to any immunity or benefit.

Finally, a specific statutory provision can decide the issue of immunity. Thus, s 60 of the National Health Service and Community Care Act 1990 stripped the NHS of many Crown privileges. Again, the Act which originally established the Advisory, Conciliation, and Arbitration Service (ACAS) provided that the functions of the service were performed on behalf of the Crown notwithstanding the fact that, in the performance of its central functions, it was to be free of ministerial direction.[14] This led Lord Scarman in *UKAPE v ACAS*[15] to say that injunctive relief was not available against ACAS. This was an interesting case because, given the nature of ACAS and the functions it performs, it is, as the legislation recognized, highly desirable that the Service should be independent and free from outside influence so that it can truly mediate between the parties in dispute. Judged by the criterion of central government control, ACAS would not qualify as a Crown body. On the other hand, the conciliatory nature of its activities makes the use of injunctive relief in connection with them wholly inappropriate. Agreement between the parties, not coercion by one of them, is the essence of the exercise. So there are good grounds for according the Service immunity from injunctive relief, but they are not captured by the formula that ACAS 'performs its functions on behalf of the Crown'.

The conclusion to be drawn from all this is that there may sometimes be good grounds for relieving a public body of some obligation (such as an obligation to pay tax) or for giving it some immunity (such as freedom from injunctive relief). But these grounds have little to do with the fact that the body is or is not part of central government, or that it is or is not subject to central government control. They have much more to do with the nature of the activity or function in question and its relationship to the benefit or immunity claimed. It is not helpful to express a conclusion

[14] Employment Protection Act 1975, Sch 1, para 11(1). The current legislation about ACAS, which appears in the Trade Union and Labour Relations (Consolidation) Act 1992, Chapter IV, does not contain this provision.

[15] [1980] 1 All ER 612, 619.

about the application of a statutory provision to a particular body's activities, in terms of whether the body is or is not part of the Crown. It would be better if the terminology were jettisoned and the underlying issues squarely faced. Such an approach would also be consistent with the current focus of administrative law on public functions, with which the special position of the Crown is extremely difficult to reconcile. Historically, the Crown, understood as the executive branch of central government, was in a special position because of its identification with the Monarch. The fundamental principle now underlying administrative law is that its scope depends not on the source of power (whether common law, the prerogative, or statute) or on the identity of the functionary, but on whether the challenged decision or action is public in nature. It has to be admitted, however, that such a radical shift in legal thinking is unlikely to occur quickly because the concept of the Crown is deeply entrenched in the British constitution and English law.

Section B

Beyond Courts and Tribunals

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16

The Bureaucracy

This book is mainly concerned with legal norms that provide both a framework for public administration and criteria for holding public administrators accountable before courts and tribunals. However, legal rules and principles are not the only norms that frame public administration, and courts and tribunals are not the only institutions that scrutinize public administration and hold public administrators accountable. In this Section the focus falls first (in this chapter) on the concept of bureaucratic values and their relationship with the values that underpin administrative law; and then on mechanisms internal to the bureaucracy for reviewing administrative decisions and investigating complaints.[1] Chapter 17 briefly discusses the concept of political accountability and the role of Parliament in scrutinizing the central executive. Chapter 18 examines at some length the institution of the ombudsman and the concept of 'injustice in consequence of maladministration', which provides the main normative criterion that guides investigation of complaints and making of recommendations by ombudsmen. Finally, Chapter 19 examines the concept of an 'administrative justice system', and its relationship to the various elements of the normative framework of public administration and the various institutions that play a role in enforcing those norms.

16.1 BUREAUCRATIC VALUES

Underlying this Section of the book and this chapter are distinctions between politics, administration, and law. These distinctions are far from watertight, and the relationship between them can be understood

[1] For a detailed survey and discussion of 'arms-length' regulation of bureaucratic agencies by other bureaucratic agencies see C Hood, C Scott, O James, G Jones, and T Travers, *Regulation Inside Government: Waste-Watchers, Quality Police and Sleaze-Busters* (Oxford: Oxford University Press, 1999). Internal review and complaint mechanisms do not fall within their definition of regulation, which focuses on inspection and auditing.

in various ways. For instance, a leading US textbook on public administration distinguishes between 'political', 'managerial', and 'legal' *approaches* to public administration.[2] By contrast, in this book, public administration is understood as being primarily concerned with the implementation of political programmes, and administrative law is conceptualized as a framework for and constraint on public administration. This approach associates public administration with 'manageralism' and sees the administration as having two masters—politics and law—both of which it must serve. Law's demands on the administration may conflict (or, at least, be in tension) not only with those of its political masters but also with the imperatives of managerialism, which reflect the 'master–servant' relationship between the elected executive and the appointed administration (civil *servants*). This helps to explain why courts and tribunals are wary about scrutinizing the (political) 'merits' of administrative decisions and actions, and also why they are sometimes criticized for having an inadequate appreciation of the internal (managerial) dynamics of administration.

As an approach to (or theory of) public administration, managerialism rests on the idea that running the country is significantly similar to running a business. Two broad varieties of managerialism can be identified: traditional management (TM) and 'the new public management' (NPM). The characteristics of TM include an emphasis on 'the three Es' of economy (concerned with inputs), effectiveness (concerned with outputs), and efficiency (concerned with the relationship between inputs and outputs)—summarized as 'value for money'; a hierarchical decision-making structure; an impersonal approach to citizens, under which individual citizens are dealt with more in terms of what they have in common with others than in terms of what distinguishes them from their fellow-citizens; and an instrumental focus on outcomes, as opposed to process and procedure. According to TM, the basic task of the appointed executive is to identify and adopt economical, efficient, and effective means to implement public programmes, as defined by legislation and government policy. To this end, the TM criterion for appointment of administrators is 'merit', defined in terms of the skills and expertise needed to perform the relevant job efficiently and effectively. According to TM, civil servants are apolitical both in the sense that the advice they give to Ministers is politically neutral and balanced and in

[2] DH Rosenbloom, RS Kravchuk, and RM Clerkin, *Public Administration: Understanding Management, Politics and Law in the Public Sector*, 7th edn (Boston, MA: McGraw-Hill, 2009).

the sense that they seek to implement government policies regardless of whether or not they personally approve of them. Under this approach, the prime mission of bureaucrats is to serve the 'public interest' (as defined by the government of the day) rather than individual citizens.

NPM shares much with TM, especially its focus on the three Es and on outcomes. However, unlike TM, NPM favours organizational structures of administration that are quasi-competitive and decentralized rather than hierarchical and concentrated. Whereas traditional management relies on rules, authority, and supervision of administrators to achieve its objectives, NPM puts greater weight on discretion, flexibility in reacting to outside pressures, and personal initiative. NPM views citizens as 'customers' and adopts customer satisfaction as an important criterion of effectiveness. This does not mean that NPM treats customers as individuals; rather, like a large firm operating in the marketplace and serving millions of customers, it aims for aggregate customer satisfaction. Like TM, NPM sees the basic task of the administration as being to implement public programmes; where it differs from TM is in its understanding of the most economical, efficient, and effective means to that end.

Public administration in England contains elements of both TM and NPM. As noted earlier (see 2.1.4), NPM has had a fundamental impact on the institutional structure of public administration: executive agencies (through which the delivery of public services is subjected to market-like disciplines and pressures) account for 75 per cent of the civil service and the implementation of many public programmes is outsourced to the private sector. Since the time of the Citizen's Charter in the 1990s, all departments and agencies have put considerable emphasis on 'being customer-focused' and 'putting things right' when mistakes are made, which has led to proliferation of internal review and complaint mechanisms.[3]

On the other hand, NPM reforms designed to foster initiative in management and competition in service delivery have been accompanied and counter-balanced by a significant increase in 'arm's-length' regulation inside government in the form of scrutiny by inspection and audit agencies.[4] Less control over inputs has been coupled with

[3] These are two of the *Principles of Good Administration* published by the Parliamentary and Health Service Ombudsman.

[4] C Hood, C Scott, O James, G Jones, and T Travers, *Regulation Inside Government* (Oxford: Oxford University Press, 1999).

greater scrutiny of outputs.[5] Moreover, the internal organization and management of government departments and agencies are still basically hierarchical, authoritarian, and rule-based. Adoption of the ideology and practices of NPM has not led to abandonment or even significant modification of the fundamental values associated with TM. These are expressed in the *Civil Service Code* as 'appointment on merit on the basis of fair and open competition', 'integrity' ('putting the obligations of public service above personal interests'), 'honesty', 'objectivity' ('basing advice and decisions on rigorous analysis of the evidence'), and 'impartiality' ('acting solely according to the merits of the case and serving equally well Governments of different political persuasions').[6] Integrity imposes obligations to 'deal with the public and their affairs fairly' and 'comply with the law and uphold the administration of justice'. 'Objectivity' imposes various obligations, including 'not to ignore inconvenient facts or relevant considerations when providing advice or making decisions'. Impartiality imposes obligations to act 'in a way that is fair, just and equitable' and not 'in a way that unjustifiably favours or discriminates against particular individuals or interests'.

From this account, it is easy to identify ways in which bureaucratic and legal values might conflict. Whereas managerialism focuses on outcomes, administrative law emphasizes process and procedure. Compliance with the law's demands for fair process and procedure may increase the cost of administration and reduce its efficiency and effectiveness. Whereas managerialism sees the main function of the administration as being to serve the public interest in some aggregate sense, the law focuses on citizens as persons and on their individual rights and interests. Legal constraints on the substance of administrative decisions may impair the ability of bureaucrats to implement government policy. And so on. This is not to say that the law gives no weight to the three Es. For example, the short time-limit on claims for judicial review is designed to prevent the performance of public functions being unduly delayed; public-interest immunity from disclosure of documents and the many exemptions under the FOI regime are designed in part to promote effectiveness in public administration; the concept of procedural 'fairness' was developed partly in order to enable the law's procedural requirements to be adapted to the needs of administrative efficiency;

[5] C Pollit and G Bouckaert, *Public Management Reform: A Comparative Analysis*, 2nd edn (Oxford: Oxford University Press, 2004), 146–7.

[6] These values are enshrined in statute: Constitutional Reform and Governance Act 2010, ss 7(4) and 10(2).

and a court may refuse a judicial review remedy on grounds of administrative efficiency even if the claimant has a good case on the merits. But economy, effectiveness, and efficiency are constraints on the promotion of the values underlying the grounds of administrative law rather than a positive aspect of the concept of good administration implicit in them.

On the other hand, 'integrity', 'honesty', 'objectivity', and 'impartiality' all pull in the same direction as various administrative law norms, none of which conflicts with these values. What is the relationship between what we might call the 'corporate mission' of the administration—economical, efficient, and effective implementation of public programmes—and the standards of personal behaviour imposed on individual administrators by the *Civil Service Code*? An attractive possibility would be to interpret the personal bureaucratic values as constraints on the pursuit of the administration's corporate mission. That would help to explain statements in *The Judge Over Your Shoulder* (noted in 1.7) that although administrative law 'is not about what "good administration" is or how to achieve it . . . a keen appreciation of the requirements of good administration [which they summarize as 'speed, efficiency and fairness'] will often give a pretty good idea of what administrative law will say on the point'. The ultimate bureaucratic value is 'good administration' understood as economical, efficient, and effective implementation of public programmes by administrators required to act with integrity, honesty, objectivity, and impartiality. Understood in this way, the tension between 'efficiency' and 'fairness' is internal to administration; and while 'legal values' of process and procedure may impose constraints on 'bureaucratic' instrumentalism, they are integral to the best understanding of good administration.

16.2 INTERNAL REVIEW AND COMPLAINT SYSTEMS

The *Civil Service Code* is incorporated into the contracts of all civil servants, and there is a process for enforcing the Code by 'appeal' to the Civil Service Commissioners. The main aim of this process is to protect individual civil servants from being required by a superior to act inconsistently with the Code. Because the Code requires civil servants to comply with the law, the process for its enforcement may provide an indirect means of enforcing compliance with general principles of administrative law.

Here, however, our main concern is with mechanisms internal to departments and agencies for reviewing administrative decisions at the behest of citizens and for investigating citizens' complaints against the administration.[7] Internal review and complaints mechanisms have proliferated in recent years. This development can be traced back to the NPM-inspired Citizen's Charter introduced in the 1990s, with its emphasis on customer satisfaction and 'putting things right'.

'Internal review' refers to reconsideration of a decision either by the original decision-maker or by another official within the department or agency. In this framework, appeal to a court or tribunal is 'external' as opposed to 'internal'. However, this distinction is not watertight. For instance, the Independent Review Service (IRS) for the Social Fund is not part of the agency that administers the Social Fund (Jobcentre Plus), but it is subject to direction and guidance by the Secretary of State; and there is no further appeal from decisions of the IRS, although it is amenable to judicial review.[8] Internal review may be a statutory prerequisite of making an external appeal; and the possibility of internal review may provide a discretionary ground for refusing permission to make a claim for judicial review.

An internal review is a species of appeal, involving general reconsideration of the evidence and grounds for the decision. On the other hand, whereas appeal to a court or tribunal involves the submission of a dispute between the administration and a citizen to a third-party adjudicator, internal review typically replicates an administrative process involving two parties—a decision-maker and a citizen—aimed at implementation of the relevant public programme in the particular case.[9] Internal reviews should probably be understood as penetrating further into the merits of the decision under review than even a general appeal to a court or tribunal. So, for instance, review by the IRS is concerned not only with whether the decision was reached correctly (in terms of facts, reasoning, and procedure) but also whether it was the right one in all the circumstances of the case. In the terminology used in Chapter 14, IRS review, and internal reviews generally, are perhaps best compared (in theory, at least) to a new trial.

[7] Citizens cannot appeal to the Civil Service Commissioners.

[8] For a little more detail see T Mullen, 'A Holistic Approach to Administrative Justice?' in M Adler (ed), *Administrative Justice in Context* (Oxford: Hart Publishing, 2010), 393–4, 402–3.

[9] For the distinction between implementation and adjudication see 3.1.2.

The concept of a 'complaint' is broader than that of 'review' in that the latter refers only to decisions: although a complaint may be about a decision, it may also refer to other forms of conduct such as rudeness, giving misleading advice, or simple failure to make a decision. It has been found that the distinction between making a complaint and seeking review of a decision is difficult for many people to understand;[10] and there is no intrinsic reason why the job of reviewing decisions and that of investigating complaints should be allocated to different officials or agencies. After all, courts adjudicate disputes not only about administrative decisions but also about other administrative conduct, and judicial review itself is not confined to decisions. On the other hand, it seems that administrators tend to be much more sensitive about complaints than about requests for review;[11] and this, perhaps, explains why, in practice, the two jobs are usually treated as distinct from one another and are often allocated to different entities within the agency. The process of investigating complaints is discussed in more detail in Chapter 18, where we will see that public-sector ombudsmen issue guidance to agencies within their remit about best practice for internal handling of complaints. The expectation is that every public agency will have an internal procedure for dealing with complaints.[12] Failure to use an internal complaints procedure is a ground on which ombudsmen very commonly exercise their discretion not to investigate complaints.

Arguments in favour of internal review of decisions and internal investigation of complaints are that conducting reviews and investigations 'closer to source' saves time and money, is less formal and intimidating for the citizen, and is a 'proportionate' way of dealing with simple and minor cases, which constitute the bulk.[13] It is also said that internal reviews and investigations are more likely than their external counterparts to make a significant contribution to raising the standard of initial administrative decision-making and improving 'service quality'.[14] On

[10] P Dunleavy, S Bastow, J Tinkler, S Goldchluk, and E Towers, 'Joining Up Citizen Redress in UK Central Government' in M Adler (ed), *Administrative Justice in Context* (Oxford: Hart Publishing, 2010).

[11] Ibid.

[12] See for instance House of Commons Public Administration Select Committee, *When Citizens Complain* (HC 409, 2007–8); and Government Response (HC 997, 2007–8).

[13] M Harris, 'The Place of Formal and Informal Review in the Administrative Justice System' in M Harris and M Partington (eds), *Administrative Justice in the 21st Century* (Oxford: Hart Publishing, 1999), ch 2.

[14] This was one of the assumptions underlying the promotion of internal review by the Citizen's Charter: A Page, 'The Citizen's Charter and Administrative Justice' in Harris and Partington (eds), *Administrative Justice in the 21st Century* (n 13 above). Ironically, the more

the other hand, internal mechanisms inevitably lack (at least) the appearance of independence;[15] and it might be expected that the quality of internal review would not be as high as that of external review. Moreover, if internal review is understood as a form of implementation rather than adjudication, it performs a different function from external review. Making internal review or investigation a precondition of external review of investigation may be thought to give the best of both worlds—local resolution of the majority of cases coupled with an external mechanism to deal with the more complex and difficult and, in the case of review of decisions, to shift from an 'implementational' to an adjudicative mode of decision-making. However, some argue that if internal review or investigation is made a prerequisite of access to external review or investigation, it will cease to be part of an administrative process of regulating and improving primary decision-making and service delivery and will become part of an adjudicative process of dispute resolution.[16] This, it is said, may actually have a negative effect on the quality of initial decision-making.[17]

It is also argued that dissatisfied citizens are less likely to seek external review or investigation if they are required to engage the internal process first. This seems plausible, especially if the internal system has two tiers—one 'local' and the other 'independent' as, for instance, is the case in relation to complaints about child support and social security payments, and was the case until 2009 in relation to complaints about the NHS. However, although there is good evidence that most people who 'lose' at the internal stage do not proceed to an external review or investigation, we do not know whether relatively more people drop out after a compulsory than after an optional internal review. More surprising are the results of an empirical study of internal reviews in homelessness cases.[18] Before 1996 the main formal avenue for

complaints there are, the greater the likely contribution of complaints-handling to quality improvement by revealing systemic failures.

[15] An agency may attempt to address this concern by introducing an 'independent' element into its internal procedure: G Richardson and H Genn, 'Tribunals in Transition: Resolution of Adjudication?' [2007] *PL* 116, 123, n 36 and text. An example is the Adjudicator's Office that provides second-tier complaint-handling for Her Majesty's Revenue and Customs and several other agencies: C Harlow and R Rawlings, *Law and Administration*, 3rd edn (Cambridge: Cambridge University Press, 2009), 458–62.

[16] See also S Kerrison and A Pollock, 'Complaints as Accountability? The Case of Health Care in the UK' [2001] *PL* 115.

[17] D Cowan and S Halliday, *The Appeal of Internal Review* (Oxford: Hart Publishing, 2003), 208–9; see also P Cane and L McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Melbourne: Oxford University Press, 2008), 258.

[18] Cowan and Halliday, *The Appeal of Internal Review* (n 17 above).

challenging homelessness decisions was judicial review. In 1996 this was replaced by appeal to a county court. Internal review is a precondition of such an appeal. The authors of the study concluded that 'the take-up of rights to internal review... is actually quite low and comparable to the level of applications for leave to apply for judicial review prior to the 1996 Act'.[19] The authors of the study suggest[20] that reasons for not seeking internal review of homelessness decisions may include ignorance of the existence of internal review, scepticism about its integrity or a perception that it is too 'rule-bound', 'applicant fatigue', and 'satisfaction' with the decision even though adverse. Other surveys tend to confirm that ignorance of internal review and complaint mechanisms is common, and that people who do know about them are often sceptical of their independence and efficacy. Encouragement by friends or family may be an important factor in explaining why some people appeal or seek reviews while others do not.[21]

The most highly developed and closely studied public-sector internal complaints system is that within the NHS. First established in 1996, its introduction changed the role of the Health Service Ombudsman (HSO) (see 18.3), who assumed a sort of appellate function as an investigator of last resort. The internal system originally had two tiers, the first at local level and the second an independent panel of lay people with access to clinical advice. In 1999, an external review report concluded that neither tier was working optimally.[22] The main concerns expressed about both tiers were lack of impartiality and independence, lack of procedural fairness, and lack of training for complaint-handlers. The Department of Health subsequently conducted a review that confirmed the validity of these concerns. In 2004, second-tier investigation was re-allocated to the healthcare regulator, the Healthcare Commission. In 2005, the HSO reported to Parliament[23] that the first stage remained fragmented; and that the whole system focused on process rather than outcomes for patients; lacked leadership, capacity, and competence; and provided inadequate redress. Moreover, the new second tier soon attracted criticism for being ineffective and delay-ridden;

[19] Ibid, 37.

[20] Ibid, ch 5.

[21] V Lens, 'Administrative Justice in Public Welfare Bureaucracies: When Citizens (Don't) Complain' (2007) 39 *Administration and Society* 382.

[22] Public Law Project, *Cause for Complaint? An Evaluation of the Effectiveness of the NHS Complaints Procedure* (London, 1999).

[23] Parliamentary and Health Service Ombudsman, *Making Things Better? A Report on Reform of the NHS Complaints Procedure in England* (HC 213, 2004–5).

and in 2009 it (along with the Healthcare Commission[24]) was abolished, leaving only local investigation supplemented by the possibility of further complaint to the HSO.

In 2009–10, the NHS received more than 150,000 complaints; and the HSO received more than 14,000 complaints, of which some 29 per cent were rejected as being 'premature' because the complainant had not complained locally before coming to the HSO.[25] A Patient Advice and Liaison Service (PALS) offers patients in NHS hospitals advice and information on health-related matters,[26] and a national Independent Complaints Advocacy Service provides support to complainants; but neither is apparently widely known or used.[27] The HSO makes a special annual report on complaint-handling in the NHS; and the first of these[28] repeats many of the criticisms that have been expressed on many occasions since the establishment of the system. The general picture of the internal NHS complaints system, after about fifteen years of operation, is of a complex, inaccessible, and dysfunctional process that leaves a significant proportion of complainants dissatisfied.

The NHS is a very large and extremely complex organization, and it may be that dealing with health-related complaints poses special and peculiarly difficult problems. On the other hand, the National Audit Office (NAO) has been more generally critical of internal review and complaints systems in the public sector.[29] In the words of one commentator: 'most research on the effectiveness of public services complaints procedures has found that they do not work well'.[30] A recurring criticism is that public agencies do not effectively use review and complaint systems to identify systemic problems which can then be put right. This criticism raises the fundamental issue (to which we will return in Chapter 20) of the role that accountability mechanisms can play in

[24] The successor to the Healthcare Commission as regulator—the Care Quality Commission—has oversight of the NHS complaints system but no complaint-handling function.

[25] Some of these complaints return to the HSO after local consideration.

[26] One view is that a key role of PALS is to 'buy off' people who think they have already complained but have not in fact done so formally: Dunleavy *et al*, 'Joining Up Citizen Redress in UK Central Government' (n 10 above), 425.

[27] National Audit Office, *Feeding back? Learning from complaints handling in health and social care* (HC 853, 2007–8), 2.8–2.18.

[28] Parliamentary and Health Service Ombudsman, *Listening and Learning: The Ombudsman's Review of Complaint Handling by the NHS in England 2009–10* (HC 482, 2009–10).

[29] National Audit Office, *Citizen Redress: What citizens can do if things go wrong with public services* (HC 21, 2004–5); *Department for Work and Pensions: Handling Customer Complaints* (HC 995, 2007–8).

[30] J Gulland, 'Current Developments in the UK—Complaints Procedures and Ombudsmen' in Adler (ed), *Administrative Justice in Context* (n 10 above), 459.

improving the quality of administrative decision-making and service delivery. Accountability is concerned primarily with investigating and providing redress for things that have gone wrong in the past, not with making things better for the future. It may be that, by expecting accountability mechanisms to perform both functions, we condemn them to double failure.

However, even if internal review and complaints systems are judged only in terms of their success in addressing and redressing individuals' grievances about the past, the available evidence suggests that their performance is disappointing. Various criticisms are made. Internal systems are said to be poorly advertised and inaccessible. This is part of a larger problem with the administrative justice, to which we will return in Chapter 19. Although public-sector internal review and complaints mechanisms are free for the user, they are said to be slow and expensive to run compared, for instance, with the private-sector Financial Ombudsman Service. It is also alleged that public-sector internal systems often do not provide suitable or adequate redress.

Such criticisms prompt several comments. First, accusations of inaccessibility and lack of economy, efficiency, and effectiveness are staples of the literature about courts, tribunals, and ombudsmen as well as that dealing with internal review and complaint systems. This is not to say that the criticisms are not valid. However, in the absence of accepted benchmarks of accessibility, economy, efficiency, and effectiveness, it is always possible to judge that any particular accountability mechanism is falling short of some unquantified ideal. In recent years, internal review complaint and review mechanisms have been the subject of frequent and intense scrutiny and it is, perhaps, unsurprising that they have been found wanting when judged against the extremely high expectations that have been generated by the NPM-inspired Citizen's Charter of the 1990s and its various subsequent manifestations.

Another reason why internal review and complaint mechanisms attract continuing criticism may be that their growth has been partly underpinned by concepts such as 'alternative dispute resolution' and 'proportionate dispute resolution', which in turn rest on largely unexamined assumptions about the nature of disputes and the best ways of resolving them. The problem may lie, at least partly, in the assumptions rather than the institutions built upon them. We will return to these issues in Chapter 19.

Finally, it may be that internal review and complaint mechanisms have come in for special criticism because of their origins in the ideology of NPM. Although we expect courts, tribunals, and ombudsmen to be

accessible, economical, efficient, and effective, we do not define their function or rationale in such terms. The ideological underpinning of courts and tribunals is generally found in constitutional concepts such as the rule of law, separation of powers, and judicial independence. The ideological foundation of the office of ombudsman in England is the constitutional principle of ministerial responsibility to Parliament. Although the Parliamentary Ombudsman is alone amongst English public-sector ombudsman in being technically an officer of Parliament, ombudsmen generally are understood to perform a quasi-constitutional function of holding bureaucrats accountable for maladministration. By contrast, internal review mechanisms and, especially, internal complaints mechanisms were promoted, and are now effectively required, primarily in the name of 'consumer satisfaction' and 'customer-focus'. They are understood more as components of the business plan of public agencies than as constitutional tools for securing accountability of the administration to the people.[31] In this view, accessibility, economy, efficiency, and effectiveness are not merely desirable features of internal review and complaints systems but their very rationale, because it is these features that enable them to satisfy dissatisfied customers. So understood, such systems are management tools rather than elements of a system of administrative justice. In some contexts—such as delivery of health and care services, perhaps—this approach may be valuable and acceptable. In other contexts—such as policing and prison administration, perhaps—an ideology of customer satisfaction may seem out of place and undesirable.[32]

[31] The involvement of the National Audit Office, the remit of which focuses on value for money, in scrutinizing internal review and complaints systems is significant. Scrutiny by the Ministry of Justice, for instance, or the Law Commission, might generate different perspectives.

[32] Gulland, 'Current Developments in the UK' (n 30 above), 462.

17

Parliament

In discussing the role of Parliament in scrutinizing the administration it is helpful to distinguish between control of administrative rule-making and control of the day-to-day implementation of public programmes.

17.1 SECONDARY LEGISLATION

Most statutory instruments (SIs)[1] have to be laid before Parliament before they come into effect. In some cases, the statute under which the legislation is made only provides that the legislation shall be laid before the Houses (or the House of Commons only). In other cases, the statute provides that an instrument shall expire or not come into effect unless approved by resolution of the House(s) (the affirmative procedure). In yet other cases, the statute provides that after laying, the instrument will automatically come into operation unless either House (or the House of Commons only) resolves to the contrary (the negative procedure).[2] Under neither procedure is there any power to amend the instrument—it must be approved or disapproved as laid.

Statutory instruments that are required to be laid are subjected to technical scrutiny and a small proportion are also scrutinized on their merits.[3] Although the distinction is not watertight, scrutiny on the merits is concerned with the substance of the legislation and whether it is acceptable in policy terms; technical scrutiny is more concerned with ensuring, for instance, that the instrument does not exceed the

[1] See 3.1.1.

[2] According to Page, of the SIs made between 1991 and 1999, 10 per cent were subject to the affirmative procedure and 68 per cent to the negative procedure. Of the rest, 2 per cent were required only to be laid, while 19 per cent did not have to be laid: EC Page, *Governing by Numbers: Delegated Legislation and Every-day Policy-Making* (Oxford: Hart Publishing, 2001), 26. Under Part 2 of the Constitutional Reform and Governance Act 2010, the ratification of treaties is subject to a form of negative procedure.

[3] JD Hayhurst and P Wallington, 'The Parliamentary Scrutiny of Delegated Legislation' [1988] *PL* 547; Page, *Governing by Numbers* (n 2 above), ch. 8.

powers of the maker and that it is clearly and effectively drafted to achieve its stated purpose. Technical scrutiny is undertaken by the Joint Committee on Statutory Instruments or, in the case of (the relatively small proportion of) instruments that are required to be laid only before the House of Commons, by the Select Committee on Delegated Legislation.[4] Scrutiny of the merits of instruments is primarily undertaken by standing committees in the House of Commons and by the Merits of Statutory Instruments Committee in the House of Lords. These committees draw the attention of the House to instruments considered to deserve further scrutiny. However, very few statutory instruments are debated on the floor of the House and even fewer are the subject of a divided vote.[5] As a matter of self-imposed restraint, the House of Lords very rarely votes against statutory instruments; but even in the Commons, it is extremely uncommon for instruments to be rejected, and since the Statutory Instruments Act 1946 came into operation only a handful of instruments subject to the negative procedure have been successfully 'prayed against'. As would be expected, instruments subject to affirmative procedure generally receive more Parliamentary attention than those subject to negative procedure, especially so far as their merits are concerned.

Views differ about the value and effectiveness of Parliamentary scrutiny of secondary legislation, although there is a widespread view that it is inadequate given the volume of secondary legislation and the importance of at least a minority of instruments. A theoretical advantage of Parliamentary control of secondary legislation, compared with judicial review,[6] is that even though it typically takes place only after the legislation has been drafted and the policies underlying it have been settled, it does occur before or at least very soon after the legislation comes into force.[7] Because secondary legislation typically affects large

[4] In practice, these committees are heavily dependent on their legally trained staff.

[5] Page, *Governing by Numbers* (n 2 above), 168–72.

[6] Secondary legislation can be directly challenged by a claim for judicial review. It may also be indirectly ('collaterally') challenged in proceedings to enforce the statute: eg *Boddington v British Transport Police* [1999] 2 AC 143; or in an appeal against an administrative decision to a court or tribunal (although it is not clear whether all tribunals have jurisdiction over challenges to secondary legislation). Successful challenges to secondary legislation that was subject to Parliamentary scrutiny are extremely rare. Hayhurst and Wallington (n 3 above), 568–9, found only twelve instances between 1914 and 1986.

[7] The validity of acts done under a statutory instrument before it is revoked is not affected by revocation: Statutory Instruments Act 1946, s 5(1). In the US, it is possible to challenge administrative rules before they are enforced. The main argument in favour of pre-enforcement review is that compliance with an illegal rule may require wasteful

numbers of people and the costs of undoing the effects of its enforcement may be very great, the fact that judicial review may take place a long time after it has come into operation and despite the fact that it was laid before and approved by Parliament (if the instrument is subject to the affirmative procedure[8]) may give courts an incentive to attempt, if possible, to interpret secondary legislation in a way that makes it lawful rather than unlawful. In some cases, it may be possible to lessen the negative impact of invalidation. For example, failure to consult a body required by statute to be consulted before legislation is made invalidates the legislation only as against that party.[9] If only one part of an instrument is invalid and can be easily severed from the rest of the instrument, the remainder can be allowed to stand.[10] On the other hand, it has been said that once it has been found to be unlawful, the court should not merely declare secondary legislation to be unlawful but should set it aside precisely because it typically affects many people.[11]

A second theoretical advantage of Parliamentary scrutiny over judicial review is that Parliament can concern itself more with the substance of the legislation. However, this raises a serious practical dilemma. One of the main reasons why so much legislation is made by the executive is that Parliamentary time is very limited and in great demand: the business of government is simply too multifarious and extensive to be regulated entirely by Parliament. Typically, primary legislation establishes broad policy objectives, and not only its detailed implementation but also important matters of policy may remain to be dealt with in secondary legislation.[12] Moreover, by inserting so-called 'Henry VIII clauses' into a statute Parliament can give the executive power to amend or repeal primary legislation by making secondary legislation rather than by presenting a bill for amendment to Parliament.[13] Although the scrutiny

expenditure. The main argument against is that it significantly slows down ('ossifies') the rule-making process.

[8] *F Hoffman-La-Roche & Co AG v Secretary of State for Trade* [1975] AC 295, 354 (Lord Wilberforce): an instrument may be invalidated even though affirmatively approved by Parliament.

[9] *Agricultural Training Board v Aylesbury Mushrooms Ltd* [1972] 1 WLR 190.

[10] *Dunkley v Evans* [1981] 1 WLR 1522.

[11] *R (C) v Secretary of State for Justice* [2009] QB 657.

[12] The role of the House of Lords Delegated Powers and Regulatory Reform Committee is to scrutinize bills for primary legislation to identify inappropriate delegation of rule-making power and provision for Parliamentary scrutiny. See P Tudor, 'Secondary Legislation: Second Class or Crucial?' (2000) 21 *Statute Law Review* 149.

[13] An important example is s 10 of the Human Rights Act: NW Barber and AL Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003]

of rules made by someone else may not take as long as making the rules in the first place, the Parliamentary timetable would simply not permit every instrument of major importance to be debated. An important reason why the affirmative procedure is relatively little used is that it necessitates a debate (which, however, is more likely to take place in committee than on the floor of the House).

Whatever the defects of the actual procedures used in Parliament for scrutinizing instruments and however they might be improved, it is unlikely that the level of scrutiny will ever be such as to make Parliament an important controller of administrative rule-making. The position of Parliament is also weak because there is no general requirement that Parliament be consulted when secondary legislation is being drafted;[14] nor is Parliament in fact normally consulted. It should probably be recognized that Parliament does not and never will play a significant part in scrutinizing secondary legislation or participating in its preparation. We should concentrate on increasing the power of Parliament in scrutinizing primary legislation[15] and develop other methods for increasing the democratic input into the making of secondary legislation.[16]

PL 112. The Legislative and Regulatory Reform Act 2006 gives Ministers very wide powers to amend or repeal primary legislation by secondary legislation.

[14] Certain statutory instruments (amending or repealing primary legislation) must be laid before Parliament in preliminary draft before being laid in final draft for approval: see eg Legislative and Regulatory Reform Act 2006, s 18. Such two-stage scrutiny, which allows Parliament to suggest amendments, is called 'super-affirmative procedure'.

[15] The mechanisms for Parliamentary scrutiny of draft primary legislation ('pre-legislative scrutiny') are not highly developed: D Oliver, 'The "Modernization" of the United Kingdom Parliament?' in J Jowell and D Oliver (eds), *The Changing Constitution*, 6th edn (Oxford: Oxford University Press, 2007), 168–9. See also A Kennon, 'Pre-Legislative Scrutiny of Draft Bills' [2004] *PL* 477; C Harlow and R Rawlings, *Law and Administration*, 3rd edn (Cambridge: Cambridge University Press, 2009), 160–1. The Joint Committee on Human Rights scrutinizes bills for compliance with the ECHR and other human rights documents. The House of Lords Constitutional Committee examines bills for constitutional implications. For more detail see R Hazell, 'Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?' [2004] *PL* 495. For a study of the ways in which MPs can influence the formulation of legislative policy see S Kalitowski, 'Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation' (2008) 61 *Parliamentary Affairs* 694.

[16] See eg House of Commons Public Administration Select Committee, *Innovations in Citizen Participation in Government,* Sixth Report (HC 373, 2000/1).

17.2 IMPLEMENTATION

17.2.1 MINISTERIAL RESPONSIBILITY

The constitutional linchpin of Parliamentary scrutiny of the day-to-day implementation of public programmes by the administration is the doctrine of individual ministerial responsibility (IMR).[17] According to this doctrine, Ministers are personally answerable to Parliament for the 'quality and success' of 'their policies, decisions, and actions, and for the policies, decisions, and actions of their departments'.[18] IMR is the key feature that distinguishes 'responsible government', in which Ministers (including the Prime Minister) are also members of the legislature, from 'presidential government' (exemplified by the US system of government) in which they (and the President) are not. IMR is a prime institution of what has become known (rather loosely) as the 'political constitution' as opposed to the 'legal constitution'. This distinction focuses on modes and mechanisms of accountability. In crude terms, the political constitution provides a framework for accountability to Parliament for policy failures, whereas the legal constitution provides a framework for accountability to courts and tribunals for breaches of public (and private) law.

In general, we might think, the stronger the mechanisms and institutions for holding public administrators politically accountable, the less need there is for legal accountability through courts and other legal institutions. One point of view is that political accountability is preferable to legal accountability because it is more democratic. Sometimes the courts rely on the possibility of political accountability (and IMR in particular) as a justification for not imposing legal constraints on the exercise of public power. On the other hand, various developments of the past fifty years—most notably, perhaps, British membership of the EU, devolution, and the domestication of the ECHR—have greatly increased the role of law and courts, relative to political institutions, in holding public functionaries to account. This is not to say that institutions of political accountability are impotent, but only that relative to legal institutions, they play a smaller role in holding public functionaries

[17] G Marshall, *Ministerial Responsibility* (Oxford: Oxford University Press, 1989); D Woodhouse, *Ministers and Parliament* (Oxford: Oxford University Press, 1994). Concerning collective ministerial responsibility see A Tomkins, *Public Law* (Oxford: Oxford University Press, 2003), 135–40.

[18] Tomkins, *Public Law* (n 17 above), 140.

accountable than they did fifty years ago. Some find this an unsatisfactory and even dangerous development.

Opinions differ about the efficacy of IMR as an accountability mechanism.[19] Three relevant issues deserve attention. The first concerns the provision of information by the executive to Parliament about the day-to-day conduct of government business. The free flow of information is a precondition of effective accountability. If IMR is to be of practical value, the government of the day must be willing to allow and require Ministers and civil servants to appear before Parliamentary committees and to place few restrictions on the sorts of questions they may answer and the sorts of information they may give.

A second issue concerns 'sanctions'. The typical requirement that IMR imposes is to give information about, and to explain, conduct of the Minister or the department. When things go wrong, a Minister may need to apologize and to undertake personally that steps will be taken to put things right. Only in very serious cases will a Minister be forced to resign in the name of IMR alone.[20] In addition to pressure exerted by Parliament, pressure from the Prime Minister, the governing party, or the country (commonly expressed through the media) is usually necessary to secure a ministerial resignation. On the other hand, a Minister may be forced to resign by extra-Parliamentary pressure even if Parliament is not seeking that outcome.

A third issue relevant to assessing the efficacy of IMR concerns its scope. Ministers are obviously responsible for their own policies and conduct (their 'public' conduct, anyway).[21] In traditional constitutional theory, Ministers are also responsible for the policies and public conduct of civil servants in their departments. This aspect of IMR goes along with the concept of an anonymous, independent, and politically neutral civil service made up of non-partisan officials doing the bidding of their political masters. Various developments in recent years have blurred this traditional picture. For example, senior civil servants may be employed on fixed-term contracts, thus undermining the job security that traditionally underpinned the neutrality of the civil service. Heads of major

[19] For an upbeat assessment see Tomkins, *Public Law* (n 17 above), 140–59. For less optimistic accounts see D Oliver, *Constitutional Reform in the UK* (Oxford: Oxford University Press, 2003), 213–17; D Woodhouse, 'Ministerial Responsibility: Something Old, Something New' [1997] *PL* 262.

[20] See generally K Dowding and W-T Kang, 'Ministerial Resignations 1945–97' (1998) 76 *Pub Admin* 411.

[21] The extent to which a Minister's private life attracts and should attract IMR is a different matter.

government agencies no longer enjoy the traditional anonymity of the civil service. The creation of non-departmental executive agencies (such as Jobcentre Plus) to deliver public services was premised on a distinction between policy-making and policy-execution. The former would continue to be the responsibility of the Minister, while the chief executive of the agency assumed responsibility for the latter.[22] This division of responsibility is unstable because the distinction between policy-making and policy-execution is inherently vague. The day-to-day implementation of public programmes is typically not merely a mechanical process of applying established rules to particular situations, but often requires the exercise of discretion and the making of policy choices. One result is that Ministers may wish to interfere with the day-to-day running of executive agencies. At the same time, however, the very instability of the distinction between making and executing policy may enable Ministers to offload responsibility for the effects of such interference onto the heads of the agencies.[23]

To the extent that such developments enable Ministers to resist the various demands of IMR, other accountability mechanisms may be needed. These include making senior civil servants directly answerable to Parliament[24] and establishing independent mechanisms for investigating complaints against non-departmental agencies (see Chapter 18).

17.2.2 QUESTIONS

Parliamentary questions are an integral part of enforcing IMR, but they deserve brief attention in their own right. Questions perform two main functions: to elicit information about the activities of government and to ventilate policy issues that arise out of the day-to-day conduct of government business. By far the majority of questions (of which there

[22] G Drewry, 'The Executive: Towards Accountable Government and Effective Governance?' in J Jowell and D Oliver (eds), *The Changing Constitution*, 6th edn (Oxford: Oxford University Press, 2007), 197–201.

[23] R. Baldwin, '"The Next Steps": Ministerial Responsibility and Government by Agency' (1988) 51 *MLR* 622; G Drewry, 'Next Steps: The Pace Falters' [1990] *PL* 322.

[24] Chief executives of executive agencies are answerable to the Public Accounts Committee of the House of Commons and can be called before other select committees. Parliamentary questions about the day-to-day activities of agencies are referred to the chief executive, and the answers are published in *Hansard* (n 26 below). Such techniques are not available in relation to local analogues of executive agencies established by central government to implement programmes and deliver services that have traditionally fallen within the sphere of local government. Such bodies escape many forms of public accountability: S Weir, 'Quangos: Questions of Democratic Accountability' (1995) 48 *Parl Aff* 306. See generally D Oliver, *Constitutional Reform in the UK* (n 19 above), ch 17.

are tens of thousands in each session) receive written answers, and this is the best medium for obtaining detailed information. Oral questions tend to be designed for political purposes rather than for getting information. Even if Ministers rarely resign as a result of revelations elicited by Parliamentary questions, it is nevertheless true that governments can be embarrassed by questions and can be prompted to do something about the matters raised. Important, too, is the fact that the question is really the only Parliamentary procedure which has remained under the complete control of the back-bencher; and for this reason, if for no other, questions remain an important counterweight to government power and a constant, if minor, irritant.[25]

A major limitation on the usefulness of questions is that a Minister can only be asked, and need only answer, questions on matters over which he or she has control. In general, this prevents Ministers from being questioned about the day-to-day management and activities of non-departmental agencies and other governmental bodies which are, in theory at least, independent of direct ministerial control and direction in relation to their routine operations. In practice this limitation is generally, if not rigidly, observed. The result is that much governmental activity is protected from the scrutiny of Parliamentary questions. In the case of executive agencies (such as the Pensions, Disability and Carers Service and Jobcentre Plus), this 'accountability gap' is partly filled by the fact that the chief executives of agencies can be asked written questions the answers to which are published in *Hansard*.[26] The real problem, however, is that the line between routine operations, about which the chief executive can be asked, and matters of policy, for which the Minister is responsible, is blurred. This blurring may enable both the chief executive and the Minister effectively to avoid answering a question fully and properly.

Continuing tension in this area between successive Parliaments and governments may be partly a result of confusion about the term 'responsibility'. The word may be understood rather legally as a rough synonym for 'liability'. Legal liability is basically of two sorts: liability to be punished (criminal) and liability to make reparation (civil). Legal

[25] The FOI Act will, in some cases, provide an enforcement mechanism in relation to government refusal to provide information requested by way of a Parliamentary question: B Hough, 'Ministerial Responses to Parliamentary Questions: Some Recent Concerns' [2003] *PL* 211.

[26] P Greer, *Transforming Central Government* (Buckingham: Open University Press, 1994), 89–91; P Leopold, 'Letters to and From "Next Steps" Agency Chief Executives' [1994] *PL* 214.

liability is typically for one's own conduct. Occasionally a person may be vicariously liable for the conduct of another, but very rarely in criminal law. If political responsibility is understood as analogous to legal liability, it is not surprising that Ministers want to minimize its scope. But political responsibility is not just about punishment and reparation. It is also about openness and explanation. It would not be reasonable to hold a Minister personally 'liable' to be 'punished' or to 'make reparation' for everything done in his or her department, let alone in non-departmental public bodies that operate in the same policy area. It does not follow, however, that the scope of responsibility in this narrow sense should also mark the boundary of the Minister's obligation to answer Parliamentary questions and generally to provide Parliament with information reasonably available to the Minister about the conduct of public business relevant to his or her portfolio.

17.2.3 SELECT COMMITTEES

The function of select committees[27] is that of 'monitoring the expenditure, administration and policy of government and its departments' by (for instance) 'monitoring performance against targets in public service agreements, taking evidence from independent regulators and inspectorates, considering the reports of Executive Agencies [and] considering major appointments made by ministers'.[28] By comparison with standing committees, which consider legislation at the committee stage and operate in an essentially adversarial way as a microcosm of the House, select committees may be less partisan, although their membership reflects the balance of power between the parties.

The operations of all of the major departments of State are monitored by a committee. The committees have wide powers to summon persons and papers (although these typically do not apply to Ministers and their departments) and to initiate inquiries. Committees may investigate large policy issues or probe more detailed current or continuing problems in the administration of government programmes. Their terms of reference are wide and enable them to investigate the activities not only of government departments, but also of non-departmental bodies.

[27] G Drewry (ed), *The New Select Committees*, 2nd edn (Oxford: Oxford University Press, 1989); Tomkins, *Public Law* (n 17 above), 162–8; D Oliver, *Constitutional Reform in the UK* (n 19 above), 178–180; Oliver, 'The "Modernization" of the United Kingdom Parliament?' (n 15 above), 169–73.

[28] Oliver 'The "Modernization" of the United Kingdom Parliament?' (n 15 above), 169–70.

However, the efficacy of the select committees is dependent, to a significant extent, on the willingness of government to cooperate and the perseverance and skill of their chairs and members. Committees cannot force Ministers and civil servants to appear before them or, when they appear, to answer particular questions or to answer them in a non-evasive way.

Particularly worthy of mention is the Public Accounts Committee (PAC)[29] which, as its name implies, monitors the use of public money by government. This committee was first formed in 1861, and its investigations are now usually based on reports by the National Audit Office (NAO), which is headed by the Comptroller and Auditor General. The NAO conducts audits of two types. Certification audits are designed to check that taxes received and monies expended are properly accounted for, that appropriations are used for the right purpose, and that government business is conducted with propriety and probity. Value-for-money (VFM) audits are designed to judge whether government business is being conducted with 'economy, efficiency and effectiveness'. Such audits are not, in theory, concerned with matters of policy; but in practice it is difficult to pronounce on matters of economy, efficiency, and effectiveness without raising what could be seen as questions of policy. For this reason, VFM audits are controversial.[30] The PAC is not, of course, required to be silent about issues of policy, but it purports to confine itself to the issue of value-for-money. The departmental select committees, by contrast, are empowered to examine the expenditure, administration, *and policy* of government departments and public agencies.

The effectiveness of the select committees[31] depends partly on what is done with their reports. Reports are presented to the House, but individual reports are rarely debated; publicity is the committees' main weapon. Much depends, too, on the ability of committees to act on the basis of consensus and in a non-partisan way;[32] and, most importantly of all, on the willingness of government departments to accept and act

[29] F White and K Hollingsworth, *Audit, Accountability and Government* (Oxford: Oxford University Press, 1999), 122–7.

[30] J McEldowney, 'The Control of Public Expenditure' in J Jowell and D Oliver, *The Changing Constitution*, 4th edn (Oxford: Oxford University Press, 2000), 217–23. See also C Scott, 'Speaking Softly Without Big Sticks: Meta-Regulation and Public Sector Audit' (2003) 25 *Law and Society* 203.

[31] 'Effectiveness' is a complex concept: Drewry (ed), *The New Select Committees* (n 27 above), 5–8, 397–8.

[32] Ibid, 362–5, 404–6, 408–11.

upon criticisms made by committees. The strength of the executive *vis-à-vis* Parliament imposes an inevitable and major constraint on what the committees can achieve by way of altering government behaviour or policy.[33]

It can plausibly be argued that select committees (like Parliament itself) operate 'on the sidelines of government'[34] because it is the executive that runs the country.[35] On the other hand, reports of select committees contain large amounts of information about government activities that would probably not otherwise see the light of day; and in a governmental system as secretive as the British, this alone is a considerable achievement. At the same time, it is regrettable that the expertise of members of select committees could not be more creatively harnessed to the job of formulating policy rather than just scrutinizing its execution.

[33] Ibid, 372–6.
[34] Ibid, 426.
[35] '[S]pare us government by select committee. This is a recipe for inertia and muddle': P Riddell, 'The Rise of the Puppetocracy', *The Times,* 8 February 1993.

18

Ombudsmen

In Chapter 16 we discussed mechanisms for investigating citizens' complaints against the administration that are internal to (embedded within) administrative departments and agencies. In this chapter we examine external, 'independent' mechanisms for investigating complaints. The generic name for an independent official who investigates citizens' complaints against the administration is 'ombudsman',[1] although not all officials who perform the role have that title. The title is also used to describe officials who investigate complaints made by customers against private sector providers of goods and services. In the UK, perhaps the best known private sector ombudsman institution is the Financial Ombudsman Service.

In the public sector, there are two models of the office of ombudsman, which might be referred to as the Parliamentary model and the tribune model[2] respectively. In the Parliamentary model, the ombudsman is a 'servant' of Parliament who assists MPs in holding the executive to account for the day-to-day conduct of government business. In the tribune model, the ombudsman operates separately from other organs of government to protect the interests of citizens against the executive and public-sector agencies. The Parliamentary model is found in some, but not all, Westminster-style governmental systems. Ombudsmen and other non-judicial accountability institutions in the tribune model are sometimes thought of as constituting a 'fourth branch of government'.

This chapter will focus on three public-sector ombudsmen in England: the Parliamentary Ombudsman (PO) and, more briefly, the

[1] In general, the independence of public-sector ombudsmen has not been a matter of controversy. However, it has been suggested that the Parliamentary Ombudsman should be nominated by Parliament rather than by the Prime Minister (as at present): Law Commission Consultation Paper 196, *Public Services Ombudsmen* (2010), Part 3.

[2] In ancient Rome, the tribunes were officials appointed to protect the interests and rights of the plebeians from the patricians. We can think of a tribune as a sort of people's champion.

Health Service Ombudsman (HSO) and the Local Government Ombudsman (LGO).

18.1 THE PARLIAMENTARY OMBUDSMAN

18.1.1 CASELOAD

The office of the Parliamentary Commissioner for Administration (PCA)—now commonly known as the office of the Parliamentary and Health Service Ombudsman (PHSO)[3]—which was created by the Parliamentary Commissioner Act 1967 PC Act, was seen as having two main functions: investigating individuals' complaints against government; and, conversely, legitimizing the administrative process in cases where complaints were found to be unwarranted, and enabling individual civil servants accused of maladministration to clear their names.

In 2009–10, the PHSO resolved 24,240 inquiries,[4] of which 11,351 were non-health ('Parliamentary') inquiries. The PO has a general discretion, reviewable by a court,[5] whether or not to accept a complaint for investigation. It was originally anticipated that all complaints that got past initial screening would be fully investigated; and this was the PO's practice until about 2000, giving the office a reputation for providing a 'Rolls Royce service'. Since then, however, more and more complaints have been dealt with by less formal and resource-intensive techniques; and of the inquiries resolved in 2009–10, only 356 were accepted for investigation, of which about half were non-health inquiries. Of the remainder (both health and non-health), 3,318 were rejected after 'assessment' because they were outside the PHSO's remit; 9,856 because they were not properly made (complaints must be in writing and non-health complaints must be referred to the PO by an MP); and 4,756 because they were premature—an internal complaint mechanism had not been used or completed. A further 1,661 were withdrawn by the complainant and 4,293 were resolved by 'intervention', without investigation (for example, as a result of the PHSO deciding that the complaint was groundless or of the agency offering appropriate redress when asked by the PHSO). In 2009–10, 78 per cent of inquiries received a

[3] The same official holds the office of Parliamentary Ombudsman (established by the Parliamentary Commissioner Act 1967 (PC Act)) and the office of Health Service Ombudsman (first created in 1974 and now regulated by the Health Service Commissioners Act 1993).

[4] An inquiry is a request to investigate, which may contain more than one complaint.

[5] *R v Parliamentary Commissioner for Administration, ex p Dyer* [1994] 1 All ER 375.

substantive response within forty working days; the target for 2010–11 is 90 per cent. However, only 65 per cent of investigations were completed within twelve months of the complaint being accepted for investigation. The PO attributed this result to increased workload following the introduction of the new NHS complaints system, and set a target of 90 per cent for 2010–11.

Of the non-health complaints investigated in 2009–10, 80 per cent were resolved wholly or partly in favour of the complainant. The public bodies which were most frequently the subjects of non-health complaints were the Department for Work and Pensions[6] (3,000 complaints), HM Revenue and Customs (1,896), the Home Office (952), and the Ministry of Justice (931).

18.1.2 PROCEDURE

As we have noted, the PO resolves most complaints informally and quite quickly either on the basis of an 'assessment' of the complaint or by an 'intervention'. The PO has wide discretion about the procedure to be followed in investigating complaints. The only statutory constraints are that the investigation must be conducted in private,[7] and that the agency or individuals complained about must be given an opportunity to comment on the complaint.[8] The PO has wide power to obtain information and make inquiries. Ministers and civil servants can be required to furnish information and produce documents. Legal obligations of secrecy and restrictions on disclosure of information do not apply to investigations by the PO, and public-interest immunity (PII) cannot be claimed. In this respect, the PO is in a stronger position than the courts. The only significant limitation on these extensive evidence-gathering powers is that the PO has no access to Cabinet documents whereas courts, in principle, do. Privacy of investigations is, no doubt, the price of the PO's more-or-less unrestricted access to government information and documents.[9] On the other hand, given the centrality of openness to concepts of fair procedure, it does cast doubt on claims that the PO is in the business of the 'administration of justice'.

[6] The largest central government department.

[7] This requirement applies to public-sector ombudsmen generally. The Law Commission proposes relaxation: CP 196, 5.4–5.35.

[8] PC Act, ss 7 and 8. For a more detailed account see J Halford, 'It's Public Law, But Not As We Know It: Understanding and Making Effective Use of Ombudsman Schemes' [2009] *JR* 81, 89–91.

[9] There are statutory limitations on disclosure by the PO of information obtained for the purposes of an investigation: PC Act, s 11.

The PO has the same powers as a court to compel witnesses, can allow any person to be represented in the investigation, and can pay expenses and compensation for lost time to the complainant and anyone else who provides information. Any act or omission that would be a contempt of court if the PO's investigation were a court proceeding can be treated as a contempt of the investigation.[10] Despite all this, however, in practice, oral hearings by the PO are 'almost unknown', although telephone or face-to-face interviews may be conducted.[11] Assumptions underlying the PO's empowering legislation and investigative practice are that neither the common law rules of procedural fairness nor the provisions of Art 6 of the ECHR apply to investigations. Although the former has been questioned,[12] both assumptions are probably safe because the PO lacks the power to determine legal rights and obligations.

18.1.3 THE PO AND PARLIAMENT

The PO, as the name of the office implies, is a 'servant' of Parliament. The office was originally conceived, in part, as a way of making up for weaknesses and gaps in Parliamentary mechanisms for scrutinizing public administration, such as questions and select committee investigations. The very wide information-gathering powers noted earlier put the PO in a much stronger position than individual MPs and select committees, who are ultimately dependent on government cooperation in obtaining information about public administration. On the other hand, the remit of select committees is not limited to the investigating complaints, and they typically scrutinize public administration more systematically and broadly than the PO.

The PO makes frequent reports to Parliament (a report must be made at least annually), and the House of Commons Public Administration Select Committee (PASC) monitors the PO's work and can investigate for itself and report to Parliament on matters arising from the reports of the PO. These activities of the PASC can give extra impact to the work of the PO in cases where the additional publicity given by a report of a Parliamentary committee is thought to be useful in securing compliance with recommendations of the PO by a resistant department, or in prompting some change in administrative policy or practice.

A recent vivid example is provided by the saga of Equitable Life. Thousands of its policy-holders suffered financial loss (estimated at

[10] PC Act, s 9(1).
[11] Halford, 'It's Public Law, But Not As We Know It' (n 8 above), 83.
[12] *Cavanagh v Health Service Commissioner* [2006] 1 WLR 1229.

between £4 and £5 billion) allegedly as a result, in part, of maladministration by agencies responsible for regulating the insurance industry. In 2008, after a four-year investigation of policy-holders' complaints, the PO published a report entitled *Equitable Life: A Decade of Regulatory Failure*, in which she made ten findings of maladministration and detailed recommendations for the payment of compensation. In its response to the report, the government accepted some of the findings of maladministration but rejected others. In March 2009 the PASC published a report entitled *Justice Denied?*, which was highly critical of the government's response; and the PHSO expressed her criticisms in May 2009 in a report entitled *Injustice Unremedied?*. The PASC published further reports in May 2009 and October 2010, between which there was a change of government. The final upshot of this persistent pressure was that the new government accepted all of the PHSO's findings of maladministration and agreed to pay total compensation of £1.5 billion to policy-holders. This is by far the largest amount of compensation ever paid in response to a report by the PO.

Another job undertaken by the PASC is reviewing the powers and working practices of the PO. The Committee has been successful in helping the PO to enforce recommendations against departments, but it has been less successful in persuading governments to extend the remit and powers of the PO: governments do not welcome the scrutiny of the PO any more than they would willingly agree to significantly increased scrutiny powers for Parliament itself.[13] Because the PO's remit is defined by a list of departments and agencies in Sch 2 to the PC Act, its extension tends to be piecemeal and case-by-case. As a result of the fact that the PO is a servant of Parliament, in cases of political sensitivity the work of the PO is bound to be affected by the relative weakness of Parliament as a check on the exercise of power by governments.

The PO can investigate a (non-health) complaint[14] only if it is referred to the PO by an MP either after a complaint is initially made to the MP or after the PO has received the complaint and sent it on to the MP. It is ultimately the complainant's MP who decides whether the PO will be asked to investigate any particular complaint or the member

[13] R Gregory, 'The Select Committee on the Parliamentary Commissioner for Administration, 1967–1980' [1982] *PL* 49. For more recent history see Select Committee on Public Administration, *Ombudsman Issues*, Third Report, HC 448 (2002/3) and the Government's Response (Cabinet Office, 2003), which is a masterpiece of evasion.

[14] The 'MP filter' applies only to non-health complaints to the PHSO. No analogous filter applies to health complaints or to any other public-sector ombudsman.

personally will take some action, such as writing to a Minister or contacting an official.[15] This is because constitutionally, the primary responsibility for defending the citizen against the executive is seen as resting with MPs. In fact, MPs deal personally with many more complaints than are referred by them to the PO.[16] Generally, only cases that are somewhat difficult, complex, or out of the ordinary are referred to the PO. Although a high proportion of MPs refer at least one complaint a year to the PO, it seems that most MPs view the work of the PO as marginal to their role as grievance-handlers.[17] The 'MP filter' has always been controversial. A 1999 survey showed that only a bare majority of MPs favoured its retention,[18] and in a 2004 survey a clear majority favoured its abolition.[19] Successive governments (most recently in 2010[20]) have rejected recommendations to remove the filter.

18.1.4 THE PO'S REMIT

The PO's remit is, in its terms, very wide: it covers any action taken by or on behalf of any of the departments and authorities listed in Sch 2 to the PC Act in exercise of administrative functions of the department or authority.[21] The phrase 'or on behalf of' means that the PO can investigate complaints against agencies to which the performance of administrative functions has been delegated by an entity subject to the PO's jurisdiction. Over the years, many additions have been made to the Sch 2 list to take account of changing patterns of delivery of public services. Subject to specific exceptions, complaints may be made by 'any individual, or by any body of persons whether incorporated or not'.[22]

[15] In 2009–10, 235 complaints were withdrawn because an MP refused to refer to the PO.

[16] AC Page, 'MPs and the Redress of Grievances' [1985] *PL* 1; R Rawlings, 'The MP's Complaints Service' (1990) 53 *MLR* 22 and 149. The fact that MPs are very active in dealing with complaints partly accounts for the fact that the PO deals with so few. It is generally believed that removal of the MP filter would significantly increase the number of complaints, as did the introduction of direct access to the Local Government Ombudsman in 1988.

[17] Concerning the relationship between MPs and the PO see G Drewry and C Harlow, 'A "Cutting Edge"? The Parliamentary Commissioner and MPs' (1990) 53 *MLR* 745.

[18] P Collcutt and M Hourihan, *Review of the Public Sector Ombudsmen in England* (Cabinet Office, 2000), para 3.38.

[19] PHSO, *The Parliamentary Ombudsman: Withstanding the Test of Time*, HC 421 (2007), 12.

[20] House of Commons Public Administration Select Committee, *Parliament and the Ombudsman: Further Report*, HC 471 (2009–10).

[21] PC Act, s 5(1).

[22] Ibid, s 6(1).

The PO can investigate complaints not only about civil servants but also about decisions made personally by Ministers. This happened, for example, in 1967 when the Foreign Secretary refused to allow certain compensation claims by ex-servicemen; and in 1974 when the Industry Secretary made misleading statements about the financial soundness of a tour operator. The PO deals with a wide variety of complaints: for example, about delay in the performance of public functions and the delivery of public services; about false or misleading advice, or unreasonable refusal or failure to give such advice;[23] about discrimination in the provision of social welfare or other benefits; about failure properly to apply departmental policy and procedural guidelines;[24] about refusal to pay compensation for injustice or loss inflicted by administrative action.[25] Conduct complained of ranges from arrogance, inefficiency, and incompetence to deliberate misconduct such as lying, personal bias, and suppression of information.

Certain areas are specifically excluded from the PO's jurisdiction. These include foreign affairs, diplomatic activity, the investigation of crime, action in matters relating to contractual or commercial activities, and the conditions of service of Crown servants. Some of these exclusions have been criticized, in particular those relating to complaints about the conditions of service of Crown employees and complaints arising out of commercial transactions. The latter exclusion prevents the PO investigating procurement and contracting-out.

The PO is empowered to investigate complaints by members of the public.[26] This imposes a legal limit on the scope of the PO's investigation, although that limit is not precisely located and will depend to some extent on the circumstances of the case. Because the PC Act says very little about how investigations are to be conducted, in practice, an investigation can be extended beyond the complainant to persons similarly situated who have not complained. However, investigation of a

[23] AR Mowbray, 'A Right to Official Advice: The Parliamentary Commissioner's Perspective' [1990] *PL* 68.

[24] AR Mowbray, 'The Parliamentary Commissioner and Administrative Guidance' [1987] *PL* 570.

[25] eg R James and D Longley, 'The Channel Tunnel Rail Link, the Ombudsman and the Select Committee' [1996] *PL* 38. This was one of the first cases in which the PCA adopted a test-case strategy for dealing with multiple complaints about the same issue. Investigating a representative complaint is now the standard technique for dealing with such cases: The Parliamentary Ombudsman, *Annual Report, 2002–3* (TSO), para 1.7.

[26] PC Act, s 5(1)(a).

complaint cannot be used as a peg on which to hang an 'investigation at large'[27] of matters that are not relevant to the specific complaint.

18.1.5 MALADMINISTRATION

The PO has power to investigate complaints of 'injustice in consequence of maladministration'.[28] Neither of these key terms is defined. The meaning of both was left to be worked out by the PO in the process of investigating complaints. 'Injustice' means something like 'harm' broadly understood to include not only pecuniary and non-pecuniary loss and damage but also, for instance, feelings of outrage, frustration, distress, and indignation.[29]

The classic formulation of the meaning of 'maladministration' is the 'Crossman catalogue' (which was formulated by the government spokesman in the course of a House of Commons debate on the PC Act): 'bias, neglect, inattention, delay,[30] incompetence, ineptitude, perversity, turpitude, arbitrariness and so on'. Over the years, this catalogue has been developed and extended by successive POs not only negatively in making findings of maladministration but also positively in enunciating principles of good administration. Such principles include adherence to hard and soft law, and to policies and procedures; timeliness; accuracy in provision of information; having and giving good reasons for decisions; avoiding conflicts of interest; acting reasonably, fairly, consistently, and proportionately.

What is the relationship between such principles of good administration and the legal norms discussed in Part II of this book? First, the PO (like ombudsmen generally) has no power to determine legal rights and obligations. At the highest, therefore, these principles are soft law.[31] They provide a normative framework within which the PO exercises the powers of the office and which complainants, and departments and authorities within the PO's remit, can legitimately expect will inform investigations and reports. The PO is amenable to judicial review and so the principles of good administration developed and promoted, the investigatory procedures followed, and the reports made by the PO

[27] *Cavanagh v Health Service Commissioner* [2006] 1 WLR 1229. The principle was stated in relation to the HSO, but applies equally to the PO and other ombudsmen.

[28] PC Act, s 5(1)(a).

[29] Halford, 'It's Public Law, But Not As We Know It' (n 8 above), 88–9.

[30] SN McMurtrie, 'The Waiting Game—The Parliamentary Commissioner's Response to Delay in Administrative Procedures' [1997] *PL* 159.

[31] The LGO, but not the PHSO, has express statutory power to make recommendations about how to prevent injustice being caused in the future by maladministration.

must be consistent with the legal framework of public administration. In practice, claims for judicial review are rarely made against the PO, and the courts tend to exercise their jurisdiction over the PO with a light touch for fear of unduly legalizing and judicializing the office and its operations.

Secondly, failure to comply with rules and principles of administrative law is not only illegal: it is also bad administrative practice. Similarly, making an incorrect decision such as could be set aside in a general appeal is bad administrative practice even if the decision is not also illegal. This overlap between the concepts of legality, correctness, and good administration is implicit in the provision that the PO should not investigate a complaint if the complainant could reasonably be expected to appeal to a tribunal or make a claim for judicial review (see 18.1.7). Maladministration encompasses both acting illegally and making incorrect decisions, but it is not confined to either. For instance, while delay might lead to a decision that is illegal[32] or incorrect, delay can constitute maladministration even though it has neither of these effects. Similarly, giving misleading information may not breach any principle of administrative law or rule of tort law, but it may constitute maladministration.

Thirdly, it has been said that maladministration only covers procedure and does not extend to the 'merits' of a decision or action, and that an ombudsman must not 'intimate any view as to whether [a decision] is right or wrong'.[33] In one sense, this is true by definition: the PO 'cannot question the merits of a decision taken without maladministration'.[34] However, this provision does not define maladministration; and because the general principles of administrative law include norms relevant to substance, the statement quoted above cannot mean that the PO is barred from considering the substance of decisions (see Chapter 7). All it probably means is that the PO should not go any further than a court or tribunal would go in scrutinizing the substance of decisions. But if a decision is, for instance, *Wednesbury*-unreasonable, or a disproportionate interference with an individual's fundamental rights, it will obviously amount to maladministration.

Findings of maladministration by the PO are not binding.[35] The reason given for this rule is that the PC Act was drafted on the

[32] *EB Kosovo v Secretary of State for the Home Department* [2009] AC 1159.

[33] *R v Local Commissioner, ex p Bradford Metropolitan City Council* [1979] 1 QB 287, 311H (Lord Denning MR).

[34] PC Act, s 12(3).

[35] *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 114. Findings of no maladministration by the PO and other public-sector ombudsmen can be challenged by a claim for judicial review.

assumption that the PO would be investigating complaints against agencies for which a Minister of State was responsible to Parliament, and that it must be open to a Minister to take responsibility in Parliament for deciding whether or not to accept a finding of maladministration. One reason why successive governments have resisted abolition of the MP filter may be a fear that this would so change the relationship between the PO and Parliament that it would reduce the freedom of the government to reject the findings and recommendations of the PO. However, the practice of ministerial responsibility has developed in the past forty years, and it seems clear that not all agencies that fall within the PO's remit are under its umbrella. On the other hand, the PO has a general obligation to report to Parliament about all the activities of the office. Is the non-binding nature of the PO's findings attributable to the practice of ministerial responsibility or to the PO's obligations to report to Parliament and to the individual MPs who refer complaints? The difference is important because the obligation to report is wider than the scope of ministerial responsibility.

By contrast with findings of the PO, findings of maladministration by the LGO have been held to be binding unless successfully challenged by a claim for judicial review.[36] The reason appears to be that the relationship between the local executive and the full council is different from the relationship between the central executive and Parliament, and there is no direct equivalent of IMR at the local level. On the other hand, since 2007 the LGO has been required to report to Parliament even though, of course, Ministers are not responsible to Parliament for the conduct of local government. The HSO, like the PO, reports to Parliament; and public-sector ombudsmen in the devolved jurisdictions report to their respective representative bodies. If the obligation to report (rather than ministerial responsibility) is the basis for the non-bindingness of ombudsmen's findings, the rule should logically apply to all these offices. By contrast, if its basis is the practice of ministerial responsibility, some of the findings even of the PO should logically be binding (because they relate to matters that fall outside the scope of ministerial responsibility). A significant problem with tying bindingness to ministerial responsibility is the pervasive uncertainty about its scope and operation.

Even though findings of maladministration by the PO are not binding on Ministers, a finding cannot be rejected merely because the

[36] *R v Local Commissioner for Administration, ex p Eastleigh Borough Council* [1988] 1 QB 855. The Law Commission thinks this applies to findings of the PO as well: CP 196, 6.87–6.107.

government does not agree with it. Rejection must be based on 'cogent' reasons.[37] In effect, the Minister has discretion whether or not to accept the PO's findings, subject to general principles of administrative law. By contrast, a local authority that wants to reject a finding of the LGO must successfully challenge it by a claim for judicial review. Opinions differ about the desirability of such judicialization and legalization of the ombudsman institution. One view is that it potentially interferes with the relationship of trust and cooperation between ombudsmen and the administration that explains the success of the institution despite its lack of coercive power. On the other hand, it is said that although there may be good reason why ombudsmen should not have coercive power and why their *recommendations* (see 18.1.6) should not bind, there is no good reason why their *findings* should not be binding, subject to general principles of administrative law. After all, the ombudsman office was specifically designed to facilitate probing, fact-finding investigations.

This disagreement echoes twentieth-century debates about the role of tribunals—were they an adjunct of the administration or part of the judicial system? One view of ombudsmen is that they undertake political scrutiny of the executive (on behalf of Parliament) or independent bureaucratic scrutiny. Another view is that they are institutions of administrative justice. Over the past forty years there has been a discernible shift from the former view to the latter. On the other hand, although ombudsmen are structurally independent,[38] they are not judicial officers, they do not perform judicial functions (of determining rights and obligations), and their investigations are not subject to the full rigour of common law and ECHR rules of procedural fairness.

18.1.6 REMEDIES

The PO has no power to award an enforceable remedy; and although making remedial recommendations is standard practice and central to the way the institution operates, the PC Act does not expressly confer on the PO power to make recommendations. Moreover, whereas a claim for judicial review can operate to suspend action on the matters in issue while the claim is being adjudicated, instigation of an investigation by

[37] *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 114. The court did not elaborate on the meaning of this formula. For an argument that a court should set aside a ministerial decision to reject a finding of the PO only in extreme cases of irrationality see J Varuhas, 'Governmental Rejections of Ombudsman Findings: What Role for the Courts?' (2009) 72 *MLR* 91.

[38] They are appointed for fixed, non-renewable terms and, like judges, can only be removed for incapacity or misbehaviour.

the PO does not in any way affect the activities of the department or agency under investigation.[39] The basic rationale for this arrangement is that the investigation by the PO was conceived as an aid to the enforcement of ministerial responsibility to Parliament, not the basis for legal redress for maladministration.

However, this strict legal position masks a very different reality: the PO's recommendations are almost always accepted, typically resulting in some form of redress for the complainant.[40] Only very rarely does the PO exercise the power to make a special report to Parliament (under s 10(3) of the PC Act) in a case where injustice in consequence of maladministration has not been or will not be remedied. The PO has much greater remedial flexibility than courts and tribunals. The PO cannot, of course, make a substitute decision. But redress regularly recommended ranges, at one end, from an acknowledgment of responsibility and an apology or explanation; through alteration or reconsideration of decisions and payment of expenses and compensation for pecuniary and non-pecuniary harm;[41] to systemic change in administrative practice.[42]

Should the PO be given coercive remedial powers? There are arguments against this. First, although the PO must give those subject to complaint an opportunity to comment on the allegations made, and can not only allow parties to be represented but also pay expenses and compensation to those who attend or provide information to an investigation, the process typically followed by the PO is informal and inquisitorial. Most complaints are dealt with merely by 'assessment' or 'intervention' by the PO. Even in cases where a complaint is investigated, only very rarely does the PO conduct an oral hearing to resolve conflicts of evidence, and the PO is not bound by the rules of evidence. The PO's procedures are more administrative than adjudicatory. If the PO had power to award coercive remedies, justifiable demands could be made that complaints should be fully investigated and that the procedure followed in investigations should be more formalized so as to give those subject to complaint a full chance to put their side of the case, and the complainant a more active role in the process. Indeed, the conferral of coercive power would probably bring the PO's investigations within

[39] PC Act, s 7(4).

[40] Halford, 'It's Public Law, But Not As We Know It' (n 8 above), 91–9.

[41] M Amos, 'The Parliamentary Commissioner for Administration, Redress and Damages for Wrongful Administrative Action' [2000] *PL* 21.

[42] See also P Brown, 'The Ombudsman: Remedies for Misinformation' in G Richardson and H Genn (eds), *Administrative Law and Government Action* (Oxford: Clarendon Press, 1994), 327–31.

the scope of the common law rules of procedural fairness and Art 6 of the ECHR. Such judicialization and formalization of PO investigations would add to their expense and length.

Secondly, investigations must be held in private.[43] This requirement clearly distinguishes the PO (and, indeed, the ombudsman mechanism more generally) from courts and tribunals. In English law and under the ECHR the basic rule is that 'justice' should be administered in public. An argument for privacy is that it helps maintain the anonymity of civil servants,[44] which the doctrine of ministerial responsibility is partly designed to protect by placing the responsibility for the efficiency of the administration on the government rather than on individual civil servants. It is true that senior civil servants, such as chief executives of agencies, are often called to account before Parliamentary select committees. However, if, in addition, the PO had power to award remedies, at least some part, if not the whole, of the PO's investigations would need to be conducted in public.

The fact that the PO is remarkably effective despite lacking coercive remedial powers is probably attributable largely to the fact that the office operates privately and informally. All POs have felt that they can do more by 'influence' or 'persuasion' than they could hope to achieve by coercion. If, however, it were thought desirable to give the PO some coercive support, the Commissioner of Complaints Act (NI) 1969 might provide a suitable model. It empowers the county court to award damages, an injunction, or other relief in cases where the Commissioner has found maladministration; and in cases where there is evidence of continuing maladministration the Attorney-General can apply for an injunction. Perhaps this latter power could be given to the PO.

18.1.7 THE PO, TRIBUNALS, AND COURTS

The PC Act (s 5(2)) provides that the PO shall not investigate a complaint if the complainant could take (or could have taken) the matter to a court or tribunal, unless the PO thinks that it would not be reasonable to expect the complainant to take (or to have taken) this

[43] Ibid, s 7(2).

[44] An important by-product of the activities of the PO has been a certain weakening of the principle of the anonymity of civil servants, because the PO's investigatory powers enable culpable civil servants to be identified (although individuals are not normally named in reports by the PO to Parliament). Concerning the naming of individuals in reports of the LGO see Local Government and Housing Act 1989, s 32.

course.[45] The availability of judicial review or an appeal is a question of law, whereas the decision whether to investigate despite the possibility of judicial review or appeal is a matter of discretion for the PO. Two factors seem particularly relevant to the exercise of that discretion. The first is cost. Judicial review can be very expensive; and appeal to a tribunal, while typically less costly, may also involve significant expenditure of time and money. By contrast, there is no fee for making a complaint to the PO, hearings are very rare, and the PO does most of the work in collecting and analysing the relevant evidence. If the complainant incurs expense, the PO can pay.

The second factor concerns fact-finding.[46] Judicial review procedure is not designed for cases involving significant, contested factual issues (see 11.3.2.3). By contrast, evidence-gathering and fact-finding are the PO's core business, and the PO has very extensive powers in support of that function, which is performed inquisitorially. Fact-finding is also core business for tribunals and they typically operate more inquisitorially than courts (see 14.2.3.4). Even so, the evidence-gathering initiative rests more heavily on the appellant in tribunal proceedings than on the complainant in an ombudsman investigation. Moreover, various rules that prevent evidence being presented to a court (such as PII and secrecy obligations) do not apply to investigations by the PO.

One motivation for s 5(2) may be a fear that a complaint to the PO will be used to gather evidence in preparation for making a claim for judicial review or an appeal to a tribunal. Although there have been cases in which an investigation by the PO was followed by a claim for judicial review, there is no reason to think that the complaint was made in preparation for litigation or that this is likely to be a common occurrence. Tribunals, courts, and ombudsmen have significantly different powers, perform significantly different functions, and offer significantly different remedial possibilities. Citizens who are sufficiently well-educated and sophisticated to understand these differences are likely to choose the avenue that holds out the best promise of the outcome they want at a cost they can afford.

[45] The LGO operates under a similar constraint, the effect of which was considered in *R v Commissioner for Local Administration, ex p Croydon LBC* [1989] 1 All ER 1033. It seems that the practice of the LGO is generally to exercise the discretion to investigate favourably to the complainant: M Harris and M Partington (eds), *Administrative Justice in the 21st Century* (Oxford: Hart Publishing, 1999), 141–4. The Law Commission has proposed that the presumption against investigation be reversed: CP 196, 4.11–4.47.

[46] *R v Local Commissioner for Local Government for North and North East England, ex p Liverpool City Council* [2001] 1 All ER 462, [21]–[28] (Henry LJ).

It is also worth observing that the administrative justice landscape looks very different now than it did in 1967. The concept of illegality has been expanded significantly in the past forty years, increasing its overlap with maladministration to a point where very many complaints—especially the more serious—are likely to engage s 5(2). Mechanisms for investigating complaints have proliferated and are no longer seen as alternative to or in competition with judicial review or an appeal to a tribunal. Rather than protecting the jurisdiction of courts and tribunals from encroachment by ombudsmen, the aims now are to ration scarce judicial resources by channelling as many grievances as possible into complaint-handling mechanisms and forms of alternative dispute resolution, and to develop a system of administrative justice in which only the most serious cases ever get to the upper reaches populated by courts and tribunals. In such a system, it may be difficult to think of good reasons why the PO would ever exercise the s 5(2) discretion against investigation; and it is noteworthy that the PO's annual report for 2009–10 does not expressly mention this ground for not investigating.

Interaction between courts and ombudsmen is relatively rare. Proposals that would allow courts to refer cases to an ombudsman and vice versa have been made[47] but not adopted. However, there are some noteworthy cases in which grievances have been the subject of both investigation by the PO and proceedings before a court. In one case, the Home Office threatened to revoke television licences bought by licensees before the expiry of their old licence in order to avoid an announced licence fee increase. The PCA investigated the Home Office's action on the assumption that it was lawful, and found that the Home Office had acted inefficiently and with lack of foresight in creating the situation in which people could buy overlapping licences, while at the same time failing to explain the situation to the public; but he did not recommend a remedy. In later litigation by an aggrieved licence-holder the Home Office's action was held to have been unlawful and licensees who had paid the new higher fee were given a refund.[48] Another example involved a case in which a landowner sought to challenge proposals for a trunk road, on the grounds of procedural unfairness and bad faith, after the statutory time-limit for challenges had expired. He alleged that there had been a secret agreement between the department and a third

[47] Most recently by the Law Commission: CP 196, 4.48–4.79. The Commission also proposes that public-sector ombudsmen have power to refer points of law to the Administrative Court: ibid, 5.36–5.92.

[48] *Congreve v Home Office* [1976] QB 629; 7th Report of the PCA, HC 680 (1974–5).

party, and that if he had known about it earlier he would have challenged the proposals when they were being considered at a public inquiry. The Court of Appeal held that the time-limit provision was effective to bar the challenge. The landowner then complained to the PCA[49] and, as a result, the Department of the Environment made a voluntary payment to cover the reasonable costs of the court action. Also, as a result of the PO's investigations, new procedures were introduced to prevent a repetition of such a situation.[50]

More recently, in *R v North and East Devon Health Authority, ex p Coughlan*,[51] a decision to close a nursing home for the chronically disabled was successfully challenged by a resident of the home. The main underlying issue was whether and when it was lawful for provision of care to be transferred from the NHS to a local authority. After the decision, the HSO received various complaints about the way the law laid down by the court was being applied; and in the report following an investigation of the complaints the HSO made findings of systemic maladministration and recommendations for change. As a result, more than 12,000 cases were reviewed and more than £180 million was paid in compensation. The issue in the so-called *Debt of Honour* case was whether the Ministry of Defence had made misleading statements about entitlement under a voluntary compensation scheme. The Court of Appeal held that the statements were not sufficiently clear and unequivocal to give rise to a legitimate expectation of payment. Even so, the PO subsequently concluded that injustice had been caused by maladministration in the way the scheme was devised and announced.[52]

These cases illustrate the proposition that although there is significant overlap between the concepts of illegality and maladministration, they are not the same. The cases raise the issue of whether it is desirable to have two different systems that apply different remedial criteria but

[49] Third Report of the PCA, HC 223 (1976/7).

[50] *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122; 2nd Report of the Select Committee on the PCA, HC 223 (1976/7).

[51] [2001] QB 213; HSO, Second Report, *NHS Funding for Long Term Care*, HC 399 (2002–3).

[52] *R (Association of British Civilian Internees, Far East Region) v Secretary of State for Defence* [2003] QB 1397; PO, Fourth Report, *A Debt of Honour: The Ex Gratia Scheme for British Groups Interned by the Japanese During the Second World War*, HC 324 (2004–5); C Harlow and R Rawlings, *Law and Administration*, 3rd edn (Cambridge: Cambridge University Press), 785–90. Another example of a case in which compensation was paid following an investigation by the PO after the complainant had failed in court is *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648; PO, Case C557/98).

do not communicate with one another, and between which citizens effectively must choose.

18.2 THE HEALTH SERVICE OMBUDSMAN

The offices of HSO and PO are held by the same official—the PHSO. The constitutional position of the HSO is different from that of either the PO or the LGO. Although the Minister is ultimately responsible for the functioning of the Health Service, its day-to-day running is largely in the hands of local health authorities and trusts, and there is no elected official with direct constitutional responsibility for NHS authorities and trusts. So complaints are made directly to the HSO, provided they have first been dealt with by the health authority.[53] The HSO can investigate complaints about the administration of the NHS, and about failures of service and failure to provide service, including matters of clinical medical judgment. In 2009–10 the HSO resolved 12,889 inquiries against providers of NHS services (representing 14,429 complaints); only 176 were accepted for investigation. The main reason for non-investigation of complaints is that they are 'premature' because the complainant has not exhausted the internal NHS complaints procedure. The largest proportion of health complaints (44 per cent) were against acute care trusts, while GPs and primary care trusts attracted 17 per cent each. In 2009–10, 63 per cent of health inquiries were resolved wholly or partly in favour of the complainant.

The power of the HSO to investigate complaints involving issues of clinical judgment raises acutely the relationship between the NHS internal complaints system, the HSO, and the courts. Matters of clinical judgment are the stuff of tort actions against medical practitioners, and dealing with civil liability issues of this sort has traditionally been considered to lie at the core of the judicial function. The HSO has discretion to investigate complaints even though the complainant could alternatively make a liability claim; and this discretion is normally exercised in favour of the complainant in matters of clinical judgment. In tort law, the basic approach of the courts to issues of clinical judgment is that a medical practitioner will not have acted unreasonably provided the allegedly negligent conduct was 'in accordance with practice accepted at the time by a responsible body of medical opinion even

[53] A second tier of complaint handling (by the Health Commission) between the health care provider and the HSO was removed in 2009.

though other doctors adopt a different practice'.[54] As a matter of law, the HSO is not bound to apply this test but could find a failure of service in a matter of clinical judgment even though the conduct complained about was not negligent according to the test if, for instance, it 'fell below best practice within the NHS'.[55] However, it has been held that by issuing guidance incorporating the test, the HSO bound itself to apply it in deciding whether a doctor had acted unreasonably in a matter of clinical judgment.[56]

18.3 THE LOCAL GOVERNMENT OMBUDSMAN

The LGO performs essentially the same function, in respect of local government, as the PO performs in respect of central government.[57] However, the constitutional underpinning of the LGO is different from that of the PO because there is no direct equivalent of IMR at the local level. Complaints may be made directly to an LGO, or via a member of the authority complained about or of any other authority concerned. Since 2007 the LGO has had an obligation to report annually to Parliament in addition to its obligations to report on investigations to local authorities.

There are three ombudsmen within the office of the LGO (technically called Commissioners for Local Administration). Until 2007, each had responsibility for a separate geographical area; but now responsibility is divided by subject matter. Exclusions from the remit of the LGO include personnel matters, internal school and college matters, and matters which affect all or most of the people living in a council's area. This last exclusion marks a boundary between the LGO and the political process. The LGO can investigate complaints about contract and commercial matters, subject to certain exceptions. Like the HSO, and unlike the PO, the LGO's remit extends to failures of service and failure to provide a service as well as injustice caused by maladministration. The basic job of the LGO is to investigate individual complaints, and like the PHSO, the office cannot initiate investigations. However, since 2007 the LGO has had statutory power to extend an investigation beyond the original complainant if it comes to the attention of the LGO

[54] *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871, 881F (Lord Scarman).
[55] *Atwood v Health Service Commissioner* [2009] 1 All ER 415, [29].
[56] Ibid.
[57] The relevant legislation is the Local Government Act 1974, Part III as amended, most recently, by the Local Government and Public Involvement in Health Act 2007, Part 9 and Sch 12.

in the course of the investigation that others have been 'affected' by the conduct complained about and have suffered injustice as a result.

In 2009–10 the LGO received 18,020 complaints and inquiries about complaining. Of these, 4,553 were premature in the sense that the complainant had not yet complained to the relevant local authority. In 3,002 cases the complainant was 'advised' either to withdraw the complaint or take it elsewhere. The remaining complaints (10,465) were forwarded to an investigative team. About 27 per cent of complaints that were investigated were resolved informally by means of a 'local settlement'—a form of resolution in which the authority agrees to provide redress before the investigation is complete.[58] The LGO made a discretionary decision not to investigate or continue to investigate 26 per cent of complaints. In 46 per cent of cases, there was found to be no or insufficient evidence of maladministration. There was a full investigation and a formal report in only 74 cases, in 69 of which there was a finding of maladministration causing injustice. In 2009–10, 85 per cent of cases were resolved within 26 weeks. The largest categories of complaints concerned housing (20 per cent), planning and building control (17 per cent), education (12 per cent), and transport and highways (10 per cent). As in the case of other public-sector ombudsmen, there is a 'permitted period' of twelve months for complaining to the LGO, but this requirement can be waived.

Unlike the PHSO, the LGO has express statutory power to make recommendations in its reports. However, like the PHSO, it has no coercive powers. As already noted, in most cases where the LGO secures a favourable outcome for the complainant, this is the result of voluntary action by authorities; and formal recommendations by the LGO are normally complied with. If a council executive fails to respond to the LGO's report within a given time, the LGO must make a second report to the full council. The ultimate 'sanction' is to publicize, in the local press and at the authority's expense, the fact that an authority has failed to take action recommended by the LGO. The authority may, if it wishes, publicize its reasons for non-compliance with the LGO's recommendations. (See Addendum 2, p. vi.) On the other hand, findings of maladministration and service failure made by the LGO are binding and must be accepted unless successfully challenged by a claim for judicial review.[59] In this respect the LGO is in a stronger position than the PO, whose findings are not binding. However, the PO can

[58] Since 2007, the practice of local settlements has had a statutory foundation.
[59] *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 114.

enlist the aid of the Public Administration Select Committee to put pressure on a recalcitrant department or agency.

18.4 THE OMBUDSMAN SYSTEM

As we have seen (in Chapter 14), the creation of the FtT and the UT made it possible to speak about a tribunal 'system' in a way that would not previously have been meaningful. The relationship between tribunals and courts has also been systematized, and in the decades to come we might reasonably expect further developments in the system for adjudicating disputes between citizen and government. Is it possible analogously to speak of an 'ombudsman system' or, more broadly, a public complaints system?

When the office of the first public-sector ombudsman—the PCA—was created in 1967, English administrative law was in its infancy. Since then, public-sector ombudsmen have proliferated: in addition to the PHSO and the LGO, there are also a Housing Ombudsman Service and a Prisons and Probation Ombudsman, for instance. Internal complaints mechanisms are widespread and increasingly formalized, and ombudsmen increasingly operate as second-tier or 'appellate' complaint investigators. Whereas the PCA was a bold experiment in 1967, it is now only one of a large and complex set of institutions and mechanisms, for investigating complaints against the public sector, which sits alongside the system of courts and tribunals that adjudicate disputes between citizen and government. Some of these complaint investigators—such as the PO—clearly follow the Parliamentary model, while internal complaints mechanisms are better understood in terms of the tribune model or even a 'customer service' model. Other ombudsmen—such as the HSO and the LGO—are hybrids that have some links with an elected, representative body but are not servants of such bodies.

In 2000 the Cabinet Office (as the result of a joint initiative by the PO, the HSO, and the LGO) published a report entitled *Review of Public Sector Ombudsmen in England*.[60] Amongst the report's recommendations was that the three main public-sector ombudsmen (but not other specialized offices such as that of the Prisons and Probation Ombudsman) should be amalgamated into a new 'collegiate' Commission structure with a single point of entry for complaints. The MP filter for complaints to the PO would be abolished. The focus of the integrated

[60] B Thompson, 'Integrated Ombudsmanry: Joined-up to a Point' (2001) 64 *MLR* 459.

Commission would be on redressing individual grievances rather than on any wider systemic function, such as improving the quality of public decision-making. The Commission would be answerable to Parliament. The report made no recommendations for extending the jurisdiction of the Commission beyond the current jurisdictions of its constituent offices, but noted that it needed to be kept in line with changes in the organization and structure of the public sector. Within the new Commission, each ombudsman would specialize, but would be able to exercise the total jurisdiction of the Commission. This would make it easier to deal with complex complaints that cross the jurisdictional boundaries of one or more of the constituent elements of the Commission.[61] The authors of the report considered that the Commission should not be given coercive remedial powers.

The report represented a modest rationalization of the three major public-sector ombudsmen rather than a radical reappraisal of the role and place of complaint-investigation agencies in the larger landscape of the 'administrative justice' system. However, its only outcomes were new legislative provisions enabling the PHSO and the LGO to conduct joint investigations of complaints that straddled their various remits. In 2009–10 the PHSO had in hand fifteen joint investigations, mostly involving the HSO and the LGO. Wales, Scotland, and Northern Ireland now have integrated local ombudsman offices, while the PO handles complaints against central government from all UK jurisdictions. Such a two-tier, local/national model has also been suggested for England.[62]

18.5 THE NATURE AND VALUE OF 'OMBUDSMANRY'

The preceding discussion of three public-sector ombudsmen provides a basis for a more general analysis of what ombudsmen do. 'Ombudsmanry' can be used to refer to investigation of complaints, made by citizens against public administrators and agencies, at second-tier and, occasionally, third-tier levels. Ombudsmanry has three distinguishing characteristics: a criterion of what constitutes good administration that is broader than either legality or correctness as these terms are used in

[61] eg complaints raising health and social services issues: HSO Annual Report 2003–4, paras 1.17–1.18.

[62] M Elliott, 'Asymmetric Devolution and Ombudsman Reform in England' [2006] *PL* 84.

administrative law; a fact-finding procedure that is private, strongly inquisitorial, and conducted with the benefit of largely unrestricted access to relevant information and documents; and lack of coercive remedial power.

From the complainant's perspective, the main advantages of ombudsmen over courts and tribunals are that their services are free, and that they have a wide remit and powers, and great remedial flexibility. That it costs nothing for an ombudsman investigation can be a great boon especially in large and complex cases (such as the Equitable Life investigation) that would be enormously expensive for the complainants if pursued through litigation. From the government's point of view, the main advantage of ombudsmen is their cooperative mode of operation, which is largely a result of the fact that their recommendations do not bind, even if their findings do. One might think that the atmosphere of trust and cooperation that is a key feature of the *modus operandi* of ombudsmen might work to the disadvantage of complainants. However, there is little hard evidence of this. All ombudsmen have generally good records of compliance with their recommendations.

The core business of ombudsmen is the investigation of individual complaints. They cannot initiate investigations. However, there are two ways in which investigation of individual complaints can be widened. One is by investigating the situation of individuals, other than the complainant, who are affected by the conduct complained about. The other is by turning investigations of a large number of related complaints into a sort of audit of an administrative system. In large and complex cases (such as *Equitable Life*) this may be done by investigating a relatively small number of 'lead complaints' that are representative of categories of complaints, and making a 'special report' that is much more wide-ranging than the typical report on one or a few related complaints.[63] Such reports are much more likely than reports on individual complaints to contain recommendations for systemic changes of administrative practice of a sort that courts and tribunals are generally unable or loath to make. Such special reports bear significant similarities to reports of government auditors and inspectors. There are two major differences in this regard between auditing and inspection agencies and ombudsmen: one is that ombudsmen are dependent on complaints to trigger the investigatory process. The other is that the concepts of

[63] R Kirkham, 'Auditing by Stealth? Special Reports and the Ombudsman' [2005] *PL* 740. For other examples of large-scale investigations see Harlow and Rawlings, *Law and Administration* (n 52 above), 549–62.

'maladministration' and 'service failure' that underpin ombudsmen investigations are somewhat different from the criteria of economy, efficiency, effectiveness, and value-for-money that underpin auditing and inspection. However, auditors, inspectors, and ombudsmen share a forward-looking emphasis on quality control and improvement that is not part of the judicial mentality or role. Of course, neither can do more than provide guidance and make suggestions for improvement; and ultimately, their realization in practice depends on good training and good management within departments and agencies.

The propensity of ombudsman offices to undertake wide investigations and to recommend systemic change depends, to some extent, on the personality of particular ombudsmen. A notable feature of ombudsman legislation is that it tends to say relatively little about how the ombudsman is to perform the vague functions of 'investigation', 'reporting', and 'making recommendations'. The personal nature of the office and flexibility in performing its functions are related aspects of the way the office of ombudsman was conceived and is still understood.

A significant aspect of the broader role that ombudsmen have increasingly assumed is that of improving administrative practice by issuing 'guidance' about good administration unrelated to the investigation of any particular complaint or set of complaints. For instance, the PHSO now issues guidance pamphlets entitled *Principles of Good Administration*, *Principles of Good Complaint Handling*, and *Principles for Remedy.* Whereas recommendations for changes of administrative practice contained in reports of investigations are likely to be quite specific, such guidance tends to be general and abstract, similar to the general principles of administrative law. While these can be understood partly as distillations of accumulated wisdom, they are also seen as tools for improving administrative decision-making and practice—a function very removed from that given to the PCA in 1967 but one that all ombudsmen have embraced in recent years. How effectively this function is performed is unknown.

The current PHSO, Ann Abraham, has been exceptionally active in making special reports and addressing systemic issues. She sees this as a key function of ombudsmen.[64] More particularly, she sees the office of PO as being of constitutional significance.[65] The PO is, she thinks, first

[64] A Abraham, 'The Ombudsman as Part of the UK Constitution: A Contested Role?' (2008) 61 *Parl Aff* 206.

[65] See also R Kirkham, B Thompson, and T Buck, 'Putting the Ombudsman in Constitutional Context' (2009) 62 *Parl Aff* 600.

and foremost an agent of Parliament to assist it in holding the executive to account. It also has a role, she says, in stimulating and contributing to political debate and in that way strengthening democracy; and the office has a responsibility to protect and promote fundamental rights, including a right to good administration.[66] At the same time, however, she has propounded a view of the office of ombudsman that sees it as much closer to courts and tribunals than auditors and inspectors. She wants public-sector ombudsmen to be thought of as a 'coherent "system of justice" in their own right';[67] and she understands investigation of complaints as a mode of adjudication, not a mode of 'alternative dispute resolution', mediation, or negotiation. But compared to courts and tribunals, she argues, ombudsmen offer adjudication that is informal, equitable, and flexible.[68] Moreover, their guidance function enables them to serve the public interest in a way that courts and tribunals cannot by raising standards of administrative decision-making and practice. In order to fulfil their potential in this respect, ombudsmen, she thinks, should be systematized in a similar way to tribunals.[69]

It is not clear whether these two quite different images of ombudsmen are mutually supportive or in significant tension with each other. Nor is it clear to what extent the model of ombudsmen as agents of democracy and rights-protection is of much relevance to ombudsman offices other than that of the PO. What is striking is that the nature and role of the office of ombudsman is so pliable that it is very much what the incumbent makes of it. Whether the high aspirations of the current PHSO will survive her period in office is an open question.

[66] A Abraham, 'The Ombudsman and the Executive: The Road to Accountability' (2008) 61 *ParlAff* 535; 'The Future in International Perspective: The Ombudsman as Agents of Rights, Justice and Democracy' (2008) 61 *Parl Aff* 681; N O'Brien, 'Ombudsmen and Social Rights Adjudication' [2009] *PL* 466.

[67] A Abraham, 'The Ombudsman and "Paths to Justice": A Just Alternative or Just an Alternative?' [2008] *PL* 1, 1; 'The Ombudsman and Individual Rights' (2008) 61 *Parl Aff* 370, 376.

[68] A Abraham, 'The Ombudsman as Part of the UK Constitution: A Contested Role?' (2008) 61 *Parl Aff* 206, 208.

[69] See also T Buck, R Kirkham, and B Thompson, 'Tine for a "Leggat-style" Review of the Ombudsman System?' [2011] *PL* 20.

19

An Administrative Justice System?

19.1 ACCESSIBILITY AND SYSTEMATIZATION

As was noted in 1.5, the Tribunals, Courts and Enforcement Act 2007 (TCE Act) contains a very broad definition of the administrative justice system:

> the overall system by which decisions of an administrative or executive nature are made in relation to particular persons including—(a) the procedures for making such decisions, (b) the law under which such decisions are made and (c) the systems for resolving disputes and airing grievances in relation to such decisions.[1]

In this chapter, the focus is on clause (c) of this definition. In 2007, a government consultation paper described the administrative justice system in this sense as concerned with 'the initial decision-makers, those who reconsider decisions, Ombudsmen and other independent complaints handlers, the tribunals and the courts, and how the system which they produce as a result of their individual roles functions'.[2] According to the same document, '[a]dministrative justice is now recognized as a separate part of the justice system in its own right'[3] in which 'justice . . . is provided not just by courts but by a range of interlocking institutions and mechanisms'.[4]

Such statements suggest that the concept of administrative justice has been elaborated in reaction to the largely uncoordinated growth, over the past forty years or so, of a plethora of institutions that are all concerned, in one way or another, with holding public administration accountable. The concept is used to underpin and justify a programme

[1] TCE Act, Sch 7, cl 13.
[2] *Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007*, Consultation Paper CP 30/07 (London: Ministry of Justice, 2007), [12].
[3] Ibid, [11].
[4] Ibid, [115].

of building these various institutions into some sort of 'system' designed to promote the efficacy, efficiency, and accessibility of accountability institutions. Whereas in the middle of the twentieth century the concern was that there were too few formal mechanisms for holding public administrators accountable for failure to comply with administrative law, now the worry is that confusion caused by the existence of a large and heterogeneous collection of accountability institutions and mechanisms constitutes a significant barrier to access, thus hindering effective and efficient resolution of citizens' grievances against government.

Various significant steps have been taken towards rationalizing and systematizing administrative justice. As we saw in Chapter 14, a large number of administrative tribunals have been amalgamated into the First-tier Tribunal, and the creation of the Upper Tribunal has brought increased order to the process of appealing from initial tribunal decisions and to the relationship between tribunals and the Administrative Court. The creation of the Tribunals Service was another step in this direction; and the government proposes to merge the Tribunals Service with its older counterpart, the Courts Service.[5] The TCE Act created the Administrative Justice and Tribunals Council (AJTC) to replace the Council on Tribunals, with a wide advisory remit over the administrative justice system as defined in the Act. However, following a review of 'arm's-length bodies', in October 2010 the government announced that the AJTC would be abolished.

A recurring criticism of the current network of public-sector ombudsmen in England is that it is insufficiently systematized. As we saw in 18.4, the recommendation of a Cabinet Office review in 2000 for the creation of a single, integrated ombudsman service was not acted upon, although provisions to allow joint investigations were enacted. Proposals to allow transfer of suitable cases between courts and tribunals have also been made. More generally, in Chapter 16 we noted evidence suggesting that people find the distinction between complaints and reviews of decisions difficult to grasp; and commentators and researchers persistently argue that the various accountability mechanisms are not widely known and are inadequately advertised.[6]

[5] In September 2010 the government announced that it proposes to create a unified court/tribunal judiciary under the overall leadership of the Lord Chief Justice.

[6] See eg H Genn and others, *Tribunals for Diverse Users*, DCA Research Series 1/06 (London: Department for Constitutional Affairs, 2006), i.

In short, the complexity and unsystematic state of administrative justice are seen as making it more or less inaccessible to many people.[7] One proposal is to create a 'single point of entry' to the administrative justice domain coupled with triage facilities to ensure that individuals are directed to the appropriate mechanism or institution to deal with their grievances.[8] In one way, this is a radical suggestion because it rests on integrated concepts of accountability and administrative justice. On the other hand, it could also be understood as a relatively simple and cheap way of significantly improving access to administrative justice without requiring completion (or even initiation) of a much more difficult and expensive programme of comprehensive integration of the various accountability mechanisms. Of course, proponents of an 'administrative justice hotline' must assume that if it were successful, significantly more people would seek access to accountability institutions and mechanisms; and this might in turn aggravate any existing problems of cost, timeliness, and effectiveness. However, there seems to be a surprising level of continuing support within government for improving access to administrative justice, and the creation of some sort of clearing house may not be an unrealistic aspiration for reformers.

19.2 ALTERNATIVE AND PROPORTIONATE DISPUTE RESOLUTION

Besides a concern with accessibility, major themes of policy-making in relation to administrative justice are well captured by two well-known colloquialisms: 'horses for courses' and 'you don't need a sledgehammer to crack a nut'. These themes have been encapsulated in the concept of 'proportionate dispute resolution' (PDR). This concept is related to the much older idea of 'alternative dispute resolution' (ADR). This latter idea bristles with ambiguities and complexities that need not be explored here. In the context of administrative justice, we can state it quite simply by saying that judicial review in the Administrative Court,

[7] Note, however, the caveat contained in a survey of empirical research about tribunals that 'most research is based on those who are *not* deterred by barriers . . . and this makes it difficult to gauge the full extent of potential barriers': M Adler and J Gulland, *Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review* (London: Council on Tribunals, 2003), 24.

[8] See eg Law Commission, *Housing: Proportionate Dispute Resolution* (Law Com No 309, Cm 7377, 2008), Pt 3. The Law Commission's concept of 'triage plus' encompasses '(1) Signposting: initial diagnosis and referral. (2) Intelligence gathering and oversight. (3) Feedback' (ibid, 3.14).

which provides the paradigm of formal, expensive, adversarial resolution of disputes between citizen and government, should be a last resort and that whenever appropriate, less formal, expensive, and adversarial accountability mechanisms should be used.

When the predecessors of the modern administrative tribunal were being established in the nineteenth century, they were promoted and justified as an alternative to courts, which were seen as being slow, expensive, and inaccessible. At this time and well into the twentieth century, courts were also perceived by many to be ideologically conservative and, more recently, unreflective of social diversity ('white, middle-class and male'). This latter criticism is now less often heard as a result, perhaps, of economic, social, and political changes and of reforms of the system for appointing judges (notably, creation of the Judicial Appointments Commission). Although tribunals were originally viewed as a form of ADR, they are now closely associated with courts. Tribunals as a group are still viewed as being less formal and more accessible than courts, and both cheaper and quicker dispensers of justice. However, it is recognized that amongst both courts and tribunals there are significant variations of practice and procedure and that both sit on a continuum from the formal to the informal.

ADR is now understood in terms of a contrast not between varieties of adjudication but between adjudication and other modes of dispute resolution such as mediation and early neutral evaluation. Such techniques are perhaps best viewed as modes of assisted settlement. We know that most private-law disputes are settled without the intervention of a third party,[9] whether a judge, a mediator, or any other sort of facilitator. We also know that most claims for judicial review are settled in this way either before or after the granting of permission to claim; but we know very little about unassisted settlement of tribunal appeals.

Courts have attempted to create incentives for parties who cannot settle a judicial review claim to seek the assistance of a third party;[10] but we know little about the actual use of ADR techniques in association either with claims for judicial review or tribunal appeals.[11] There is

[9] ie a person who does not represent either of the disputing parties.

[10] *Cowl v Plymouth City Council* [2002] 1 WLR 803.

[11] There has been one rather discouraging pilot of early neutral evaluation (ENE) in the social security context: C Hay, K McKenna, and T Buck, *Evaluation of Early Neutral Evaluation ADR in the SSCS Tribunal*, Ministry of Justice Research Series 2/10, 2010. The researchers found that ENE took longer and cost more than traditional hearings, but could not explain why. For a negative assessment, based on views of public-law practitioners, of the speed and cost of mediation in judicial review claims see V Bondy and L Mulcahy,

considerable resistance to the use of ADR techniques in public-law contexts on the ground that bargaining and negotiation are inappropriate ways of resolving disputes between citizen and government. However, such views are not universal,[12] and the prevalence of unassisted settlement of judicial review claims undermines objections to assisted settlement.

In England, complaint to an ombudsman was not originally conceived as a form of ADR but rather as an adjunct to Parliamentary scrutiny of the administration. However, it is certainly possible to think of formal investigation by an ombudsman in this way. In recent years, ombudsmen have developed various techniques short of a full scale investigation for managing their caseload; and now only a very small proportion of complaints are formally investigated. Most are resolved as a result of some sort of informal intervention by the ombudsman; and if formal investigations are seen as a form of ADR, informal resolution could be called ADR within ADR! It is also true to say that internal review and complaint mechanisms were not conceived as a form of ADR but in terms of customer service and satisfaction. Nevertheless, formalization of such mechanisms creates space for less formal diversionary alternatives. For instance, it is said that one of the roles performed by the NHS Patient Advice and Liaison Service is resolving grievances before they result in formal complaints. We know nothing about such pre-complaint resolution in other contexts. However, we may speculate that every formal mechanism for reviewing decisions or resolving complaints is likely to encourage less formal, expensive, and time-consuming 'alternatives' designed to prevent cases engaging the formal mechanism.

Proportionate dispute resolution encompasses ADR, but it has wider implications. PDR assumes that the various formal accountability mechanisms and institutions—judicial review, appeals, ombudsman investigations, and so on—each have distinctive functions and characteristic strengths and weaknesses. It also assumes that for this reason, the various formal mechanisms are each best suited to dealing with a particular type of grievance and recommends that particular grievances should be handled by the mechanism or institution best suited to do so. In the words of a 2004 White Paper, 'policies and services must be tailored to the particular needs of people in different contexts, moving

Mediation and Judicial Review: An Empirical Research Study (London: Public Law Project, 2009).

[12] See eg M Supperstone, D Stilitz, and C Sheldon, 'ADR and Public Law' [2006] *PL* 299.

away from the limited flexibility of existing . . . systems'.[13] However desirable an aspiration, theoretically PDR is an extremely complex concept, and its practical implementation would present enormous challenges.[14] It could only work in conjunction with a single point of entry to the administrative justice system and sophisticated triage facilities. A major threshold issue would concern the status of allocation decisions by the triage authority. Traditionally, the initial choice of accountability mechanism or institution and any subsequent decision to use ADR have rested with the aggrieved party, who carries the risk of making a mistaken choice or decision. It is entirely unclear to what extent a system of PDR could or would depart from this traditional approach.

19.3 CONTRACTING-OUT AND ADMINISTRATIVE JUSTICE

The 2007 Consultation Paper referred to in 19.1 says of justice that 'it can usefully be sub-divided: criminal, civil, administrative, family, employment, housing and so on. There is room for debate about how many "justice systems" there are, the precise boundaries between them, and the extent to which they overlap'.[15] The distinction between the administrative justice system and the civil justice system roughly tracks that between administrative (public) law and civil (private) law. In English law, both distinctions are of quite recent origin. Some of the most important issues about the boundary between the administrative justice system and the civil justice system have arisen out of changes in patterns of delivery of public services—in particular, contracting-out to non-governmental (private sector) entities. The question to be considered here concerns the impact of contracting-out on accountability for delivery of public services and on the scope of the administrative justice system.

Although contracting-out of the provision of aged-care services or the management of prisons (for instance) is, from one point of view, merely a form of public procurement it is, from another perspective, importantly

[13] *Transforming Public Services: Complaints, Redress and Tribunals* (London: HMSO, 2004), 2.4.

[14] M Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 *MLR* 958; 'The Idea of Proportionality in Dispute Resolution' (2008) 30 *J of Social Welfare and Family Law* 309.

[15] *Transforming Tribunals* (n 2 above), [11].

different. Traditional public procurement involves the acquisition of goods and services for consumption by the procuring agency. By contrast, contracting-out involves the acquisition of services for consumption by citizens (such as residents of aged-care facilities and prisoners). Where services are provided directly by public agencies to citizens in exercise of statutory or common law powers, the various mechanisms and institutions we have discussed in this Part are, in principle at least, available to hold agencies accountable for the way those powers are exercised and to police compliance with the norms discussed in Part II. By contrast, when an agency chooses to deliver services indirectly by procuring those services under a contract with a non-governmental entity, the issue of accountability becomes much more complex creating what has been described as an 'accountability gap'.

To begin with, there are significant weaknesses and limitations in the mechanisms of accountability for the decision to provide services indirectly by contract rather than directly under statutory or common law power and for the conduct of the contracting process.[16] This is a greater problem in relation to central government than local government because the Crown has inherent common law power to contract whereas the contracting powers of local authorities (and other non-Crown government agencies) are entirely statutory. However, statutory provisions that confer contracting power are often drafted in very broad, vague terms that leave the contracting agency with considerable discretion, with the exercise of which courts, for instance, may be relatively unwilling to interfere.

So far as concerns accountability for delivery and quality of the service, the contract will, of course, specify the rights and obligations of the contracting agency and the service-provider, and it may do so in great detail. The service-provider's contractual obligations will be enforceable by the agency as a matter of private law, but not normally by the consumers of the service; and there will typically be no contract between the consumer and the service-provider for breach of which the former could sue the latter in private law. The contracting agency will remain ultimately responsible, as a matter of public law, for the delivery of the service; and its management of the contract may be subject, in

[16] ACL Davies, *The Public Law of Government Contracts* (Oxford: Oxford University Press, 2008), chs 4 and 5. The common law rule against delegation (see 6.4.2) presents some obstacles to contracting-out, but many of these are removed by the Deregulation and Contracting Out Act 1994.

principle at least, to various public-law accountability mechanisms.[17] The amenability of the private-sector service-provider to such mechanisms is less clear.

These issues can be approached in two quite different ways. According to the first, contracting-out by government of the provision of public services to citizens should not be allowed to limit public accountability for the delivery of the services. For instance, it has been argued that there should be a presumption that the service-provider and the contracting agency are 'concurrently liable' for the provision of the service.[18] The origins of this approach may be found in the *Takeover Panel* case.[19] This was not, technically, an instance of contracting-out, but the court's ruling that decisions of the Panel were amenable to judicial review rested on a judgment that the Panel's self-conferred function of regulating corporate financial transactions should be subject to public-law norms.[20] As we have seen, delivery of services by non-governmental entities at the behest of government has also raised difficult questions about the scope of the HRA.[21] At bottom, disagreements over the appropriate scope of public-law accountability are disagreements about the desirability of this first approach to the issues raised by contracting-out.

Supporters of the second approach set much less store than supporters of the first on the value and importance of public-law modes and principles of accountability and on the distinction between administrative justice and civil (private-law) justice. What matters, they say, is not that contracted-out service-providers should be subject to public-law accountability as opposed to private-law accountability but only that adequate modes of accountability, of whatever type, should be available.[22] A common argument in favour of contracting-out is that it subjects service-providers to 'market accountability' (or 'the discipline of the market') and to other forms of accountability (such as liability for breach of contract), and that these may provide at least as much protection to consumers of services as the modes of accountability they replace. It is the total amount of accountability that is important, so the argument goes, not its public or private character. According to some understandings of the concept of accountability, having to compete in the market is not a mode of accountability at all. But accepting, for the sake of

[17] Davies, *The Public Law of Government Contracts* (n 16 above), 215–28, 237–40.
[18] Ibid, ch 8.
[19] *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815.
[20] See further 12.1.1.
[21] See further 4.1.3.6.
[22] C Scott, 'Accountability in the Regulatory State' (2000) 27 *J of Law and Society* 38.

argument, that it is, it might still be suggested that the various modes of accountability are not comparable and interchangeable in the way this approach suggests, and that quality is just as important as quantity.[23] The point would be that public modes of accountability may protect values and perform functions that private modes of accountability do not, and vice versa. For instance, it has been suggested that public modes of accountability are concerned with decision-making procedures and inputs much more than private modes, which focus on outcomes.[24]

One avenue for addressing such arguments without making contracted-out service-providers directly subject to public accountability mechanisms might be the contract between the contracting agency and the service-provider. The general idea is that the contract would spell out public-law norms to which the contractor was required to conform and would make provision for mechanisms to enforce those requirements. However, there are serious objections to such an approach. For one thing, it depends on the willingness and ability of the contracting agency to include such provisions in the contract. For another, although the agency could, in theory, enforce compliance, it is much less likely that service consumers would be able to do so as a matter of contract law unless the contract were carefully drafted to achieve this.[25] Both problems could, in theory, be overcome either by development of the common law of contract by the courts or, more realistically, by legislation; but neither development seems likely.

How can we choose between these two approaches? Contracting-out is commonly promoted partly on grounds of economic efficiency. However, a preference for market-based and private modes of accountability over public modes is also frequently at least implicit in such support. Indeed, there is a sense in which public modes of accountability are ideologically incompatible (or at least in tension) with commitment to contracting-out, and changed accountability arrangements are part and parcel of such developments. This suggests that arguments for inclusion of public modes of accountability in arrangements for contracting-out may be based on opposition to contracting-out itself and the values and objectives that motivate it and not merely on objections to changes in accountability arrangements.

[23] J McLean, 'The Ordinary Law of Tort and Contract and the New Public Management' (2001) 30 *Common Law World Review* 387.

[24] R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Basingstoke: Palgrave Macmillan, 2003), 166–71.

[25] See generally C Donnelly, '*Leonard Cheshire* Again and Beyond: Private Contractors. Contract and s. 6(3)(b) of the Human Rights Act' [2005] *PL* 785.

Part IV

The Purposes and Effects of Administrative Law

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Functions of Administrative Law

20.1 WHAT IS ADMINISTRATIVE LAW FOR?

The main theme of this book is that administrative law provides a normative framework for public administration. What is the purpose of such a framework? There are two approaches to answering this question, which we may call 'non-instrumental' and 'instrumental' respectively. According to both approaches, the purpose of imposing a normative framework on public administration is to protect and promote certain values concerned with the way public administration should be conducted and the way administrators should interact with citizens. Very abstractly expressed, such values might include the rule of law, protection of individual rights and interests, accountability, and so on. More concretely expressed values might include procedural fairness, consistency, rationality, openness, and so on. Each of these more concretely expressed values could, in turn, be elaborated in terms of more specific rules and principles.

The non-instrumental and the instrumental approaches to administrative law differ in what they say about *how* administrative law protects and promotes these various values. According to the non-instrumental approach, administrative law protects and promotes values mainly by embodying and expressing them in its rules and principles, and by providing appropriate (accountability) mechanisms for enforcing compliance and remedying non-compliance with its norms. By contrast, according to instrumentalists, administrative law protects and promotes values chiefly by influencing and affecting the organization and practice of public administration. According to instrumentalism, the worth of administrative law and the measure of its success (or failure) lies in the extent and quality of its impact on bureaucratic organization and practice. According to non-instrumentalism, the worth of law and the measure of its success (or failure) lies in its rules and institutions. An instrumentalist would consider administrative law to be successful only

to the extent that its effect was to bring bureaucratic organization and practice into ongoing conformity with specified values. By contrast, an instrumentalist would consider administrative law a success to the extent that it clearly, consistently, and coherently expressed specified values and provided appropriate mechanisms for enforcing compliance and remedying non-compliance with its norms. Of course, a non-instrumentalist might consider administrative law to be more successful to the extent that it also had a positive impact on bureaucratic organization and practice, but would still think it worthwhile even if it could not be shown to have any such impact. On the other hand, although we might speculate that administrative law is unlikely to bring administrative organization and practice into conformity with specified values unless it expresses those values clearly, consistently, and coherently and provides appropriate mechanisms for enforcing compliance and remedying non-compliance with its norms, the instrumentalist would not give law any credit for such expression of values if it did not also have a positive impact on the organization and practice of public administration.

Instrumentalism has become central to thinking about the administrative justice system. Improving the quality of administrative decision-making and public service delivery is now a priority of public policy in the area of administrative justice and is considered to be an important function of accountability mechanisms, especially internal review and complaint systems and ombudsmen. Thinking about the role of courts and tribunals continues to be significantly informed by non-instrumentalism; but improving the quality of public administration is widely considered to be one of the functions of accountability institutions generally. This approach acutely raises the question of whether such institutions can and do effectively improve public decision-making and service delivery in the sense of increasing their compliance with the norms that these institutions apply and enforce. This is an empirical question which can only be answered by gathering evidence about the actual effects of the activities of courts, tribunals, ombudsmen, and other accountability institutions on bureaucratic organization and practice. The available evidence is surveyed and discussed in 20.2.

Independently of the evidence, there are speculative reasons for scepticism about the potential of accountability institutions to improve general standards of public administration. First, although some institutions—such as tribunals and the NHS complaints system—deal with a very significant number of cases each year, the caseload of others—such as the Administrative Court and the PHSO—is very small.

Furthermore, relative to the number of decisions made by the administration and the volume of services delivered, appeals and complaints that find their way even to the high-volume accountability institutions represent a very small proportion of total bureaucratic activity. We also know that relatively few departments and agencies attract a significant majority of complaints and applications for review of decisions, and that many agencies are rarely called to account through the administrative justice system. If it is assumed that the relatively small aggregate caseload of the various accountability institutions accurately reflects the level of citizen dissatisfaction with the administration, its relationship to total administrative activity is good news for the 'rule of law' and the legitimacy of public administration. On the other hand, if, as is often argued, the various components of the administrative justice system are more-or-less inaccessible to many aggrieved citizens and if there is, as a result, significant unmet need for administrative justice, we might speculate that any potential impact of institutions of administrative justice on standards of public administration is likely to be significantly unrealized.

Secondly, because institutions of accountability must generally be activated by aggrieved citizens, there is reason to speculate that they may not systematically address defects in public administration. We might hypothesize that systematic and regular auditing and inspection, based on statistical sampling and representative surveys of administrative decision-making and service delivery, would be more likely to identify bad administration than the activities of accountability mechanisms. However, auditing and inspection could promote legal values only by focusing on bureaucratic compliance with administrative law norms. Most public-sector auditing is concerned with financial propriety and value-for-money, and does not purport to monitor compliance with administrative law. The only accountability institution that undertakes something like 'administrative law auditing' is the ombudsman. Although the English public-sector ombudsmen do not formally have audit or inspection powers, large-scale investigations, such as that by the PHSO into the regulation of Equitable Life, can be understood as a species of audit.

Thirdly, accountability institutions are likely to have a general impact on public administration only if public administrators are well informed about the activities and decisions of such institutions. Some accountability institutions are better placed than others to send clear, strong messages to administrators. For instance, an internal reviewer or complaint-handler may be more likely than an external reviewer or

complaint-handler to be able to communicate effectively with administrators within the agency about how to improve standards of decision-making and service delivery. Ombudsmen have developed various means of communicating, to agencies within their remit, principles of good administration and specific recommendations for improvement. By contrast, lines of communication between courts and tribunals on the one hand and the administration on the other appear to be underdeveloped and ineffective. However, we know relatively little about how and how well accountability institutions communicate with the administration.

Fourthly, because the prime role of accountability institutions is to focus on the past, on individuals and on redress, we might speculate that they are not optimally designed or placed to promote systemic improvement in general standards of bureaucratic compliance with administrative law. So, for instance, although the PHSO's Equitable Life investigation can plausibly be understood as an audit, it focused on events in the past rather than on the present and future operation of the agencies under investigation. By contrast, for instance, audits by the NAO of internal complaint and review systems are primarily concerned with their current and future working rather than with how they have functioned in the past. US scholar, Jerry Mashaw, once argued that in appropriate cases of breach of administrative law norms by officials of a social security benefits agency, in addition to ordering that particular decisions be set aside and reconsidered, courts should also consider ordering the agency to adopt 'a management system for assuring adjudication quality in claims processing'.[1] This proposal was made against a background in which US courts had recently started making orders requiring (for instance) desegregation of school systems and reform of dysfunctional prison systems, and had been actively involved in managing the implementation of such orders. Mashaw saw court involvement in systemic reform of social welfare decision-making as a feasible extension of such activities. English courts have never entertained, and are unlikely ever to contemplate, such 'structural reform' litigation despite their willingness to allow public-interest claims for judicial review. However, the proposal neatly illustrates the distinction between backward-looking, accountability-based and forward-looking, managerial approaches to administrative justice.

[1] JL Mashaw, 'The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims' (1974) 59 *Cornell LR* 772.

At the end of the day, of course, neither decisions by courts, tribunals, and internal reviewers, nor recommendations by ombudsmen and other complaint-handlers will improve general standards of bureaucratic decision-making and service delivery in the absence of adequate resources and effective management to implement change. Some people detect a dilemma here: accountability mechanisms are likely to make a significant contribution to promoting good administration only if they are themselves well-resourced and managed. However, the more that is spent on review and complaint systems and on redressing individual grievances, the fewer will be the resources available for improvement of administrative decision-making and service delivery. In a world of limited resources, enforcing accountability for past administrative shortcomings and improving administration in the future are inevitably in competition with one another. It is by no means clear how this tension can be managed in an environment, such as that in contemporary Britain, of ever-increasing demand not only for better public services but also for better redress for service failures.

20.2 WHAT DOES ADMINISTRATIVE LAW ACHIEVE?

20.2.1 IMPACT AND VALUES

The non-instrumentalist answers the question—what does administrative law achieve?—first, by identifying or specifying the values that administrative law does, or should, protect and promote; and secondly, by examining the rules and practices of administrative law to determine the extent to which they embody and express those values clearly, consistently, and coherently and provide appropriate mechanisms for their enforcement. Such an approach informs much administrative law scholarship (including this book) and can plausibly be said to characterize judicial reasoning and methodology in administrative law. A conclusion that administrative law does not protect and promote the 'right' values, or that it protects and promotes values unclearly, inconsistently, or incoherently, or that it does not provide appropriate mechanisms for enforcing compliance with those values and redressing non-compliance, may lead scholars and law reform bodies to make suggestions for changing the law, and judges (and legislators) to do just that.

Discussion of the values that are or should be protected and promoted by administrative law is central to non-instrumentalism. By contrast, instrumentalists tend to focus on the effects of administrative law on

bureaucratic organization and practice, and to give relatively little attention to the values being protected and promoted. In principle, it might be possible to study the impact of administrative law on bureaucratic organization and practice without making any assumptions about values. In that case, the research questions would be whether administrative law has any discernible impact on bureaucratic organization and practice and if so, what that impact is. However, instrumentalist 'impact researchers' typically begin with some understanding of the values that administrative law does or should protect and promote, and they set out to determine its success (or failure) in terms of those values. Most of the available impact research is concerned with courts and judicial review, and to the extent that values are mentioned, they tend to be framed in abstract terms such as 'good decision-making',[2] bureaucratic justice',[3] and 'openness and participation in public decision-making'[4] with little or no discussion of what these phrases mean. Indeed, it has been suggested that it is only when we understand the impact of judicial review that we can meaningfully engage in debate about the values it does or should promote.[5] However, such relative lack of attention to values is a weakness in research of this type. A proper assessment of what administrative law achieves can be made only on the basis of a judgment about what it is for.

This is not to say that identifying the values that administrative law protects and promotes is an easy task. Administrative law is an extremely complex set of norms with a complex set of associated accountability mechanisms. Not only does it protect and promote many values, but those values may, in particular circumstances, conflict or at least be in tension with one another. Moreover, people may and do disagree about the values that administrative law ought to protect and about how conflicts between those values ought to be resolved. The only point that needs to be made here is that administrative law can be judged a success or a failure in terms of its impact on public administration only by reference to some account of the values that administrative law apparently seeks to protect and promote or some theory about the values that it ought to protect and promote.

[2] eg M Sunkin and K Pick, 'The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund' [2001] *PL* 736, 745; G Richardson and M Sunkin, 'Judicial Review: Questions of Impact' [1996] *PL* 79, 100.

[3] S Halliday, 'The Influence of Judicial Review on Bureaucratic Decision-Making' [2000] *PL* 110, 111–12.

[4] Richardson and Sunkin, 'Judicial Review', n 2 above, 101.

[5] Ibid, 80–1.

20.2.2 METHODOLOGICAL ISSUES

Apart from some understanding of what administrative law is for, another requirement for studying the impact of administrative law is clarity about what is meant by 'impact', which is a more complex concept than it might appear to be.[6] First, we can distinguish between various agents of impact: courts, tribunals, ombudsmen, internal complaint systems, and so on. To date, courts have been the subject of most impact research.[7] Secondly, we can distinguish between various 'targets' of impact: for instance, Ministers of State, senior bureaucrats involved in policy-making and management, front-line decision-makers involved primarily in implementation of public programmes, and so on. Thirdly, various media of impact can be identified. For instance, some impact research has focused on individual court decisions, while other research has examined the aggregate impact of the setting-aside of decisions by courts,[8] and yet other projects have been more concerned with the impact of administrative law norms (as opposed to accountability institutions).[9] Fourthly, some research is concerned with what we might call 'direct impact'—investigating, for instance, the frequency with which administrators make the same decision again after the initial decision has been set aside and remitted for reconsideration. By contrast, research concerned with 'indirect impact' examines, for instance, the effect of norms and accountability mechanisms on bureaucratic 'culture' or 'styles of decision-making'.

[6] There are also, for instance, issues about what is meant by 'judicial review': P Cane, 'Understanding Judicial Review and Its Impact' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Dimensions* (Cambridge: Cambridge University Press, 2004). For present purposes, these can be ignored because the focus here is on judicial review as explained and analysed in this book.

[7] Concerning the impact of ombudsman investigations in the Netherlands see M Hertogh, 'Coercion, Cooperation and Control: Understanding the Policy Impact of Courts and the Ombudsman in the Netherlands' (2001) 23 *Law and Policy* 47. Concerning UK social security tribunals see N Wikeley and R Young, 'The Administration of Benefits in Britain: Adjudication Officers and the Influence of Social Security Tribunals' [2001] *PL* 238, 250–62.

[8] eg R Creyke and J McMillan, 'The Operation of Judicial Review in Australia' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004); 'Judicial Review Outcomes—An Empirical Study' (2004) 11 *Australian J of Admin L* 82.

[9] eg G Richardson and D Machin, 'Judicial Review and Tribunal Decision-Making: A Study of the Mental Health Tribunal' [2000] *PL* 494; S Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004).

Fifthly, in studying the impact of administrative law and accountability institutions it is important to be sensitive to context. For instance, the impact of an institution may vary over time. Research into the impact of judicial review on the Independent Review Service for the Social Fund (IRS) found that it was greatest soon after the establishment of the IRS but waned later.[10] A more general point about context picks up on one of the most persistent themes in the empirical literature about judicial review, namely the interaction between various influences and pressures to which bureaucrats are subject. Researchers characterize judicial review as a legal influence and contrast it with various non-legal influences with which it may compete or at least be in tension. For instance, in their research on decision-making by mental health tribunals, Richardson and Machin discuss the interaction between legal requirements and medical considerations.[11] In that context, medical considerations are made formally relevant by statute; but other influences, such as time pressure, budgetary constraints, productivity demands, professional values, and institutional 'culture' may be informal. The basic point is that legal influences on decision-making will necessarily operate in an environment in which public administrators are subject to various non-legal influences. When bureaucrats face conflicting pressures, they may react by yielding to one rather than the other or by trying to accommodate them in some way. Because of their authoritative status, legal requirements will, in principle at least, trump informal influences. In practice, however, non-legal influences may prove stronger.

Finally, we may note that impact may take different forms to which researchers, obviously, need to be alert: for instance, enactment or amendment of secondary legislation, creation of or changes to soft law, the making of a new decision, changes to decision-making procedure, 'cultural change', and so on.

The general point is that because impact is such a complex concept, it is important for researchers to decide in advance which parameters of impact are to be investigated and to design the research in such a way as to isolate them from the various other possible objects of investigation. Only if this is done carefully will impact research yield robust results.

Besides complexity in the concept of impact, there are at least two additional significant difficulties in studying the impact of law and legal institutions. First, it is one thing to identify patterns or changes in

[10] Sunkin and Pick, 'The Changing Impact of Judicial Review' (n 2 above).
[11] See n 9 above.

administrative organization or practice, but quite another to determine what caused them. In a case where, for instance, an agency reconsiders and changes an individual decision following a successful claim for judicial review by a person directly affected by the decision, a causal link between the new decision and the court order may be quite easily established. But where the impact is a more general change in bureaucratic behaviour, the contribution of an individual court decision may be much harder to trace. Hardest of all may be to trace the general impact of an accountability institution, such as judicial review, as opposed to the impact of one or more individual decisions by that institution.[12]

Secondly, even if it is established that a particular change in bureaucratic practice is attributable to judicial review (for instance), there may be disagreement about whether the change is positive and intended or negative and unintended. A good example is found in ongoing debates about the impact of requirements of procedural fairness. It is widely accepted that regulating administrative procedure is an appropriate function for administrative law, but also that procedural requirements can be counter-productive if they reduce the efficiency of the decision-making process too much—by causing protracted delay, for instance. There is less agreement about the optimum balance between procedural fairness, and efficiency and timeliness. More importantly, it is unlikely that such disagreement could be resolved by empirical evidence about the impact of judicially imposed procedural requirements on agency practice because the concepts of fairness and efficiency, and views about the optimum balance between them, are ultimately matters of value-judgment rather than empirical evidence.

Another example is provided by an American study of the impact of judicial review on the US Environmental Protection Agency,[13] which neatly illustrates the adage that one person's meat is another's poison. The author distinguishes between 'positive' and 'negative' effects of judicial review. Amongst those she identifies as negative are 'increased power of legal staff' and 'decreased power and authority of scientists'. More pointedly, several of the effects she identifies appear in very similar form on both sides of the ledger. For instance, she cites reduction in the power of the Office of Management and Budget (OMB) (a Presidential

[12] See, eg, L Platt, M Sunkin, and K Calvo, *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales* (London: Institute for Social and Economic Research, 2009), 10–11.

[13] R O'Leary, 'The Impact of Federal Court Decisions on the Policies and Administration of the US Environmental Protection Agency' (1989) 41 *Admin LR* 549.

auditing body) as a negative effect, and 'lifting of... prolonged OMB review' as a positive effect.[14] Redistribution of resources within the agency appears as a negative effect from the point of view of the losers, and as a positive effect from the point of view of the winners.

Uncertainty and disagreement about whether particular consequences are good or bad would not matter if our only interest in studying impact were descriptive. But because law is a purposive social institution, underlying many empirical studies of law and legal institutions is an evaluative or teleological agenda aimed at justifying and 'improving' legal systems and practices. In other words, researchers are not merely interested in describing the impact of law and legal institutions but also in assessing whether it is desirable or undesirable.

20.2.3 IMPACT RESEARCH

In Britain, the stirring of interest in the impact of administrative law, and especially judicial review, can be traced back to the 1970s. In a path-breaking article, Carol Harlow discussed three techniques that could be used by government to neutralize the impact of adverse judicial decisions: delaying tactics, making the same decision again but in accordance with the court's ruling,[15] and legislating to nullify the effects of the court's judgment.[16] In an essay published in 1987, Baldwin and McCrudden suggested that judicial review of decision-making by regulatory agencies has various adverse effects including discouragement of long-term planning and of the pursuit of radical policy options, increase in the use and influence of lawyers in administration, and the adoption of informal methods of working which are more immune to judicial review than more formal methods.[17] It is often argued, too, that judicial interference with the administrative process leads to the adoption of time-consuming 'defensive' administrative practices designed to minimize the risk that decisions will be successfully challenged rather than to improve the 'quality' of decisions.

Courts have shown themselves receptive to such arguments. For example, it seems that one reason for the development of the notion of

[14] Ibid, 567.

[15] Remember that judicial review does not usually involve the court substituting its decision for that of the original decision-maker, and that many of the grounds of judicial review leave open the possibility that the same decision may be made again when the original decision-maker reconsiders the case.

[16] C Harlow, 'Administrative Reaction to Judicial Review' [1976] *PL* 116.

[17] R Baldwin and C McCrudden, *Regulation and Public Law* (London: Weidenfeld and Nicolson, 1987), 60–1.

procedural 'fairness' was to reduce the 'burden' imposed on administration by the rules of natural justice (see 4.1.1); the prospect of administrative inconvenience may be taken into account in the exercise of remedial discretion (see 13.3); the risk of engendering undue caution and unhelpfulness in administrators has been used as a reason for not extending the doctrine of estoppel (see 6.3.1.1.3); and the danger of 'overkill' (ie of encouraging undue defensiveness on the part of decision-makers) has figured prominently in decisions denying the existence of a duty of care in the performance of regulatory functions (see 8.2.1). Typically, however, such assertions about the potentially negative effects of judicial decisions are based on intuition and anecdote rather than hard evidence.[18]

In the 1970s and 1980s various studies traced the reaction of public administrators to individual court decisions.[19] Some of these studies concerned the impact of judicial decisions on policy-making while others looked at its effects on front-line (or 'street-level') decision-making and service delivery.[20] Interest in the actual and potential impact of judicial review on policy-making is part of a long tradition, especially in the US and particularly amongst political scientists, of study of the role of courts in bringing about social change.[21] There is no doubt that judicial decisions do sometimes precipitate changes in policy, especially if they attract a lot of publicity or deal with issues of major public importance.[22] A limitation of studies of this type is that it may be difficult to generalize from reactions to individual court decisions or groups of decisions to conclusions about the impact of courts and judicial review as institutions. However, this is not a problem unique

[18] For some (not very robust) evidence about bureaucratic attitudes to judicial review see n 34 below and text.

[19] eg T Prosser, 'Politics and Judicial Review: The Atkinson Case and its Aftermath' [1979] *PL* 59; *Test Cases for the Poor* (London: Child Poverty Action Group, 1983), ch 5; L Bridges, C Game, O Lomas, J McBride, and S Ranson, *Legality and Local Politics* (Aldershot: Avebury, 1987); M Loughlin and PM Quinn, 'Prisons, Rules and Courts: A Study in Administrative Law' (1993) 56 *MLR* 497. For a more recent example of this type of study see Platt, Sunkin, and Calvo, *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales* (n 12 above), 14–18.

[20] For discussion of this distinction see L Sossin, 'The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada' in Hertogh and Halliday (eds) (n 8 above), *Judicial Review and Bureaucratic Impact*.

[21] English studies in this tradition include Prosser, *Test Cases for the Poor* (n 19 above) and C Harlow and R Rawlings, *Pressure Through Law* (London: Routledge, 1992).

[22] An example is provided by the case of *R v Lord Chancellor, ex p Witham* [1998] QB 575 which elicited a positive response from the Lord Chancellor: HC Debs, Vol 292, Written Answers, col 366, 17 March 1997.

to research of this sort. Empirical research about law and legal institutions is difficult, time-consuming, and expensive; and its focus is often necessarily quite narrow. Even so, it may be tempting to extrapolate from what the research tells us to situations with which it does not directly deal or to conclusions that it does not fully support. For the foreseeable future, our knowledge about the impact of administrative law is likely to be patchy and incomplete, and this sort of speculative generalization may be inevitable. However, it is important to recognize that once we go beyond the evidence, judgments about impact are likely to be based on views about the proper role of law in public administration. For example, if there is evidence that judicial review has had a good (or a bad) impact in particular circumstances, and we extrapolate from this that judicial review is likely to have a similarly good (or bad) impact in other more-or-less similar circumstances, this conclusion is likely to be based partly on a value-judgment that judicial review is generally a good (or a bad) thing; and this value-judgment is likely to be based on approval (or disapproval) of the values promoted by judicial review rather than on its effects on behaviour (which are unproven).

It was not until the 1990s that researchers started studying administrative law and judicial review systematically to discover how they work in practice and what their impact might be. One body of research about judicial review addresses the issue of the targets of impact by tracing patterns of judicial review claims.[23] The general finding is that departments and agencies vary very significantly in their exposure to judicial review, supporting the speculation that the impact of judicial review is likely to be similarly variable.

Other studies have examined the impact of a successful claim for judicial review on the final outcome for the claimant. Because the typical judicial review remedy is setting aside of a decision and remittal to the decision-maker for reconsideration, it is often assumed that claimants for judicial review are disadvantaged relative to citizens who appeal against administrative decisions because on appeal, if the court or tribunal finds for the appellant the typical remedy is substitution of a decision in the appellant's favour. By contrast, setting aside and remittal leaves open the possibility that when the matter goes back, the decision-maker will (have a strong incentive to) find a way of making the same

[23] L Bridges, G Meszaros, and M Sunkin, *Judicial Review in Perspective,* 2nd edn (London: The Public Law Project, 1995); M Sunkin, K Calvo, L Platt, and T Landman, 'Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales' [2007] *PL* 545.

decision again, consistently with the decision of the court, and that success in a judicial review claim will often (if not typically) be pyrrhic. Australian research casts doubt on this assumption.[24] The researchers found that in about 60 per cent of cases in which the Federal Court of Australia set aside an agency's decision, the judicial review claimant ultimately obtained a favourable outcome. US research found that judicial 'remand' of decisions back to administrative agencies resulted in 'major changes' in the claimant's favour in 40 per cent of cases.[25] The proportion of cases in the two studies in which the claimant was successful at the judicial review stage was roughly the same. There is no way of knowing how the difference in ultimate success rates can be explained; and despite the difference, both groups of researchers think that the results of their respective studies seriously undermine the traditional assumption. However, whether a figure of 60 per cent ultimate 'success'—let alone 40 per cent—should be so assessed is itself a matter of opinion on which the empirical evidence casts little light. Furthermore, because some grounds of judicial review leave the original decision-maker with more discretion than others in reconsidering the initial decision, we would need to know much more about the cases in the research sample in order properly to assess the significance of the results.

Research in England has also found that merely communicating an intention to challenge a decision by making a claim for judicial review can often produce a favourable outcome for the claimant;[26] and that a significant proportion of claims are settled in favour of the claimant after the grant of permission to claim judicial review.[27]

In addition to their relevance for the particular claimant and the particular agency, at least some judicial review decisions have indirect relevance for public administrators other than the defendant. The nature and extent of this indirect impact of a judicial review decision may depend on the subject matter of the claim. For example, we may speculate that a claim arising out of a type of decision that is made by many administrators thousands of times a year is likely to have more indirect impact than one arising out of a unique or rare type of interaction between a citizen and the administration. There have been various

[24] Creyke and McMillan, 'The Operation of Judicial Review in Australia', n 8 above.

[25] PH Schuck and ED Elliott, 'To the Chevron Station: An Empirical Study of American Administrative Law' [1990] *Duke LJ* 984, 1059–60.

[26] V Bondy and M Sunkin, 'Accessing Judicial Review' [2008] *PL* 647.

[27] V Bondy and M Sunkin, 'Settlement in Judicial Review Proceedings' [2009] *PL* 237.

empirical studies of the enforcement of regulatory regimes in areas such as water pollution, health and safety at work, consumer protection, and so on. One of the issues addressed in such research concerns the contribution of law and legal processes to the achievement of regulatory goals.[28] A few studies have focused more directly on the effects of judicial review on the operation of regulatory regimes.[29] Other research has investigated the indirect impact of judicial review on decision-making by housing authorities,[30] local authorities more generally,[31] mental health tribunals,[32] and the Independent Review Service for the Social Fund.[33] Some studies have examined the attitudes of public administrators towards administrative law and judicial review.[34]

As noted earlier, a recurring theme of this literature is that administrative law is only one of a number of influences on public administration.[35] Other normative and institutional factors may operate independently of, and possibly in conflict with, administrative law norms. Researchers often discover that public functionaries routinely disobey the law either as a result of ignorance of its requirements or under the pressure of stronger competing influences.

Because impact research is expensive, time-consuming, and methodologically and conceptually difficult, individual research projects are inevitably limited in various ways—for instance, by focusing on a particular area of public administration or a particular agency. For these reasons, too, the body of empirical research on the impact of

[28] K Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford: Oxford University Press, 2002).

[29] C Scott, 'The Juridification of Regulatory Relations in the UK Utilities Sectors' in J Black, P Muchlinski, and P Walker (eds), *Commercial Regulation and Judicial Review* (Oxford: Hart Publishing, 1998).

[30] eg I Loveland, 'Housing Benefit: Administrative Law and Administrative Practice' (1988) 66 *Public Administration* 57; *Housing Homeless Persons: Administrative Law and the Administrative Process* (Oxford: Clarendon Press, 1995); S Halliday, 'The Influence of Judicial Review on Bureaucratic Decision-Making' [2000] *PL* 110.

[31] Platt, Sunkin, and Calvo, *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales* (n 12 above).

[32] Richardson and Machin, 'Judicial Review and Tribunal Decision-Making' (n 9 above).

[33] Sunkin and Pick, 'The Changing Impact of Judicial Review' (n 2 above). See also T Buck, 'Judicial Review and the Discretionary Social Fund' in T Buck (ed), *Judicial Review and Social Welfare* (London: Pinter, 1998).

[34] eg M Sunkin and AP Le Sueur, 'Can Government Control Judicial Review?' (1991) 44 *CLP* 161; Sunkin and Pick, 'The Changing Impact of Judicial Review' (n 2 above); R Creyke and J McMillan, 'Executive Perceptions of Administrative Law—An Empirical Study' (2002) 9 *Australian J of Admin L* 163; Platt, Sunkin, and Calvo, *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales* (n 12 above), 19–22.

[35] See esp Loveland, *Housing Homeless Persons* (n 30 above), ch 10.

administrative law is small and is likely to remain so for the foreseeable future. Therefore, it is difficult and dangerous to draw general conclusions about impact from the available data. One way of dealing with this problem is to treat the existing empirical data as a source of testable hypotheses. This is the strategy adopted by Halliday in his study of the impact of judicial review on homelessness decision-making by various local authorities.[36] According to Halliday, his findings support the following hypotheses:

1. The more public administrators know about administrative law, the greater its impact will be. This hypothesis raises the issue (about which we know very little) of how knowledge of administrative law is communicated to and disseminated within departments and administrative agencies.
2. The more conscientious public administrators are about applying their legal knowledge to the performance of their functions, the greater will be the law's impact. To be legally conscientious is to be motivated to obey the law. Competing demands on decision-makers—such as the need to keep within a budget—may weaken this motivation if those demands conflict with the requirements of the law.
3. The greater the 'legal competence' of public administrators, the greater will be the law's impact. 'Legal competence' is a complex concept. Essentially it refers to the ability to apply legal knowledge in such a way as to produce legally compliant outcomes. This may involve not merely mechanical application of legal rules to the facts of individual cases. Much public decision-making requires the exercise of discretion, and applying the rules and principles of administrative law properly typically involves a degree of interpretation of the law and individual judgment about its application to the particular case.
4. The less competition there is between law and other influences on administrative action, and the stronger the law's relative influence, the greater will be its impact. Halliday relates the law's strength to the ability of courts to enforce administrative law. He concludes that law is relatively weak because there is little that courts can do to

[36] S Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004).

ensure that public decision-makers comply with orders made and rules laid down in judicial review proceedings.[37]

5. The clearer and more consistent the law is, the greater will be its influence on public administration. Halliday argues that administrative law is 'riven by competing priorities' and sends out mixed messages to public decision-makers. This partly explains why its influence is often weak relative to other demands on decision-makers.
6. The more 'authoritative' the agent of impact, the greater its impact is likely to be.

These hypotheses are stated in simplified form, and readers are encouraged to refer to Halliday's book for a fuller account of the research and of these hypotheses. Notice that the hypotheses make relative rather than absolute statements about the impact of administrative law. Notice, too, that some of them refer to the impact of legal norms while others refer to the impact of accountability mechanisms. The various hypotheses are relevant to understanding not only why decision-makers fail to comply with administrative law, but also conditions that are likely to promote compliance. In terms of law's impact, understanding compliance is at least as important as understanding non-compliance. In any well-functioning legal system, most people comply with the law most of the time. Claims for judicial review and use of other modes of accountability are marks of non-compliance—of the pathology of the legal system, if you like. Whatever the impact of judicial review and other accountability mechanisms on the public decision-making process, it is perhaps unlikely that they hold the key to explaining why most public administrators comply with administrative law most of the time, or to promoting legality in public administration. Studying the day-to-day conduct of public administrators in a rounded context may provide much more illumination than studying the impact of accountability institutions on public administration. The role of accountability institutions in promoting compliance with the law is likely to be quite small.

[37] The importance of this factor is illustrated by a study of the major role played by US federal courts in 'reforming' the prison system: MM Feeley and EL Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge: Cambridge University Press, 1999). A significant part of the story is that courts not only laid down standards for the running of prisons but were also actively involved in ensuring that the standards were implemented. In effect, the courts in these cases operated as multi-functional regulatory agencies, setting standards for the performance of public functions, and monitoring and enforcing compliance with them.

Although other impact researchers have not, explicitly at least, followed the same methodology as Halliday, various other hypotheses can be extracted from their work. These include the following:

7. The impact of administrative law may vary as between different types of rules. For instance, it has been suggested that procedural rules are likely to have more impact than rules concerning the substance of decisions.[38] Other issues that have been identified include the relative impact of 'bright-line' rules as opposed to more abstract 'principles'; and the effect on impact of the clarity of the pronouncements of courts, tribunals, and other accountability institutions.
8. The more personal experience an administrator has had of judicial review, the greater its likely impact on the administrator's behaviour. We have already noted that relatively very few administrative decisions and actions are challenged and that relatively few departments and agencies account for the great majority of challenges. On this basis, we might speculate that most bureaucrats will have had very little direct, personal experience of accountability institutions.
9. The impact of judicial review on the work of a particular decision-maker may vary over time.[39]
10. Negotiatory and investigatory complaints procedures are likely to have more impact than adjudicatory procedures.[40] The underlying idea here is that decision-makers are more likely to understand what the law requires of them if they are involved in some sort of dialogue with the complainant and the complaint-handler about resolving the complaint. The impersonal and adversarial nature of judicial review militates against such dialogue.
11. '[J]udicial review has the potential to cause the greatest change when it conflicts with what is currently happening but is most likely to do so with minimum resistance when it strikes a chord with the needs of officials.'[41]

The important point for present purposes is not whether these hypotheses will be shown to be true either generally or in relation to

[38] Machin and Richardson, 'Judicial Review and Tribunal Decision-Making' (n 9 above).
[39] Sunkin and Pick, 'The Changing Impact of Judicial Review' (n 2 above).
[40] M Hertogh, 'Coercion, Cooperation and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001) 23 *Law and Policy* 47.
[41] Platt, Sunkin, and Calvo, *Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales* (n 12 above), 5.

particular areas or agencies of public administration. Rather, because they are themselves derived from empirical observation of public administrative processes, they provide good starting points for thinking about when administrative law and accountability mechanisms are likely to have greatest impact and about how its impact might be increased, if this is thought desirable.

20.3 CONCLUSION

Administrative law provides a normative framework for public administration and establishes accountability mechanisms to police that framework. It promotes and protects certain values relevant to the way public administration should be conducted and the way public administrators and citizens should interact. Evidence suggests that beyond redressing individual grievances against the administration, administrative law and its accountability mechanisms have some more general impact on the organization and practices of public administration, although the extent and nature of that impact is unclear. It is not obviously sensible or reasonable to expect courts, tribunals, ombudsmen, and so on to play a major role in improving standards of administrative decision-making and service delivery. It may be wiser to devote available resources to strengthening their performance as accountability mechanisms and to look elsewhere for significant improvements in standards of public administration.

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